



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI

ENVIRONMENT & LAND CASE 216 OF 2008

**ABRAHAM KIARIE MBURU.....PLAINTIFF/APPLICANT**

**VERSUS**

**LYDIA WAIRIMU MBURU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LUCY WANJIRU MBURU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

There is before me chamber summons application by the plaintiff dated 07.05.08 stated to be brought under Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules plus section 3A of the Civil Procedure Act, Cap.21. The relevant substantive prayer at this stage is prayer 3, which is in the following terms:

**‘3. THAT there be issued an interim injunction directed against the defendants, their servants, agents, or anyone acting in their names from interfering with the plaintiff or his workers while on the farm, entering into, trespassing onto, alienating, committing acts of waste, or dealing in any manner with Githunguri/Gathangari/1322 until the hearing and determination of this case.’**

The grounds upon which the application is based are:-

- a) That the parcel of land belongs to the plaintiff.
- b) That the defendants together with their children on 02.05.08 barred the plaintiff and his employees from working on the said Githunguri/Gathangari/1322 and the plaintiff has not been to the farm ever since.
- c) That the defendants’ acts of waste will cause irreparable loss and damage to the plaintiff.

The application is supported by the plaintiff’s affidavit sworn on 07.05.08.

At the hearing of the application on 11.06.08, the plaintiff/applicant was represented by learned counsel, Mr J. Kitheka while the defendants/respondents were represented by learned counsel, Mr R.M. Njiraini.

In response to the application and its supporting documents, the defendants/respondents filed a joint replying affidavit sworn by them on 16.05.08 challenging the plaintiff’s/applicant’s claims. On 26.05.08 the plaintiff/applicant filed a supplementary affidavit sworn by him on 23.05.08 in answer to the defendants’/respondents’ aforesaid replying affidavit.

Plaintiff's/applicant's counsel contended that his client was the registered owner of the suit property and has been utilizing the same since acquiring it in 1975. Counsel said he concedes that the 1<sup>st</sup> defendant/respondent lives in a structure on the suit property. The said counsel, however, denied that the 2<sup>nd</sup> defendant/respondent lives on the suit property.

Plaintiff's/applicant's counsel complained that the defendants/respondents have been preventing the plaintiff from utilizing the suit property. Counsel reiterated the contents of paragraph 9 of the plaintiff's affidavit that on 02.05.08 the defendants prevented the plaintiff and his workers from harvesting his crops on the farm (suit property). Plaintiff's counsel also said the father of defendants previously sued the plaintiff vide HCCC No.2793 of 1981 (O.S.) for adverse possession but lost and appealed but the appeal has not been heard. That on 19.05.04 the Court of Appeal ordered *status quo* to be maintained (as at 18.05.04) between the plaintiff herein and the father of the defendants [regarding Githunguri/Gathangari/1322 and Githunguri/Gathangari/1323] and that to date the plaintiff has not interfered with rights over Githunguri/Gathangari/1323 and has not evicted anybody from Githunguri/Gathangari/1322 (suit land) but he has continued to farm the suit land.

Plaintiff's/applicant's counsel submitted that the present case is a fresh cause of action arising from the plaintiff being prevented from harvesting his crops and continuing his farming activities.

With regard to the respondents' replying affidavit sworn on 16.05.08, plaintiff's/applicant's counsel submitted that it is incurably defective, arguing that Order XVIII rule 5 requires an affidavit to be drawn in the first person while the respondents' affidavit alludes to 'we'. Plaintiff's/applicant's counsel contended that the replying affidavit contains matters misleading to the court. He cited the following as examples:-

- a) That the Title Deed, annexure 'LWM 1 (a)' was acquired through *ex-parte* arbitration proceedings in Githunguri D.O's office, which were subsequently quashed in Court of Appeal Civil Appeal No.91 of 1990 vide the Judgment at annexure 'AKM 2' to the plaintiff's supplementary affidavit sworn on 23.05.08 (but that the defendants did not bring out the fact of the quashing of the arbitration proceedings).
- b) That Joel Mburu Nganga and Yurandah Njeri Nganga named in the impugned Title Deed are father and mother of the defendants herein but that the said Title Deed, shown to have been given on 17.02.94, never featured in H.C.C.C. No.2793 of 1981 whereby the father of the defendants was claiming adverse possession of the suit land. Yet, that vide paragraph 6 of the defendants' replying affidavit sworn on 16.05.08 the defendants say the suit land belongs to their father, which according to plaintiff's/applicant's counsel is not a true statement of fact.

