



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 972 of 2006

LILIAN WAIRIMU NGATHO1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE2ND PLAINTIFF

VERSUS

CECILIA NDURUKA1ST DEFENDANT

JAMES NJOROGE NJAU2ND DEFENDANT

RULING

1. Land and Environmental Law Division
2. Subject of main suit: Originating summons:
 - i) Land
 - ii) LR No. Kiamba/Waguthu/385
 - iii) Questions
 - a) The property belongs to late Wanjiku Njau (aged 74 years in 1998).
 - b) Respondent 1 and 2 occupied property without legal light
 - c) Require to pay profits made on land for past 9 years to estate.
3. Application 10 September 2006
 - a) Orders restraining defendant/respondent from disposing cultivating construction of any structure and or wasting LR Kiambu/Waguthu/385
4. Opposition by respondents 1 and 2
 - i) Suit by way of Originating Summons filed to counter-Act. Hccc317/06 Originating Summons seeking prayers for Adverse Possession.

- ii) Several suit filed – some settled others have judgments to.
- iii) No prima facie case shown that there is a likely hood of success
- iv) Applicants administration to grant not yet confused by court.
- v) Injunction should not issue as Hccc317/06 OS is a good suit.

5. Held: i) That there is a prima facie case.

ii) Injunction to issue.

6. Case law – Nil

7. Related cases filed by parties.

a) Wanjiku Njau v Moki Savings Co-operative Society.

Hannah Mukami Kiruhi.

Hccc3972/1991

b) Wanjiku Njau v Moki Savings Co-operative, Hannah Mukami – withdrawn- alleged by fraud.
Hccc5868/92, Kiruhi & Barclays Bank of Kenya

In the Estate of Mary Wanjiku Njau Succession cause 1074/98.

d) Joseph Ndirangu Kiruhi and Lillian Wairumu Ngotho vs Kiruhi Kimondo, Hannah Mukami Kiruhi & Commission of Lands and Registrars of Titles.

e) Lillian Wairumu Ngotho & Elizabeth Murungari Njoroge

V Kiruhi Kimondo

Hannah Mukami Kiruhi

The Commissioner of Lands and The Registrar of Titles.

Hccc 2406/99 (OS)

f) Githurai Ting'ang'a Ltd v Moki Savings Co-operative Society Ltd Hannah Mukami

Kiruhi CA 286/99.

g) Lillian Wairimu Ngatho and Elizabeth Murungari Njoroge

Commissioner of Lands and Chief Land Registrar

Mis.applicaiton 662/00

Judicial Review.

h) Lillian Wairimu Ngatho and Elizabeth Murungari Njoroge

V Moki Savings Co-operative Society Ltd.

Hannah Mukami Kiruhi

Hccc745/01 (OS).

i) Lilian Wairimu Ngotho and Elizabeth Mungai Njoroge and Commissioner of Lands Respondents Mis application 735/00

Judicial Review respondent

j) Stephen Njau Njoroge and 7 Others v Lilian Wairimu Ngotho and Elizabeth Mungai Njoroge.

Hccc317/06 OS.

k) Lillian Warui Ngotho and Elizabeth Mungai Njoroge

V Cecilia Nduruka

James Njoroge Njau

Hccc 972/06

8. Advocates:

J.W. Kimiti of Rumba Kinuthia & Co. Advocates for the plaintiff/applicant- present

J.O. Okeyo of Otieno Okeyo & Co. Advocates for the defendant-present/respondent

LILIAN WAIRIMU NGATHO1ST PLAINTIFF

ELIZABETH MURUNGARI NJOROGE2ND PLAINTIFF

VERSUS

CECILIA NDURUKA1ST DEFENDANT

JAMES NJOROGE NJAU2ND DEFENDANT

RULING

I: **Injunction**

A: The application dated 13 September 2007 [seeks] that:

“This court issue a temporary injunction restraining the defendants/respondents or any other party claiming through them from interfering with the suit premises by way of disposing cultivating, constructing of any structures, temporary or otherwise, or in any way wasting or dealing with LR No. Kiambaa/Wagathu/385 pending the determination of this suit or until further orders.”

ii) That the costs of [the] application be provided for.”

1. The background of this application would show the very sad and pathetic situation of the genesis of this matter involving one Wanjiku Njau (now deceased) who since 1988 has been trying to be heard on her cases. No complete trial has been heard and finalized. She finally died at the age of 74 years old – in

April 1998. Her estate is in court and includes involvement in this present suit filed by way of Originating Summons. It was whilst the respondents, advocates was submitting that it transpired that there were numerous cases filed. A brief background is therefore necessary to first be outlined to see the global picture and to comprehend the application seeking injunction before me.

