

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1184 of 2004

FELISTAS GATHONI NG'ANG'A (suing as the Administrator of the Estate of the late
PETER NG'ANG'A NDITE)PLAINTIFF

VERSUS

JOYCE WACU MBUGUADEFENDANT

R U L I N G

On the 3rd November 2004, Felistas Gathoni Ng'ang'a ("**the Plaintiff**") suing in her capacity as the Administrator of the Estate of the late Peter Ng'ang'a Ndite ("**the Deceased**") instituted this suit against Joyce Wacu Mbugua ("**the Defendant**") seeking a permanent injunction to restrain the Defendant from constructing on or otherwise interfering with the piece or parcel of land known as Title No.

Githunguri/Kanjai/190, Githunguri, Kiambu District. With the Plaint dated the 2nd November 2004, the Plaintiff also filed an application of even date therewith which she subsequently abandoned and took out the Chamber Summons application dated and filed on the 2nd December 2005, the subject of this Ruling.

In this Application, which is supported by the Plaintiff's own affidavits sworn on the 2nd December 2005 and the 18th January 2006 respectively, the Plaintiff seeks an injunction to restrain the Defendant from trespassing or in any other manner interfering with the piece of parcel of land known as Title No. Githunguri/Kanjai/93 ("**the suit land**") pending the hearing and determination of the suit. The Plaintiff also seeks leave of the court (which she does not require as pleadings have not closed) to amend the description of the suit land in the Plaint to read "*Githunguri/Kanjai/93*" instead of "*Githunguri/Kanjai/190*" as is currently the case.

The Defendant's own Replying Affidavit sworn on the 5th January 2006 was filed together with her Grounds of Objection on the 5th January 2006 in opposition to the Application.

The Plaintiff, who appeared in person, was married to the Deceased at the Catholic Mission Church, Keriiita, on the 25th July 1975 and they had nine children. She states that her deceased husband inherited a portion of the suit land from his late mother, Bibi Ndite, but had not prior to his death obtained title thereto as the administration of his late mother's estate had not been completed. The Plaintiff had always lived on the suit land with the Deceased (except during temporary periods of absence when the Deceased was away in the Kinangop where he was a teacher) and had continued to reside at the matrimonial home thereat even after her husband's death in March 2003 to date. It was not until recently that the Defendant, alleging to be a wife of the Deceased (which the Plaintiff denies) and with the assistance of the local District Officer unlawfully occupied a portion of the suit land and started cutting down trees and building a house thereon.

The Defendant has contended that she is the lawful wife of the Deceased under Kikuyu Customary Law and that they had five children. She says that the Deceased separated from the Plaintiff in 1979 and married one Julia Muthoni, also under Kikuyu custom, with whom the Deceased lived until his death. The Defendant has further contended that the Grant of Letters of Administration Intestate in favour of the

Plaintiff was obtained secretly and fraudulently and as the suit land does not form part of the Deceased's estate and is not in any event provided for in the Certificate of Confirmation of Grant dated the 25th April 2005, the Plaintiff lacks both the legal and equitable right in the suit land to entitle her to the order of injunction sought. Finally, it has also been contended by Mr. G.K. Gatere, learned counsel for the Defendant, that the Deceased had prior to his death and in the presence of village elders earmarked a portion of the suit land for use by the Defendant. On these and other grounds, Mr. Gatere urged that the Application be dismissed with costs.

I have some difficulty in accepting the evidence in the Defendant's Replying Affidavit for a number of reasons. Firstly, and with regard to the averment that the Defendant lawfully married the Deceased under Kikuyu Customary Law, there is no affidavit (or any other evidence whatsoever) from the elders or other persons present during the negotiations of the alleged marriage nor even from any or all of the five persons named in paragraph 4 of the Replying Affidavit showing that their alleged mother, the Defendant, was a wife of the Deceased. Secondly, there is also no evidence that the Grant of Letters of Administration Intestate in favour of the Plaintiff was "**obtained secretly and fraudulently with the sole aim of disinheriting me and my family**" as stated in paragraph 7 of the Defendant's said Affidavit. There is also no evidence of any active steps having been taken by the Defendant in Nairobi High Court Succession Cause No. 429 of 2004 (or in any other proceedings) seeking to set aside what the Defendant contends to be a fraudulent Certificate of Confirmation of Grant. Further, and with regard to the averment in paragraphs 12 and 13 of the Replying Affidavit, the Defendant has failed to tender evidence from the village elders or from any other source to show that the Deceased did, in fact, earmark a portion of the suit land for use by the Defendant. Finally, the Defendant has also not explained why she has taken no steps since March 2003 when the Deceased died to formalize her alleged beneficial ownership of the portion she claims in the suit land.

The Plaintiff, on the other hand, is not only currently in possession and physical occupation of the suit land but has also resided thereat as her matrimonial home since she was married to the Deceased in 1975. Upon his death in 2003, the Plaintiff promptly moved the court for a Grant of Letters of Administration Intestate and subsequently filed this suit when her interest in the suit land was threatened by the Defendant.

All in all, I find that the Plaintiff has established a *prima facie* case with a probability of success and even if I were in doubt, the balance of convenience certainly lies with the Plaintiff. Accordingly, I allow the Chamber Summons Application dated and filed on the 2nd December 2005 and do hereby grant orders in terms of prayers Nos. 2 and 3 thereof respectively with the costs of the Application to the Plaintiff.

Dated and delivered at Nairobi this Twenty-fourth day of March, 2006.

P. Kihara Kariuki

Judge