REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Misc. Appli. 278 of 2008

JOSEPH NGAHU NJIGU ..... 1ST PLAINTIFF

MARY WANGARI PAUL ..... 2ND PLAINTIFF

PETER KARIUKI ..... 3RD PLAINTIFF

LYDIA WAITHERRERO ..... 4TH PLAINTIFF

VERSUS

ZAKAYO MACHARIA KARIUKI ..... 1ST DEFENDANT

HILLARY MWANGI KARIUKI ..... 2ND DEFENDANT

JOHN KARIUKI NJIGU ..... 3RD DEFENDANT

MARTIN NJIRU KIGO ..... 4TH DEFENDANT

BETH NJERI CHEGE ..... 5TH DEFENDANT

JESSE THUO WANJIHIA ..... 6TH DEFENDANT

WILSON WANJIHIA MUNORU ..... 7TH DEFENDANT

ESTATE OF MWANGI NGAHU ..... 8TH DEFENDANT

R U L I N G

Before me is an application dated 30th September 2008 and filed in court on 9th October 2008. It is expressed to be brought under order XXXIX Rules 1(a), 2, 3 and 9 of the Civil Procedure Rules and Sections 3 & 3A of the Civil Procedure Act. In the application, the Plaintiffs who for the purposes of this application I will henceforth refer to as the applicants have sought orders:-

1. THAT Temporary Injunction do issue and order that payments of the Tea delivered by the Defendants/Respondents from original LR. Loc. 2/Kangari/603 be stopped and/or restrained by this court to Kenya Tea Development Agency Ltd (K.T.D.A.) and/or agents until the hearing and determination of this suit.

2. THAT the Kenya Tea Development Agency Ltd (K.T.D.A.) do hold money in account of proceeds of tea delivered by the Defendants from original and sub-sequent sub-division LR. Loc. 2/Kangari/603 and Loc. 2/Kangari/3644, 3645, 3544 and 3545 respectively until the case is fully determined.

3. Costs be in the cause.

The application is grounded on the facts that:-

"***(a) THAT the High Court issued orders of maintaining status quo on 31st January 2005 pertaining LR. Loc. 2/Kangari/603 & Loc. 2/Kangari/3644, 3645, 3544 and 3545 the Defendants/Respondents have failed to comply with thus contempting (sic) the orders of the Honourable Court.***

(b) THAT Mwangi Ngahu is a deceased who passed away in October 2002 and without Letters of Administration no transfers of his land could have been made in November 2002/April 2003 and December 2004.

(c) The deceased Mwangi Ngahu used to deliver his Tea at Makombi Tea Factory under number MK-095.

(d) Currently tea is delivered illegally under numbers MK02-136 at Nduti Tea Factory and Makomboki Tea Factory and there was another number which was also issued in 2006 to Wilson Wanjihia Munoru on unknown dates from the same piece of land of the deceased.

(e) THAT some of the accounts were opened when the orders of this court and status quo were in place.

(f) THAT there is a pending suit on administration of the deceased's Estate.

The application is further supported by the affidavit sworn by the 1st applicant on his own behalf and on behalf of the other co-applicants. In pertinent paragraphs he depones:-

1. .....

2. THAT original No. LR. Loc. 2/Kangari/603 and its sub-division numbers Loc. 2/Kangari/3644, 3544, and 3545 were sold illegally.

3. THAT on 31st January 2005 orders of maintaining status quo on LR. Loc. 2/Kangari/603 and Loc. 2/Kangari/3644, 3645, 3544 and 3545 were issued by the High Court of Kenya, Nairobi.

4. THAT despite the orders most of the Defendants opened Kenya Tea Development Agency Ltd Tea Accounts at Makomboki Tea Factory to process the proceeds of sale of tea as per the annexed K.T.D.A copy letter marked as "NN-1"

5. THAT the Defendants also brought fictitious criminal proceedings in Kigumo Law Courts being Criminal Case No. 282 of 2006 against some of the Plaintiffs in an attempt to chase away the Plaintiff from the suit property.

6. THAT the Defendants have been selling tea to Makomboki Tea Factory which is managed by Kenya Tea Development Agency Ltd under numbers MK02-138 and MK02-136, and in the year 2005 Wilson Wanjihia Munoru was issued with another number MK02-151 on 1st April 2005 started delivery.

7. THAT the payments of the Tea delivered by the Defendants/Respondents from original LR. Loc. 2/Kangari/603 and the subsequent sub-divisions be stopped and/or restrained by Kenya Tea Development Agency Ltd and/or agents.

