



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

Civil Case 776 of 2005

FOIBE MUTHONI GICHAGA1ST PLAINTIFF/APPLICANT
GRACE MUKAMI MWANIKI2ND PLAINTIFF/APPLICANT
PETER MURIUKI GICHAGA3RD PLAINTIFF/APPLICANT

VERSUS

MAGDALENE NGIMA MURIUKI1ST DEFENDANT/RESPONDENT
SOLOMON MURIUKI KIMU2ND DEFENDANT/RESPONDENT
NDIMA TEA FACTORY LIMITED3RD DEFENDANT/RESPONDENT
MISS MATHENGE4TH DEFENDANT/RESPONDENT
PETER MUCHOKI WAHOME5TH DEFENDANT/RESPONDENT

RULING

The plaintiffs moved the Court by Chamber Summons dated 15th June, 2005. The application was brought under Orders **XXXIX**, rules 1, 2, 2A, 3 and 5 and **L**, rule 2 of the Civil Procedure Rules, and s. 3A of the Civil Procedure Act (Cap. 21). The substantive prayers were as follows:

- (i) That, the 1st and 2nd defendants, their servants and/or agents be restrained from plucking tea leaves from the tea plantation, cultivating, harvesting any crop, entering or remaining in the piece or parcel of land known as KIINE/KIANGAI/1207 and from committing other acts of waste or damage of whatsoever nature on the said land pending the disposal of the suit herein;
- (ii) That, the 3rd and 4th defendants be restrained from receiving, processing or buying any tea leaves plucked by the 1st and/or 2nd defendants, their servants and/or agents from the tea plantation in the said land pending the disposal of the suit herein;
- (iii) That the defendant, its servants and/or agents be restrained from paying to the 1st and 2nd

defendants, their servants and/or agents the price of any tea leaves delivered or that might be delivered or sold under No. NMO80294 aforesaid or in any other membership number pending the disposal of this suit, unless ordered otherwise by the Court.

The application is premised on the grounds that there are acts of waste and damage being perpetrated on the suit land by the **1st and 2nd defendants**, their servants and/or agents and the said acts are continuous and may cause irreparable harm; that the **1st and 2nd defendants**, their servants and/or agents are illegally, wrongfully and without any colour of right, occupying and committing acts of waste on the suit land and will/persist in doing so unless restrained by Court orders; that the 3rd and 4th defendants have fraudulently been receiving, processing and paying for leaves illegally picked by the 1st and 2nd defendants from tea plantation on the suit land which belongs to the estate of the deceased.

Evidence in support of the application is in the affidavit of **Grace Mukami Mwaniki** sworn and filed on 22nd June, 2005. She makes depositions on behalf of herself, and of the other two applicants. She avers that the applicants are the administrators of the estate of the late **David Gichaga Solomon Muriuki** (“the deceased”) who died on 2nd June, 2003; they are administrators pursuant to a grant of letters of administration intestate, issued on 26th May, 2004. The deceased, as at the date of his death, was **the proprietor of a parcel of land, L.R. No. KIINE/KIANGAI/1207** situate in Kirinyaga District, comprising 2.6 hectares, or thereabouts.

It is deponed that in 2003 the defendants, their servants and/or agents illegally and without any colour of right, entered the said land and there erected a temporary hut; and thereafter they committed acts of waste and damage, including picking the tea planted and being therein, cultivating the land and planting crops, and felling trees, in disregard of the plaintiffs’ rights as the administrators of the estate. It is averred that the verbal and written requests of the plaintiffs, that the defendants do vacate the suit land, and cease all acts of waste, have had no response. The deponent avers that she has reason to believe, and indeed does believe, that the defendants, their servants and/or agents will persist in their wrongful acts and continue occupying the suit land, unless restrained by the Court.

The deponent avers that neither the 1st nor the 2nd defendant has any tea plantation within the area of operation of the 3rd defendant. It is deponed that the 3rd, 4th and 5th defendants have aided and abetted the 1st and 2nd defendants in fraudulently picking and selling the plaintiffs’ tea, by wrongfully receiving and processing the same.

The deponent depones that she has reason to believe that the loss and damage being occasioned by the defendants through fraudulently picking tea, and wrongfully tilling the suit land, is unlikely to be compensated for, as the defendants do not have sufficient or any means known to the plaintiffs which could enable them to pay compensation. It is deponed that the defendants have their family land elsewhere, and they could re-locate thereto if ordered to vacate the suit land as prayed, pending determination of the suit. The deponent avers that the plaintiffs have a reasonable probability of succeeding in this suit – as the personal representatives of the deceased, who was the absolute registered owner of the suit land.