Plaintiff's/applicant's counsel submitted that the plaintiff/applicant has established a *prima facie* case with probability of success that the plaintiff is the registered owner of the suit land, Githunguri/Gathangari/1322 and that if the interim injunction sought is not granted, the plaintiff will suffer irreparable damage. Plaintiff's/applicant's counsel added that, on the contrary, the defendants will not suffer damage if the injunction is granted. Plaintiff's/applicant's counsel also said that the plaintiff has filed an undertaking to compensate the defendants if they suffer during pendency of the injunction sought by the plaintiff/applicant. Plaintiff's/ applicant's counsel also said that the defendants/respondents have not claimed the suit land, Githunguri/Gathangari/1322 in their replying affidavit sworn on 16.05.08.

For the foregoing reasons, plaintiff's/applicant's counsel urged this court to issue the injunctive orders sought, pending hearing and determination of the suit.

On the other hand, defendants'/respondents' counsel opposed the application relying on defendants'/respondents' replying affidavit sworn on 16.05.08 and annexures thereto. He submitted that the plaintiff/applicant has a duty to prove he owns the suit land Githunguri/Gathangari/1322 and drew attention to the Title Deed annexure 'LWM 1 (a)' to the defendants'/respondents' replying affidavit showing the registered proprietors of the said land as Joel Mburu Nganga and Yurandah Njeri Nganga.

Counsel also referred to certified copy of Green Card, annexure 'LWM 1 (b)' relating to the same property which he said confirm at entries 6 and 7 that the said Title Deed in the names of Joel Mburu Nganga and Yurandah Njeri Nganga is genuine.

Defendants'/respondents' counsel said that the plaintiff's/applicant's counsel conceded that the defendants are children of Joel Mburu Nganga. Defendants'/respondents' counsel drew attention to paragraphs 6 and 10 of the defendants'/respondents' replying affidavit whereat the defendants depone that they live on the suit land with the authority of their father who is the registered owner of the suit land. Counsel also said that the plaintiff conceded that there is a dispute over the suit land pending in the Court of Appeal vide Civil Appeal No.118 of 2003 and that the Court of Appeal ordered *status quo* to be maintained vide Civil Application No.NAI.6 of 2004 (annexure 'LWM 2'). Defendants'/respondents' counsel, therefore, contended that at this stage the plaintiff cannot purport to be the owner of the suit land, i.e. Githunguri/Gathangari/1322. Counsel submitted that the Land Certificate, annexure 'AKM 1' to the applicant's affidavit sworn on 07.05.08 in support of his present application, which Land Certificate shows the plaintiff/applicant as proprietor of the suit land as from 02.01.79, is no proof of his ownership of the suit land; that the Land Certificate is false since the plaintiff's/applicant's registration as such proprietor was cancelled by the Land Registrar, Kiambu vide Gazette Notice No.12 dated 07.01.94, annexed as "LWM 4' to the defendants'/respondents' replying affidavit and a new Title issued to Joel Mburu Nganga and Yurandah Njeri Nganga on 17.02.94. Defendants'/respondents' counsel pointed out that the new Title is annexure 'LWM 1 (a)' to the defendants'/respondents' replying affidavit sworn on 16.05.08. Counsel also said there has been no challenge or revocation of the Gazette Notice and submitted that the new Title stands and that the plaintiff/applicant has not proved his ownership of the suit land. Defendants'/respondents' counsel pointed out that the defendants have averred that they live on the suit land and farm there. Counsel submitted that the land belongs to the defendants' father and that the plaintiff does not live or farm on the suit land. Defendants'/respondents' counsel said that although the plaintiff/applicant has deponed that he cultivates on the suit land, he has not shown anything to prove his allegation.

