



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
Civil Case 1088 of 2004**

**GITHI MWANGI.....1ST APPLICANT
MBURU KIMANI..... 2ND APPLICANT
MARTHA WARIARA..... 3RD APPLICANT
STEPHEN MWANGI.....4TH APPLICANT
MICHAEL NJOROGE..... 5TH APPLICANT
(Suing as the legal representatives of the
Estate of PHILIP MWANGI NJOROGE)**

VERSUS

**JOSEPH MWAI KABIRU.....1ST RESPONDENT
KANYUTU KIMANI..... 2ND RESPONDENT
LEONARD MAINA MBUKI..... 3RD RESPONDENT
PATRICIA WANJIKU GACHAGUI.....4TH RESPONDENT
MBARI YA MUNA..... 5TH RESPONDENT**

RULING

By chamber summons of 15.10.04 brought under Order XXXIX rule 2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap. 21), the applicants applied for the following orders:-

1. That service of this application be dispensed with in the first instance.
2. That the respondents herein, their servants and/or agents be hereby restrained from interfering with the occupation, control and quiet enjoyment of the land of the applicants herein known as Tigoni/Karamba-ini 43 and 148 until the hearing and determination of the originating summons filed herein.
3. That the costs of this application be in the cause.

The grounds upon which the application is based are :-

- a) That the 1st, 2nd, 3rd and 4th respondents, being directors of the 5th respondent and neighbours of the applicants herein, have instructed their agents and servants to harass the applicants herein.
- b) That they have further made it difficult for the applicants herein to tend to their crops already planted on their land referred to herein.
- c) That the respondents' servants and/or agents, in 2002, attempted to remove the applicants herein from this land by destruction of their property but failed.
- d) That they have now influenced the chief of Karamba-ini into arresting the applicants at will when the applicants attempt to tend to their crops, only to be released later and/or through the court.

The chamber summons application and the grounds on which it is based are stated to be supported by the affidavits of M/s Githii Mwangi, Mburu Kimani, Martha Wariara, Stephen Mwangi and Michael Njoroge (applicants herein) sworn on

14.10.04. The said affidavits are not annexed to the application but are annexed to originating summons of 14.10.04. The said originating summons was replaced by amended originating summons of 15.10.04 which states on the face thereof that it is supported by the applicants' aforesaid affidavits but the affidavits are not annexed to the amended originating summons of 15.10.04 and respondents' counsel made an issue of this fact.

The genesis and foundation of the chamber summons of 14.10.94 is the amended originating summons of 15.10.04 which is the main suit and whose prayers are:-

1. That service of summons be hereby dispensed with in the first instance.
2. That the respondents' servants and/or agents be hereby restrained from interfering with the applicants' occupation and quiet enjoyment of L.R. Tigoni/Karamba - ini 43 and 148 until the hearing and determination of this suit.
3. That this honourable court do declare that the applicants herein are the rightful owners of Tigoni/Karamba-ini 43 and 148 by virtue of being in adverse possession of the land for over twelve (12) years.
4. That the respondents herein as directors of the 5th respondent be hereby compelled to issue the applicants herein the title to their land, Tigoni/Karamba-ini 43, 148 and 3.
5. That the costs of this application be in the cause.

I pause here to note that prayer 2 in the chamber summons of 15.10.04 is the same as prayer 2 in the amended originating summons of the same date while prayer 3 in the chamber summons is the same as prayer 5 in the amended originating summons. The main suit is, however, the amended originating summons as noted earlier.

The chamber summons came up for hearing before me on 03.03.05 whereat the applicants were represented by learned counsel, Mrs J. Owino while the respondents were represented by learned counsel, Mr. M. Kimani. The hearing did not end that day but was concluded on 26.04.05.

In essence, applicants' counsel made the following points:-

- a) That the chamber summons application relates to Tigoni/Karamba-ini 43 and 148 of which the applicants have been in occupation since 1972 and that the land was allocated to them by the 5th respondent (described in the amended originating summons as a limited liability company) of which the applicants are members.
- b) That the 5th respondent co. has refused to issue title deeds to the applicants despite a court order regarding the land.
- c) That the respondents now threaten to evict the applicants using the chief of Karamba-ini Location, Limuru and are obstructing the applicants from farming on the land and have indicated they want to sink a borehole there.
- d) That the applicants will lose crops they planted on the suit land, which is their home, unless the respondents are restrained.