Stephen Mwaniki Muriuki the Chairman of the Board of Directors of the 3rd defendant swore and filed a replying affidavit, on behalf of the 3rd, 4th and 5th defendants on 27th July, 2005. He depones that by the records held by the 3rd defendant the 1st, 2nd and 3rd **plaintiffs** are the lawful tea pickers in respect of L.R. No. KIINE/ KIANGAI/1207; and the 3rd defendant is registered grower No. NM 0080202. It is averred that the 1st defendant is **also** a registered grower of the 3rd defendant by virtue of her being a widow to one **Solomon Muriuki Gichaga** (deceased) who was at the time of his death a registered tea picker on **L.R. No. IRIANI/CHECHE/785 which parcel of land falls under the area of operation of the 3rd defendant herein**. The deponent believes to be true the information which he has received from the management of the 3rd defendant, that the 1st defendant delivers tea picked from L.R. No. IRIANI/CHECHE/785 to the 3rd defendant herein. The deponent avers that as far as the 1st, 2nd and 3rd

defendants are concerned, the 1st defendant delivers tea to the 3rd defendant lawfully and, if it were the case that she delivers tea from the suit parcel of land, this would ***not be within the 3rd defendant's knowledge***, as it would be difficult to detect which tea is picked from which parcel of land.

Hearing of the application took place on 8th November, 2005 when learned counsel **Mr. Wamae** represented the plaintiffs/applicants, while learned counsel **Mr. Kahari** represented the 3rd, 4th and 5th defendants. Although there was an affidavit of service, dated 31st October, 2005 and filed on 8th November, 2005 to show that ***service had been effected upon the 1st and 2nd defendants***, they were not represented during the hearing of this application.

Learned counsel **Mr. Wamae** noted that no objections had been filed by the 1st and 2nd defendants who were the ***primary defendants***. He noted from the evidence that it is the 1st and 2nd defendants who had harvested tea from the plaintiffs' land, and then these defendants had elected not to oppose the instant application. Counsel urged that orders of injunction be granted against the 1st and 2nd defendants; and also that injunctions be granted against the 3rd and 4th defendants, in relation to the tea pickings brought by the 1st and 2nd defendants. **Mr. Wamae** submitted that the 3rd and 4th defendants had no proper answer to the charge that their tea pickings came from the suit land.

Learned counsel **Mr. Kahari** submitted that as tea coming to the 3rd defendant had been picked from ***L.R. No. IRIANI/CHECHE/785***, the 3rd defendant had not acted in any manner to the prejudice of the plaintiffs; there would be cause for complaint only if tea coming to the 3rd defendant had its provenance in ***L.R. No. KIINE/KIANGAI/1207*** – but in that case only the 1st and 2nd defendants, who made no depositions, would know. Hence, counsel submitted, there would be a basis for orders against the 1st and 2nd defendants but not against the 3rd, 4th and 5th defendants.

Upon reading the content of the application, considering the grounds and the evidence, and hearing the submissions of counsel, I have come to the conclusion that the applicants have a clear case against the ***1st and 2nd defendants*** who, for unknown reasons, have filed no response and have not been represented in Court. The applicants, however, do not appear at this interlocutory stage, to have a clear case against the 3rd, 4th and 5th defendants: the exact position can only be known after the full trial of the ***main suit***. The 1st and 2nd defendants may or may not have picked the tea leaves which they brought to the 3rd defendant, from both L.R. No. IRIANI/CHECHE/785 and L.R. No. KIINE/KIANGAI/1207 – but the 3rd defendant would have no way of knowing; which suggests that the 3rd defendant cannot be said at this stage to have committed a wrong against the plaintiffs.

I will, therefore, make orders as follows:

- 1. The 1st and 2nd defendants, their servants and/or agents are hereby restrained from plucking tea leaves from the tea plantation, cultivating, harvesting any crop, entering or remaining in the piece or parcel of land known as KIINE/KIANGAI/1207 and from committing other acts of waste or damage of whatsoever nature on the said land, pending the disposal of the suit herein.*
- 2. The 1st and 2nd defendants shall bear the plaintiffs' costs in any event*
- 3. Other costs in this application shall abide the outcome of the suit.*

Orders accordingly.

DATED and DELIVERED at Nairobi this 24th day of February, 2006

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

For the Plaintiffs/Applicants: Mr. Wamae

Instructed by M/s. P. M. Wamae & Co. Advocates

For the 3rd, 4th, 5th Defendant: Mr. Kahari

Instructed by M/s. Kahari & Kiai Advocates

1st and 2nd Defendants – absent and unrepresented