Defendants'/respondents' counsel pointed out that on 03.06.08 the plaintiff/applicant was granted leave to file a supplementary affidavit, that he swore one on 23.05.08 but did not furnish any evidence to show that he farms on the suit land. I interpose here to point out that the leave for the applicant to file a supplementary affidavit was granted on 22.05.08, not on 03.06.08. Defendants'/respondents' counsel also accused the plaintiff/applicant of material non-disclosure as follows:-

- a) That he never disclosed that his Land Title, annexure 'AKM 1' was cancelled by Gazette Notice No.12 of 07.01.94.
- b) That he never disclosed relationship between himself, defendants/respondents and Joel Mburu Nganga regarding the dispute over the suit land.

It was defendants'/respondent' counsel's contention that the plaintiff/applicant should have disclosed that the respondents are children of Joel Mburu Nganga and grandchildren of Yurandah Njeri Nganga who is mother of Joel Mburu Nganga; that Joel and Yurandah are parties to the dispute over the suit land pending before the Court of Appeal; and that the plaintiff/applicant plus others are also parties to the case pending before the Court of Appeal.

Defendants'/respondents' counsel submitted that the plaintiff/applicant has not established a case for the grant of the interlocutory injunction he seeks; that he does not stand to suffer irreparable harm as he does not farm or live on the land; and that if plaintiff/applicant suffers any loss, he can be compensated by damages which he has prayed for. Counsel added that if the injunction is granted, the respondents stand to suffer more because they will not be able to access the land on which they live. Counsel submitted that the defendants' replying affidavit is properly before court since it is a joint affidavit, hence the use by the respondents of 'we'. Counsel submitted that the applicant's chamber summons is improperly before the court and that it is defective in that it invokes section 3A of the Civil Procedure Act on inherent power of the court while there is a specific provision vide Order XXXIX covering the subject matter of the injunction and that the applicant should have come under the said Order. In this regard,

defendants'/respondents' counsel relied on Mediterranean Shipping Co. SA -vs- International Agriculture Enterprises Ltd & ETCO (MSA) Ltd [1990] KLR 183 (a decision by Bosire, J as he then was). Counsel asked this court to strike out the chamber summons.

With regard to *status quo*, defendants'/respondents' counsel said this court cannot tell what *status quo* was meant by the Court of Appeal; that the applicant has his version while the respondents have theirs; and that if any party has any problem with what *status quo* the Court of Appeal had in mind, such party should go to the Court of Appeal for interpretation.

Defendants'/respondents' counsel urged this court to dismiss the chamber summons application dated 07.05.08 with costs to the defendants/respondents.

In reply, plaintiff's/applicant's counsel submitted that the Court of Appeal Judgment in Civil Appeal No.91 of 1990, Kiarie Mburu -vs- Joel Mburu Nganga & Yuridah Njeri Nganga (annexure 'AKM2' to the plaintiff's/applicant's supplementary affidavit sworn on 23.05.08) clearly establishes the plaintiff's ownership of the suit land. In this connection, counsel referred to the photocopy Green Card, annexure 'LWM 1 (b)' whose entry 8 refers to the above Court of Appeal Judgment and notes that the case was referred to the High Court. He pointed out that the Court of Appeal decision is of 20.07.95 and that it overturned Gazette Notice No.12 of 07.01.94 (annexure 'LWM 4' to respondents replying affidavit). He said the Court of Appeal decision overturned the High Court decision which led to the Gazette Notice. On the issue of non-disclosure complained of by defendants' counsel, plaintiff's counsel said the plaintiff disclosed all material facts, including the High Court and Court of Appeal cases.

With regard to the Mediterranean shipping case (*supra*), plaintiff's counsel in the present case said the applicant in the Mediterranean shipping case applied to court under section 3A alone instead of Order IX B rule 8 and that his application had to fail; and that in the present case the plaintiff's application was brought under Order XXXIX rules 1, 2 and 3 and also under section 3A of the Civil Procedure Act. Plaintiff's counsel submitted that the present application is not defective. For this proposition, he relied on Suleiman -vs- Amboseli Resort Ltd [2004] 2 KLR 589 where the applicant went to court under Order XXXIX rules 1, 2 and 4 as well as under section 3A and was successful. On the issue of compensation, plaintiff's counsel pointed out that the plaintiff said he has crops on the land. Counsel submitted that the balance of convenience tilts in the plaintiff's favour. Plaintiff's counsel said that paragraph 9 of the plaintiff's/applicant's affidavit sworn on 07.05.08 to the effect that on 02.05.08 he and 5 workers were working on the suit land when the defendants and their sons invaded the suit land, created a scene and snatched some farm implements and ran away with them has not been specifically denied.

