



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Case 20 of 2007 (O.S.)

GERALD GATU NGUMO.....1ST APPLICANT/PLAINTIFF

JOSEPH MAINA NGUMO.....2ND APPLICANT/PLAINTIFF

LEAH WANGECHI NGUMO.....3RD APPLICANT/PLAINTIFF

JULIA WAMBUI NGUMO.....4TH APPLICANT/PLAINTIFF

Versus

WANYIRI GATU alias JOSHUA WANYIRI GATU.....1ST RESPONDENT/DEFENDANT

GATU WANYIRI.....2ND RESPONDENT/DEFENDANT

JOHN GACHUGU WACHIRA.....3RD RESPONDENT/DEFENDANT

JEREMIAH MWAI JOSHUA.....4TH RESPONDENT/DEFENDANT

RULING

The Plaintiffs have filed a Chamber Summons dated 5th April 2007. The application prays for the following orders:

“THAT the respondents be and are hereby restrained by a temporary injunction, by themselves or their servants or agents or otherwise howsoever from evicting the applicants from, or in any way alienating or wasting or damaging L.R. Nos. Othaya/Thuti/863, 864, 865, 866, 867, 868 and 869 or in any other way interfering with the applicants use and occupation or L.R. Nos. Othaya/Thuti/863, 864, 865, 866, 867, 868 and 869 pending the hearing and final determination of this suit.

THAT a copy of this order be and is hereby served upon the Land Registrar – Nyeri district for registration against the aforesaid land parcels registers.”

The affidavit in support is sworn by the 1st Plaintiff. He stated in that affidavit that during consolidation and demarcation of land, the 1st Defendant was registered as the owner of land parcel No. **OTHAYA/THUTI/363** to hold in trust for himself and the Plaintiff’s deceased father. That land he said was family land, which belonged to their grandfather known by the name Gatu. That because it was family land it was therefore registered in the name of the oldest son, that is, the 1st Defendant. The land

measures 11.8 acres and the Plaintiff's father and the Plaintiffs have occupied it since birth. On the death of the Plaintiff's father their late mother lodged complaints with the Chief, D. O. and D.C and the matter had been deliberated upon severally by clan elders who had reached a decision that the land be subdivided equally and the trust be terminated. While the Plaintiff's late mother was following the issue through the local administration the Plaintiff stated that the Defendants sub divided the property **OTHAYA/THUTI/363** into several sub divisions which had been registered in the names of the Defendants. The sub divisions are as follows:

<u>Parcel</u>	<u>Beneficiary</u>
(a) <i>L.R. Othaya/Thuti/863</i>	<i>Wanyiri Gatu</i>
(b) <i>L.R. Othaya/thuti/864</i>	<i>Wanyiri Gatu</i>
(c) <i>L.R. Othaya/Thuti/865</i>	<i>Gatu Wanyiri</i>
(d) <i>L.R. Othaya/Thuti/866</i>	<i>Wanyiri Gatu</i>
(e) <i>L.R. Othaya/Thuti/867</i>	<i>John Gachugu Wachira</i>
(f) <i>L.R. Othaya/Thuti/868</i>	<i>Wanyiri Gatu</i>
(g) <i>L.R. Othaya/Thuti/869</i>	<i>Jeremiah Mwai Joshua</i>

The Plaintiff further deponed that his late mother had filed a case with Othaya Land Dispute Tribunal namely case No. 17 of 1996. The award of that Tribunal was subsequently found by the High Court to be a nullity. The Plaintiff stated that he had been frustrated in his attempt to register a caution against the properties. That the Defendants were colluding to further sub divide the land parcels with a view to selling the same to defeat the trust. That the Defendants have demanded that they move out of the land or be evicted by force. That the Defendants have further threatened to pull down the Plaintiff's development. And that further the Defendants are sending them gangs who are cultivating the portions that the Plaintiffs have always cultivated. The application was opposed by the Defendants by an affidavit sworn by the 1st Defendant. The Defendant stated that it is not true that the Plaintiffs occupy the enumerated parcels of land save for **OTHAYA/THUTI/865** and **867**. The Deponent stated that he was the registered proprietor of the original parcel of land **OTHAYA/THUTI/363**. He stated that that property belonged to him and his late father Gatu Gakuhi. At the time of demarcation and consolidation the 1st Defendant stated that he was working in Nyahururu. That he and his brothers were all eligible to be registered as owners of land owned by their father. He therefore denied that a trust exists between him and the Plaintiffs and he called such a notion a figment of the Plaintiff's imagination. He, however, stated that on humanitarian grounds only he was willing to transfer parcel No. 866 to the Plaintiffs. He concluded by stating that it was not clear to him why it has taken the Plaintiffs this long to bring the matter in court. In submissions the Defendants' counsel followed the arguments raised in the replying affidavit and further argued that the action is wrongly brought by way of Originating Summons. He argued that *Order XXXVI* of the Civil Procedure Rules does not provide for an action to be brought under Originating Summons where there is a claim for trust.

In that regard I have looked at rule 1 of that order and I find that the same provides for hearing of questions which arise out of the administration of a trust amongst others but it does not provide for the declaration of the existence of a trust. Having, however, found that to be so, I am conscious of the *Rule 10 (1)* of the same order, which provides the court with power to convert an originating summons to a Plaint. I therefore do hereby convert this Originating Summons to proceed by way of a Plaint and in that regard the Originating Summons dated 28th March 2007 shall be regarded to be a Plaint and the Defendant shall file a defence to it. With respect to the prayers that the Plaintiff seeks, the court needs to consider whether the Plaintiff has sufficiently met the principles of granting an injunction. These are well laid out in the case of **GEILLA -V- CASSMAN BROWN & CO. LTD. [1973] E.A. 358**. They are as follows:

“An applicant must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; when the court is in doubt, it will decide the application on the balance of convenience.”

The Plaintiffs allege that parcel No. 363 was registered in the 1st Defendant’s name in trust. That property was family land. The Defendant denies the same. However in considering the evidence both in the affidavits and in the Originating Summons, I find that a *prima facie* case has been made by the Plaintiff for the granting of an injunction. The Plaintiffs have shown a *prima facie* case with probability of success. I am therefore of the view that it is necessary for an injunction to be granted to ensure that the parcels of land do remain in the state that they are in. I am, however, of the view that such an injunction should not be for a longer period than eight (8) months. The reason for that is because parties once they are granted an injunction they invariably sit back and take no action on the suit. The orders of the court therefore are as follows:

1. That the Originating Summons dated 28th March 2007 be converted into a Plaint, the Defendants are to file their defence within 14 days of today’s date.
2. That an injunction is hereby issued restraining by temporary injunction, the Defendants, their servants or agents from evicting the Plaintiffs or from alienating, wasting or damaging property numbers **OTHAYA/THUTI/863, 864, 865, 866, 867, 868 and 869.**
3. The injunction order granted in number 2 above shall subsist for eight (8) months from this dated hereof unless extended by the court.
4. This order after being extracted shall be served on the Land Registrar, Nyeri.
5. The costs of the Chamber Summons dated 5th April 2007 shall be in the cause.

Dated and delivered at Nyeri this 20th day of July 2007.

MARY KASANGO

JUDGE