Applicants' counsel urged that the court to grant prayer 2 in the chamber summons. Counsel also urged the court to issue the declaration sought vide prayer 3 in the amended originating summons. I find the latter prayer curious because the said prayer constitutes the central issue of the main suit and is not part of the chamber summons now under consideration.

On the other hand, respondent's counsel opposed the chamber summons application relying on the grounds of opposition of 25.02.05, which are:-

- a) That the application is misconceived, incompetent and cannot stand.
- b) That the application is untenable as the main suit is defective and the orders sought in the main suit cannot be granted in any event.
- c) That the application is unsupported by any evidence at all.

There was also the common omnibus ground about other grounds to be adduced at the hearing of the application.

Regarding lack of evidence in support of the application, respondent's counsel took the point that the chamber summons was not supported by any evidence; that any affidavits filed in the matter were in support of the original originating summons of 14.10.04 and that the chamber summons of 15.10.04 should have been supported by its own affidavit or affidavits, which was not done. Counsel drew attention to the fact that both the original originating summons 14.10.04 and amended originating summons of 15.10.04 were brought under Order XXXVI rule 3 D and noted that sub – rule (2) mandatorily requires the summons to be supported by a certified extract of title to the subject land, which has not been done in the present case. Respondent's counsel submitted that if you seek adverse possession, your possession can only be adverse to that of title holder and that had a certified copy of title been annexed, it would have shown the registered proprietor of the subject two parcels of land to be the Government of Kenya, as deponed by Leonard Maina Migwi in his affidavit filed on 12.11.04. In the latter regard, counsel drew attention to section 41 of the Limitation of Actions Act (Cap.22) to make the point that no order of adverse possession can be made against the Government. Respondents' counsel made the further point that since the respondents are not holders of title to the suit land, no adverse possession can be issued against them and as such the amended originating summons, which is the main suit, is bound to fail, in which case the chamber summons would naturally have to fail also.

Respondents' counsel next pointed out that the chamber summons is brought under Order XXXIX rule 2 and submitted that if an application is brought under the above order and rule, there must be a prayer for a permanent injunction in the main suit for the application for a temporary injunction to succeed. In this regard counsel sought to rely on *Kihara – vs – Barclays Bank (K) Ltd* [2001] 2 E.A. 420 and *Morris & Co. Ltd -vs- Kenya Commercial Bank Ltd & others* [2003] 2 E.A. 605. Both decisions were by a single Judge of the High Court (Ringera, J - as he then was).

It was respondents' counsels' further submission that since in his view the applicants have not demonstrated that they have a *prima facie* case against the respondents in the main suit, the chamber summons application for a temporary injunction must fail. In this connection counsel cited *Kenya Commercial Finance Co. Ltd - vs – Afraha Education Society* [2001] 1 E.A. 86 in which the Kenya Court Appeal held that the sequence of steps to be followed in an enquiry whether to grant an interlocutory injunction is (i) whether the applicant has laid out a *prima facie* case with a probability of success; (ii) whether the applicant might suffer irreparable injury if the injunction is not granted; (iii) if there is doubt, whether the balance of convenience favours the applicant. In the Kenya commercial Finance case, the Court of Appeal followed the decision in *Giella – vs – Cassman Brown & Co. Ltd* [1973] E.A 358 and clarified that the conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third one can be addressed.

In reply, applicants' counsel submitted that it is not necessary to seek a permanent injunction first in order for a prayer for a temporary injunction to succeed. In this regard, counsel referred to High Court Milimani Commercial Court Civil Appeal No.1858 of 2001, *Aprotech Services Ltd - vs – Savings & Loans Kenya Ltd* in which the High Court (Mwera, J) cited with approval a decision by Ringera, J (as he then was) in HCCC No.1327 of 2001, *Laxmanbhai Construction - vs – Anspar*

Beverages that there is no requirement in Order XXXIX rule 1 (b) that a applicant to the relief of temporary injunction under that provision should have sought a permanent injunction in the plaint before such interlocutory application can be entertained by the court

Applicants' counsel in the present case pointed out that the affidavit of Leonard Maina Migwi filed on 12.11.04 does not deny the applicants' occupation of the subject land; that annexures to Leonard Maina Migwi's affidavit show that the first entry of ownership is that of the 5th defendant but that no proof is attached to show that the suit property was transferred to next owner, i.e. the Government of Kenya; that whereas Leonard Maina Migwi's affidavit contains at paragraph 8 an allegation that the applicants have been interfering with community projects on the suit land, the deponent did not annex any documentary evidence to prove the allegation.