Plaintiff's/applicant's counsel said that the plaintiff's case against the present defendants is separable from the case pending before the Court of Appeal, that the defendants herein are adults as acknowledged by them vide paragraph 1 of their replying affidavit and that they are answerable for their activities. Plaintiff's/applicant's counsel reiterated his prayer that the present application be allowed.

I have given due consideration to the rival arguments of the parties.

It is clear from the material availed by the parties to the present application that there has been a long-standing and fierce dispute within the family of the parties over the suit property, Githunguri/Gathangari/1322. The dispute has been the subject of arbitration proceedings before the Githunguri D.O; it has been the subject of High Court proceedings; and it has also been the subject of proceedings before the Court of Appeal. I note from an order of the Court of Appeal made on 19.05.04 in Court of Appeal Civil Application No. NAI. 6 of 2004, Joel Mburu Ng'ang'a and Yurandah Njeri Ng'ang'a -vs- Jenio Rimui and Kiarie Mburu that the dispute is over registered land and that after hearing the parties advocates the Court of Appeal had:

**'come to the conclusion that the interest of substantial justice are best served by maintaining the status quo as at on 18<sup>th</sup> May, 2004 on the said lands, namely, GITHUNGURI/GATHANGARI/1322 and GITHUNGURI/GATHANGARI/1323 pending the hearing and determination of the Civil Appeal No.118/2003 or other orders of this Court ....'** [underlining added]

According to the plaintiff/applicant in the application now before me, the present case is a fresh cause of action, separable from the dispute which resulted in the appeal pending before the Court of Appeal. Yet vide paragraph 6 of his affidavit sworn on 07.05.08 in support of the present application, the plaintiff deponed:

**‘6. THAT defendants, who live and farm on an adjacent property namely Githunguri/Gathangari/2640 have been interfering with my use of the suit property by making it impossible for my workers to cultivate in peace by use of insults, abuses and being generally a nuisance to the extent that I have had to keep on engaging new employees almost every month.’**

And at paragraph 8, the plaintiff deponed:

**‘8. THAT sometime in 2007 the defendants trespassed onto my said land and harvested my maize without my knowledge and my permission.’**

Both averments have been denied by the defendants/respondents. Paragraph 6 above suggests a dispute which has been on-going while paragraph 8 suggests that the plaintiff/applicant may not be residing on the suit land. I am not sure if there is a disconnect between the present case and the one before the Court of Appeal.

It seems to me that the correct position can only be confidently ascertained through oral evidence of the parties. By far the biggest dilemma of this court is that it does not know what the *status quo* alluded to by the Court of Appeal was as at 18.05.04. In this regard, I note that the plaintiff/applicant at least conceded that the 1<sup>st</sup> defendant/respondent lives in a structure on the suit property. If the *status quo* alluded to by the Court of Appeal was that at least the 1<sup>st</sup> defendant’s/respondent’s occupation of the suit property should not be disturbed pending the hearing and determination of the appeal in question, then if this court grants the interim injunction sought by the plaintiff/applicant, this court would in effect be purporting to overrule the Court of Appeal! I cannot do that.

Plaintiff’s/applicant’s counsel urged this court to find the defendants’/respondents’ replying affidavit sworn on 16.05.08 defective because it alludes to ‘we’. This submission was made in the context of Order XVIII rule 5 which provides, *inter-alia*, that every affidavit shall be drawn in the first person. It should be remembered that under the rules of statutory interpretation, the singular includes the plural and vice versa. The replying affidavit in question is a joint affidavit. The deponents were perfectly entitled to swear the affidavit and their allusion to ‘we’ is their equivalent of the first person referred to in Order XVIII rule 5.

It is my finding that the plaintiff/applicant has not made out a sufficient case for this court to grant the interim injunction sought. I hold that the balance of convenience tilts in favour of not granting the interim injunction sought by the plaintiff/applicant. Accordingly, I decline to grant the said interim injunction against the defendants/respondents.

Costs in the cause.

Orders accordingly.

**Delivered at Nairobi this 30<sup>th</sup> day of July, 2008.**

**B.P. KUBO**

**JUDGE**