8. THAT Kenya Tea Development Agency Ltd do hold money in account of the proceeds of tea delivered by the 5th to 8th Defendants from original and sub-sequent sub-division LR. Loc. 2/Kangari/603 and Loc. 2/Kangari/3644, 3645, 3544 and 3545 respectively until the case is fully determined.

9. THAT some of the accounts were opened when the orders of this court and status quo were in place and in particular the one by the 8th Defendant opened on 1st April 2005."

The application was opposed. In a replying affidavit dated 16th March 2009 sworn by the defendants through the 3rd defendant whom I shall henceforth refer to as *"the respondents"*, they in pertinent paragraphs depone that:-

"***1. .....***

2. .....

3. THAT the application has no merit is an abuse of the court process and is vexatious.

4. THAT the application has annextures of letters written in 2005 and a criminal case concluded the same year and these being events that occurred four years ago the applicants do not show why they have just realized that they have suffered loss and why a temporary injunction should issue.

5. THAT the issues raised in the application can only be addressed in a full hearing as the subject land parcels are in the possession of the 6th, 7th and 8th defendants who bought the same from the 1st to 5th defendants.

6. THAT the suit land parcels originally belonged to one Mwangi Ngahu now deceased.

7. THAT the said deceased who was my uncle and a bachelor transferred the suit land to the 1st to the 5th defendants during his life time and the transfers were sanctioned by the Kigumo Land Control Board as is he case with Agricultural land transfers.

8. THAT I believe the K.T.D.A letters annexed to the application were written out of ignorance and concealment of facts by the plaintiffs.

9. THAT the applicants have conveniently not disclosed that the status quo as at 31st January 2005 was that the 6th, 7th and 8th defendants were in possession of the suit land as is the case today and are the registered owners of he suit land to date.

10. THAT the applicants do not also mention why they have waited for four years before filing this application yet the documents they purport to rely on have been in their possession for four years. Curiously the reference of the letters bear the case number in this matter when it was at the Nairobi law courts and there are no copies in favour of the applicants which raises suspicion on their authenticity.

11. THAT the applicants do not also disclose where the alleged pending suit on the administration of the estate of Mwangi Ngahu (deceased) is pending and why they could not file the instant application in the alleged succession cause which to the best of my knowledge is ficticious.

12. THAT had the applicants been serious they should have taken a hearing date bring along with them their witnesses if any and prosecute the case herein which has been pending in court for over four years without being prosecuted save for various frivolous applications filed by he plaintiffs in the past.

During the oral hearing of the application, **Mr. Kahuthu**, learned advocate for the applicants submitted that the accounts were opened after the orders to maintain the status quo were made. That the application was not opposed by the other respondents as they had not filed replying affidavits save for the 3rd respondent. In any event the 3rd respondent was not one of the registered proprietors of the 4 parcels of land.

Mr. Wachira, learned advocate for the respondents countered the applicants' submissions by stating that the status quo as at 31st January 2005 was that the 6th to 8th respondents were the ones in occupation of the suit premises. That the applicants had not disclosed that the 3rd applicant had been convicted for the criminal offence of trespass and no appeal had been preferred. The respondents shall suffer irreparable damages if the orders sought were issued as the suit premises belong to them and have titles to the same. The application was unmerited as the applicants have not explained why for 4 years they had not taken steps to prosecute main suit.

I have considered very carefully the application, the respective supporting and replying affidavits with the annextures thereto, respective oral submissions and the law. To my mind the grave men of this application is the order made herein by **Mugo J** though erroneously attributed to **Ransley J** as he then was on 31st January 2005. I have perused the said order and it was in these terms:-

"***..... (1) THAT the preliminary objection dated 13th January 2005 be and is hereby disallowed.***

(2) THAT fresh date for the hearing of the Chamber Summons dated 8th December 2004 be taken at the Registry.

(3) THAT the costs of the preliminary objection be and is hereby awarded to the applicant.

(4) THAT status quo be maintained pending interpartes hearing ....."

