REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT 86 OF 2004

M'ETHIORI KITHIORI …….…….…. APPLICANT/PLAINTIFF

VERSUS

M'IMARIA M'MWAMBI……. RESPONDENT/DEFENDANT

RULING

This application was dated 22.10.2004. It sought orders of injunction restraining the defendant by his agents, servants, employees or whosoever from entering, trespassing into, cutting trees and/or interfering in any manner howsoever with the plaintiffs possession and user of parcel No.Njia/Buri-E-Ruri/29 until the hearing and final determination of the suit.

The plaintiff's facts of the case are that the plaintiff is the registered owner of the said parcel of land aforementioned which he claims to have extensively developed by planting indigenous and exotic trees. He leased part of the said land to the defendant in 1992 at ground rent of Kshs.100, 000/- for a period of 8 years which expired in the year 2000. That the defendant has since the expiry of the lease refused to vacate the land. That the defendant is now carrying out wanton destruction of the crops and trees on the land and threatens to continue doing so in the future. The plaintiff therefore seeks the restraining orders to avoid suffering irreparable loss and damage. The plaintiff calls the defendant a trespasser, especially after the expiry of the alleged lease. He argued that since he is the registered owner, the plaintiff has a prima facie case to remove the defendant and to protect and preserve his property on the land, hence the prayer for restraining orders.

Anticipating what the defendant might say in reply, the plaintiff states that the defendants had no right to file in their defence a replying affidavit as well as a statement of grounds of opposition as Order 50 Rule 16(1) allows only one or the other and not both. He accordingly instigated the court to expunge both but if not, then to (if I understand him well) rely only on the replying affidavit which responds to the plaintiff's supporting affidavit.

The respondent through Mr. Nyamu decided to rely on both the replying affidavit and the statement of grounds of opposition. In my view Order 50 Rule 6(1) gives a party choice to and rely on a replying affidavit or on a statement of grounds of opposition, but not both. The language used by the legislature is clear and the clear and express interpretation of it raises no ambiguity. Mr. Mwangi in his submission, encouraged the court to strike both out. I have considered the same and I am of the view that since the replying affidavit appears to be donating more information which will assist the court, the court will rely on it while ignoring the grounds of opposition.. The court's clear warning is that a party has to choose one mode of responding under Order 50 Rule 16(1). By not striking out both processes however, this court is not laying down a method of dealing with those parties who deliberately ignore the express words and meaning of the said rule.

In his replying affidavit, the Defendant stated that he was a third party who entered into a lease agreement with David Kobia, the son of the plaintiff who has lived on and occupied part of the land in question for many years. He states further that David Kobia did so with the knowledge and consent of the plaintiff, his father, who as well had granted defendant leave, express or implied to occupy and use the said part of land. That part of David Kobia's user was planting miraa on the said part of the land which again, he asserted, was with the knowledge and consent of the plaintiff. The plaintiff did not object to the planting and tendering of the miraa, defendant added. It is not clear when the defendant started to pluck the miraa for sale but on probable evidence on record, the miraa were ready for plucking by 1st February,2000 when a lease agreement was signed. The plaintiff vaguely stated that by 1992 a lease agreement for the plucking of the miraa was entered into, thus suggesting that plucking of the miraa must have started even before then but no tangible evidence was produced to confirm so especially on the face of the denial by the defendant that there was a lease before February, 2000. The defendant therefore produced a written lease agreement for the plucking of miraa between him and the son of the plaintiff which agreement appears to have taken effect on 1.2.2000. He further asserted that he has been plucking the miraa since then and that an extension of the lease was signed and the plaintiff did not begin objecting to the lease until recently when filed this suit and this application. The defendant further denied destruction of any trees on the land as alleged by the plaintiff. He even invited the court to visit the land to confirm the truth of the matter. The defendant also pointed out to the lease agreement and asked what would happen with the heavy investment he has made on the land under the lease which amounted to over Kshs.288,000/=. He concluded by asserting that the plaintiff has not demonstrated a prima facie case with chances of success nor has he proven that if the injunction orders sought are not granted he would stand to suffer loss or damage beyond the possibility compensation. He

finally argued that the best course under the present circumstances is to leave things where they are until the case is finally determined.

I have carefully perused the material before me and considered the same, inclusive of the authorities cited by both parties. I must point out that at this stage all I need to decide is whether the plaintiff has satisfied the court that he should be granted the injunctive orders sought or not. While therefore the authorities cited are incisive on relevant issues, they may not be strictly relevant on this application.

There is no dispute that the land in question, L.R. No.Njia/Buri-E-Ruri/29 is and has always been registered in the name of the plaintiff. There is no doubt either that one David Kobia M'Ethiori is applicant's son who lives and has lived all along with him on the said land. The plaintiff did not deny defendant's assertion that the said David Kobia, son of the plaintiff, occupies part of the above land which he has extensively developed by planting miraa. The further evidence which was not denied by the plaintiff was that the miraa were planted with the knowledge and consent, express or implied, of the plaintiff. The plaintiff indeed tried to prove that the miraa were ready for picking since 1992 when he asserted the first lease agreement was entered into between the defendant and the said son of the plaintiff. This would in my view establish that plaintiff had full knowledge of the existence of the plantation and that by and large the plaintiff must originally have authorized the planting and tendering of the same until the plucking period arrived. The plaintiff is not asserting that he had authorized the planting of the miraa upon certain or any conditions. Indeed it would be difficult to do so. It would therefore be reasonable to assume that once the said son of the plaintiff with the said consent of the plaintiff planted the cash crop of miraa, the miraa would be exploited in any most economic manner possible. That is to say, if the son of the plaintiff decided to lease the same to a third party like the defendant, if that would be more lucrative, he should be free to do so. If by any chance the proceeds from the miraa were to be used jointly with the plaintiff,(which position is not asserted herein) then that is a matter which has nothing to do with a third party who has paid his lease rent properly and who should be left to exploit the crop in accordance with the lease agreement. It is clear to the court therefore that on the probable evidence before the court, the son of the plaintiff, had a probable right to use the part of the land he occupies with the said consent of his father the plaintiff, in tending the miraa cash crop. In the view of the court as well, and upon the legal authorities cited, the plaintiff may not have equitable right to remove his son from the said part of the land that he occupies by virtue of his being the son of the plaintiff who therefore may hold equitable recognizable rights over the land despite it being admittedly registered in the name of the plaintiff. In conclusion therefore the mere fact that the land is registered in the name of the plaintiff may not alone raise a prima facie case that he has overriding rights over it, especially as against his son David Kobia who occupies part of it, and who has planted permanent cash crop of miraa with the consent of the plaintiff.

On the other hand, the plaintiff has not indeed demonstrated that if the injunctive orders he seeks are not granted he will suffer loss or damage that cannot be compensatable with damages. In fact there is no evidence that there is anything he is getting presently that he will lose. And finally, all circumstances taken into account, the balance of convenience would tilt in favour of leaving things where they are presently; that is to say, the defendant should be left free to pluck the miraa until the case is finally determined or until the existing lease agreement expires. It may be wise for the defendant to note, that while this case pends, no further fresh lease for the plucking of the said miraa should be entered into.

The end result therefore is that this application has no merit. It is dismissed but without the order of costs either way.

Orders accordingly.

Dated at Meru this 15th day of September, 2005

D. A. ONYANCHA

JUDGE