Applicants' counsel submitted that the foregoing accusations and counter-accusations between the parties raise triable contentious issues requiring to be adjudicated upon, hence the present suit, and urged the grant of the temporary injunction.

I have duly considered the matters in controversy between the parties and their lawyers' submissions, including the authorities cited.

I wish at the outset to dispose of the technical point raised by respondents' counsel that for the temporary injunction sought in the chamber summons brought under Order XXXIX rule 2, there must be a prayer for a permanent injunction in the main suit, i.e. the amended originating summons. I address the issue here just for the sake of clarity, otherwise it is of no moment in the present case. Respondents' counsel relied for his aforesaid proposition on the cases Kihara -vs – Barclays Bank (K) Ltd and Morris & Co. Ltd -vs- Kenya Commercial Bank Ltd & others (supra). Both decisions were by a single Judge of the High Court (Ringera, J – as he then was). The direct and main decision made on the point is Kihara's case in which there was no prayer for a permanent injunction in the main suit. That is not quite the position in the present case in which the main suit, i.e. the amended originating summons, seeks at prayer 3 a declaration that the applicants herein are the rightful owners of the subject two parcels of land (L.R. Tigoni/Karamba-ini 43 and 148) while at prayer 4 the said originating summons seeks an order compelling the 5th respondent to issue the applicants with titles to the suit land, and to another parcel known as Tigoni/Karamba-ini 3 which does not seem to be an issue in the present case. To my mind, prayers 3 and 4 in the amended originating summons, if granted, would have the same effect as a permanent injunction, so in my respectful view the decision in Kihara's case has no application to the present case. In any event I find nothing in Order XXXIX rule 2 pegging an application for a temporary injunction thereunder to a prayer for a permanent injunction in the main suit.

Respondents' counsel makes a valid point when he says of the chamber summons application under consideration that it is misconceived and incompetent on the ground that it is based on a main suit which is defective and seeks orders which cannot in any event be granted.

A look at the amended originating summons of 15.10.04, which is the main suit, shows that it is brought under Order XXXVI rule 3 D (1), (2) and (3) and rule 2 of the Civil Procedure Rules as well as under section 3A of the Civil Procedure Act. The relevance of rule 2, which relates to orders for administration of estates of deceased persons or trusts, has not been made manifest in the present case. Section 3A of the Civil Procedure Act is an omnibus provision acknowledging the court's inherent power to issue such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Whoever invokes the section has to demonstrate he has a case to influence issuance of an order in his favour under the

section. It is clear from the grounds cited in the chamber summons application of 15.10.04 that the said application is based on the Limitation of Actions Act (Cap. 22). Rule 3D of Order XXXVI which is among the provisions under which the application is brought provides, inter alia, as follows:

**“3D. (1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.
(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”**

Clearly, the mandatory requirements of Order XXXVI rule 3D (2) have not been complied with as no certified extract of the title to the suit land has been annexed to the amended originating summons. I agree with respondents' counsel that non-compliance with the mandatory requirements of Order XXXVI rule 3D (2) renders the amended originating summons, i.e. the main suit, incompetent. This cuts off the ground underneath the chamber summons thereby rendering the chamber summons application of 15.10.04 incompetent and I declare the said chamber summons application incompetent and strike it out. Consequently, prayer 2 in the said chamber summons seeking an order that the respondents herein, their servants and/or agents be hereby restrained from interfering with the occupation, control and quiet enjoyment of the suit land known as Tigoni/Karamba-ini 43 and 145 until the hearing and determination of the originating summons filed herein is refused. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 21 day of June, 2005.

B.P. KUBO

JUDGE