These orders were made pursuant to the application dated 2nd December 2004. They were to remain in force until the said application was heard interpartes. It is not clear from the record what became of that application. Be that as it may, it is not quite clear as to what was meant by the order "**status quo be maintained pending interpartes hearing.....**" To my mind it would have been desirable for the parties concerned to seek clarification from the judge what she actually meant by that order. In the ordinarily course of events however, such an order would mean the status quo currently obtaining as at the time the order was made. If that be the case and I have no reason to doubt it, it meant that the 6th, 7th and 8th respondents who were in occupation of their respective suit premises will retain such ownership and possession until the application is heard interpartes. And if they were delivering the tea from their respective suit premises and paid they would continue to do so. I do not think therefore that the applicant should use that order in support of this application. They should have raised the issues they are canvassing herein during the interpartes hearing of the said application. On this I would concur with the respondents submissions that if the applicants had been serious in this matter they should have taken serious steps to prosecute the originating summons instead of filing unnecessary and frivolous applications. The instant application is obviously frivolous and vexatious. The originating summons was filed way back on 2nd December 2004. Since then pleadings have closed. Yet the applicants have not seen the need to take directions and have the originating summons heard on merit. Instead they have inundated the court with numerous but unnecessary applications at the expense of a full hearing of the suit on merit. As correctly deponed to by the respondents, the application has annextures of letters written way back in 2005 and a reference to a criminal case heard and concluded the same year. These being events that occurred 4 years ago the applicants have not demonstrated why they have just realized all of a sudden that they have suffered loss and therefore a temporary injunction ought to issue now. Indeed they have not even deponed to what damage they have suffered with the regard to the conduct of the respondents following the making of the order aforesaid. If they have waited this long without taking any steps in the prosecution of the case since the filing of the same, they can still wait for a little longer until the case is heard and finalised.

The applicants have deliberately been ambiguous regarding the prayers in the application, the affidavits in support thereof as well as in their oral submissions in support of the application. I am unable for instance to make head or tail of what the applicants want in prayer 1 of the application. Are they seeking a temporary or mandatory injunction? You cannot have the same under one prayer. Yet this is what the applicants have endeavoured to do. Prayer 2 is not in the nature of an injunction.

The applicants are well aware that the original **LR Loc. 2/Kangari/603** was subdivided into 3644, 3645, 3544 and 3545 respectively and transferred to some of the respondents who were issued with the titles thereto. In law therefore and for now they are sole proprietors to their respective suit premises and their titles are indefeasible. In terms of the order for the status quo to be maintained and as already stated it meant that the respondents will continue to hold on their properties and if they were harvesting tea therefrom and delivering the same to the tea factories they could continue to do so. The issue as to whether the subdivision of the original suit premises and subsequent transfer of the resultant subdivisions thereof to some of the respondents was fraudulent is a matter of evidence during the substantive hearing of the main suit on merit. In other words, most of the issues raised in the application can only be addressed at a full hearing as the impugned suit premises are in the legal possession of the 6th, 7th and 8th respondents who allegedly bought them from the 1st to 5th respondents. It cannot therefore form the basis of granting the prayers sought in the instant application.

It is also not lost on me that one of the applicants, the 3rd applicant to be precise, was the subject of criminal prosecution in the Senior Resident Magistrates court at Kigumo in criminal case number 282 of 2005 for the offence of trespass. He was charged with 3 other with trespass with regard to some of the suit premises that are the subject of these proceedings. He was convicted and sentenced to a fine of Kshs.4000/= in default 3 months imprisonment. In her judgment, the learned magistrate had the following to say which is pertinent to this application:

"**..... There is also no doubt that the High Court made an order for status quo to be maintained on 31/1/2005. On 31/1/2005, the complainants herein were the registered owners of the three parcels of land. If status quo was to be maintained then they were to remain as the registered owners. There is no order quashing their ownership of the land ..... The accused persons and their witnesses questioned the way and manner the complainants acquired the title deeds. That is the subject of another day as the said ownership though questioned by the accused persons have not been disturbed or quashed by any court .....**" I could not have put it any better.

The applicants have stated that the respondents' actions amount to intermeddling with the estate of the deceased. They have also alluded to a succession cause they have filed. However whether deliberate or not, they do

not give particulars of the succession cause. If indeed such a succession cause exists, couldn't it have been better for the instant application to be ventilated in that succession cause? I certainly think so.

Finally I wish to comment on the submission by **Mr. Kahuthu** that apart from the 3rd respondent, the other respondent were not opposing the application by virtue of not having filed their respective replying affidavits. This submission cannot possibly be correct. There is on record a replying affidavit filed by the 3rd respondent. In that affidavit he clearly states that he has been authorised by the 1st to 8th defendants to swear the same. It is clear from the foregoing therefore that the application was opposed.

All said and done, I do not think that the applicants have brought themselves within the well known parameters for this court to grant injunction, temporary, mandatory or

otherwise. Accordingly the application fails and is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 11th day of May 2009

M. S. A. MAKHANDIA

JUDGE