II: Background

2. Wanjiku Njau (now deceased) was married to one John Boyes (also deceased); the original registered owner of Land parcel LR 5964/I registered under the certificate of Title known as the Registration of Titles Act Cap.281 Laws of Kenya. The land survey plan numbers being 86387 and he area of land consisting 20 acres.

3. John Boyes died in 1976 and the title of land passed on to Wanjiku Njau on the 26 August 1978 transfer registration IR 1145/20.

4. She also held other properties that is not relevant to this case being:-

i) LR 362/24 Eastleigh

ii) Dagoretti/Riruta/S227

iii) Soweto plots

iv) Snowball Foundation Services –Preparatory school.

v) Ksh.1.395,000/- in the bank.

5. In 1984 M/s Githurai Ting'anga' Co. Ltd filed suit against Wanjiku Njau herein referred to as the (original deceased) being Hccc1788 of 1984 claiming that the late husband John Boyes had sold to them 7 ½ acres of suit land – John Boyes died before transfer could be effected. They claimed Adverse Possession. The suit was decided and the said company lost at the High Court and the Company appealed to the court of appeal. The deceased was restrained by a court order from disposing of the subject matter.

6. According to ruling delivered by Bosire J on 21 November 1991, it stated that the deceased before the injunction could be effected sold the parcel of land consisting of 19 acres to M/s Moki Savings Co-operative Society. There were therefore two sale agreements by this second party. The first agreement was for Ksh.1,000,000/- with a deposit of Ksh.237,500/- and the second agreement undated for Ksh.2,375,000/- with a deposit of Ksh.237,500/- paid. It is alleged that the first agreement was effected within the stipulated time whilst the second agreement was outside the time.

7. M/s Moki Savings Co-operative Society directors are alleged to be Hannah Mukami Kiruhi the wife of Kiruhi Kimondo a former politician and member of parliament. They registered the whole suit land by way of transfer to the name of M/s Moki Saving Co-operative Society. The deceased being aggrieved on the grounds that the only Ksh.785,000/- was paid to her out of the purchase price leaving a balance of Ksh.1,587,500/- to make a total of Ksh.2,375,000/- being the original purchase price to her filed

Hccc 3973/1991. Wanjiku Njau v Moki Savings Co-operative Society .

And Hannah Mukami Kiruhi Hccc 3973/91

7. The 1st defendant M/s Moki Savings Cooperative Society who in effect are really. Hannah Mukami Kiruhi and Kiruhi Kimondo (husband and wife) transferred the parcel of land to Hannah Mukami Kiruhi. She in turn charged the property to the Barclays Bank of Kenya.

8. Before doing so, the deceased alleged that she was bed- ridden. Kiruhi Kimondo came to her and asked her to sign some papers some papers so she could be given some medication. Out of ignorance she

did so. The said Kiruhi Kimondo paid her Ksh.15,000/-. It was later that she discovered that her property case No.3973/91 had been discontinued by consent. The case had an injunction that was registered against the title. The injunction was issued by Bosire J on 21. November 1991 as stated earlier. The effect of discontinuing the suit lifted the injunction orders thus allowing further dealings with the suit property. The deceased alleged the signing of the documents was a fraud and obtained by deceit of the said politician Kiruhi Kimondo. She was left with no choice but file another suit being Hccc 5868/1992.

Wanjiku Njau V Moki saving Co-operative Society

Hannah Mukami Kiruhi v. Barclays Bank of Kenya Ltd.

She prayed for an injunction to restrain the defendants from dealing with the property. A charge of Ksh.3,000,000/- was taken on the property. Hannah Mukami was originally, shown to have paid Ksh.1.500,000/- to Moki Saving Co-operative Society, then took a loan of Ksh.3,000,000/- . There was no repayment made. Barclays Bank proceeded to exercise their right of sale.

9. This suit is still pending and the last judge who recorded in it did so on 17 November 1992.

10. Six years later with no decisions from these courts having been made, the deceased Wanjiku Njau passed away due to a coma and brain tumor at the Kenyatta National Hospital on 24 April 1998.

ii) Second dispute

11. A fresh dispute arose. This time with the Estate of the deceased Wanjiku Njau. At her death she left no issue. She had brothers, sisters, nephews and nieces. Her relatives disputed as to who should hold letters of grant?

12. In the Success case of in the Estate of Mary Wanjiku Njau Succession Cause 1074/98. It was alleged that a will filed therein was not genuine and that it be revoked. That application for revocation came before Etyang J and on 30 September 1999 he ruled that “the Will” be revoked. He granted the application on grounds that there being no execution and the will being invalid the deceased estate be taken that she died intestate. Those entitled to the estate do so under section 39 of the Law of Succession – namely in the line of consanguinity on priority. As the father, mother of the deceased, the spouse of the deceased all pre- deceased her, the court was called to determine who then is entitled to the grant.

13. In her ruling of 2 November 2000 Hon. Lady Justice K.H. Rawal ruled that those who where in preference to take the grant be Lilian Wairimu Ngatho and Elizabeth Murugari Njoroge as nieces of the deceased. The other relatives such as Naomi Nduruka (sister), Njoroge Njau (brother).

Joseph Gatheru Micheka brother

Alfred Njuki Njau brother

Margret Nduta Njau – sister

Richard Gachine – brother

Patrick Kuganyi brother

Nyambura Kiganji – sister

Were declined to be administrator and administratrix as they were half brothers and sisters.

14. It was as a result of Lilian Waru Ngatho and Elizabeth Mugu Njoroge being administratrix to the estate that they began to collect the estate of the deceased. This included the dispute with Kiruhi Kimondo and Hannah Mukami Kiruhi the alleged directors of M/s Moki Co-operative Society. It is

alleged that the said politician burnt down the St Philips Preparatory School under the Snowball foundation that belonged to the deceased, in May 1999 and attempted to encroach thereon (Hccc 634/99 OS) (and Hccc 2406/99 OS). It is in the later suit that Naomi Nduraki Njau and Njoroge Njau has on 8 March 2000 claimed to be administration of the estate of the deceased and wished to be duly enjoined. They showed letters of administration intestate dated 3 February 2000 issued by Mbogholi Msagha J. It is unclear how this came about noting Etyanga J's ruling in 1999 and Rawal J's Ruling in November 2000.

15. The said same persons were named as relatives of the deceased in the Succession Cause.

16. In the meantime Cecilia Nduruka and James Njoroge Njau alleged relatives took possession of LR No. Kiamba/Waguthi/385 that is alleged to belong to the deceased and were inter meddling with the said property. They threatened to build pursuant sentiments within the suit and plant crops.

17. The two and others filed Hccc 317/06 on the 30 March 2006 seeking Adverse Possession of the said property claiming to have lived on the said land for over 12 years. The court perused this file and noted that service was not made by a process server nor advocate of the High court of Kenya Njau the respondents how Lillian Ngatho and Elizabeth Nungari Njoroge. It was on 15 December 2006 when Interlocutory Judgment was duly entered. This judgment an illegality null and void as in law no Interlocutory Judgments is permitted to be entered on an Originating Summons.

18. I hereby suo moto accordingly so order that the said Interlocutory Judgment be duly set aside, suo moto.

19. The two administratrix Lillian Warui Ngatho and Elizabeth Mungai Njoroge, to counter act the said suit filed this current suit of Hccc 972/06 seeking for an injunction. In so doing the advocate for the defendant/respondents that are circumventing the persons suit that was filed first.

20. The application of 13 September 2007 first came before Ojwang J for hearing and was duly granted. These orders were given ex parte and was duly set aside.

21. The application before me comes in by way of inter parties hearing and were both orders were given the opportunity to address me.

III: Application 13 September 2006

22. The task of the two administrators is to preserve the estate of the deceased. In order to do this the property in question should not be interfered with until the estate is rightly distributed then the administratrix return to the probate court to confirm such distributions. That there after the grant is confirmed subject to there being no protest and the estate is distributed to the rightful persons.

23. I hereby hold that an injunction be and is hereby granted restraining the 1st and 2nd defendant Cecilia Nduruka James Njoroge Njau their agents and or servants and or persons named as plaintiffs agent in Hccc317/06 until the determination of the Originating Summons.

24. There is a part heard before Ojwang J being Hccc745/2001 ((OS) that has only the submission by Mr. Okeyo left to be done. This case should proceed to hearing to its finalization before that judge and which concerns M/s Moki Saving Cooperative Society and Hannah Mukami Kihuri.

The related files to the original initial cases are:

Hccc 3972/91

Hccc 5868/92

Hccc 634/99 (OS)

Hccc 2406/99 (OS)

Mis applic.662/00

Hccc745/01 (OS) pending before Ojwang J.

25. The files cornering this application are:

Misc 735/00

Hccc 317/06 (OS)

Hccc 972/06

And Hccc Succession cause 1074/98.

These are two separate issues for trial and should be kept separate for hearing.

26. I award costs to the applicant.

Dated this 6th Day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

J. W. Kimiti of Rumba Kinuthia & Co. Advocates for the plaintiff/applicant – present

J.O. Okeyo of Otieno Okeyo & Co. Advocates for the defendants - present