



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI**

CIVIL CASE 72 OF 2005

1. EDWIN KANG’ETHE WACHIRA)

2. LIZZIE NJAMBI WACHIRA) PLAINTIFFS

VERSUS

1. WAHOME THEURI)

2. AGRICULTURAL FINANCE CORPORATION)

3. JACKSON M. HARO) DEFENDANT

RULING

Edwin Kangethe Wachira and Lizzie Njambi Wachira (hereinafter referred to as 1st & 2nd Plaintiffs) and both of whom are suing in their capacity as personal representative of the estate of Wachira Aram Githanda have come to this court under Order XXXIX Rules 1, 2, 3(1) and 9 of the Civil Procedure Rules, section 3A and 63 (c) of the Civil Procedure Act Cap. 21 Laws of Kenya seeking orders: against Theuri Munyi, Agricultural Finance Corporation and Jackson M. Haro (hereinafter referred to as 1st, 2nd & 3rd Respondents respectively) as follows:

- ***THAT the 1st, 2nd and 3rd Defendants/Respondents be restrained by themselves their employees, servants, agents in any other manner howsoever from entering, trespassing, destroying trees, planting, cultivating artemisia annua or any other crop or plant, harvesting or removing any crop, plant or item or carrying any activity whatsoever on parcel of land Loc. 20/GITHURI/ 910 pending the hearing and determination of the suit.***
- ***THAT a mandatory injunction to issue against 1st, 2nd and 3rd Defendants/Respondents by themselves, their employees, servants or agents ordering the 1st, 2nd and 3rd Defendants/Respondents forthwith to vacate and hand over vacant possession of the entire parcel of land Loc. 20/GITHURI/910 to the 1st and 2nd Plaintiff/ Applicants pending the hearing and determination of the suit.***
- ***THAT costs of this application be provided for.***

It is the applicants contention that land parcel known as Loc. 20/Githuri/910 belongs to the late Wachira Aram Githanda deceased, and that the 1st Respondent has trespassed onto this land and destroyed 25 acres of trees and illegally planted a crop suspected to be *Artemisia annua* on the said 25 acres of the deceased’s land. It is further contended that Loc. 20/Githuri/910 borders land parcel Loc 20/Githuri/896

owned by the 2nd Respondent which land (Loc. 20 Githuri 896) the 2nd Respondent purported to sell to the 1st Respondent, but that the 2nd Respondent through its agent 3rd Respondent had pointed out the deceased's aforementioned land parcel (Loc. 20/Githuri/910) as the one sold to the 1st Respondent and the 1st Respondent has wrongly and illegally taken possession of Loc. 20/Githuri/910 thereby depriving the 1st & 2nd applicants and the beneficiaries of the estate of the deceased use and enjoyment of the land.

The applicants therefore seek the orders of injunction including the order for mandatory injunction for the Respondents to vacate Loc. 20/Githuri/910 so as to restore the *status quo ante*. Counsel for the applicants relied on **Civil Appeal No. 111 of 2002 Jag Super Power Cash & Carry Ltd. v/s Nairobi City Council & 2 others** and also the case of **Aikman v/s Muchoki (1984) KLR 353**.

For the 1st Respondent it was submitted that the applicants had failed to join Kotri Investments for which the 1st Respondent was acting. It was further submitted that the mistake was not that of 1st Respondent as he relied on 2nd and 3rd Respondents.

Finally it was submitted that the applicant was not coming to the court with clean hands as they have waited for the 1st Respondent to cultivate the land and plant before harvesting and destroying part of the crops.

The 2nd & 3rd Respondents conceded that it had no interest in Loc. 20/Githuri/910. They further maintained that the 1st Respondent was not authorized to take possession of the land and any encroachment by the 1st Respondent was done without the knowledge or connivance of the 2nd or 3rd Respondents. The 2nd & 3rd Respondents further urged the court not to aid the applicants' as they were indolent in waiting until the crop was cultivated and was ready for harvest.

The applicants have established through annexing a copy of the land certificate and an official search, that Loc. 20/Githuri/910 is registered in the name of Wachira Aram Githanda, and through annexing a copy of letters of administration *ad litem*, that the applicants are the administrators of the estate of Wachira Aram Githanda who is deceased. The applicants have also annexed a copy of an official search showing that Loc. 20/Gikundu/Githuri/896 belongs to the 2nd Respondent. Finally the applicants annexed an affidavit from a surveyor who physically examined the two parcels of land together with the Registry index map and confirmed that the cultivation done by the 1st Respondent is on Loc. 20/Githuri/910.

The above facts have not been disputed by the Respondents. Instead the Respondents are simply shifting blame onto each other. I am satisfied on the above that the applicants have established a prima facie case. I have no doubt that by cultivating the deceased's land, the applicants and beneficiaries of the estate are suffering irreparable loss as they have been denied the use of the land. I am satisfied that the applicants have satisfied the conditions for granting an injunction as laid down in the case of **Giella v/s Cassman Brown & Co. Ltd. [1973] EA 358**.

I further concur with the counsel for the applicants that this is an appropriate case for the granting of a mandatory injunction at an interlocutory stage so as to restore the *status quo ante* as it is evident that the Respondents are trespassers on the deceased's land. The issue of indolence which was raised by the Respondents only becomes material in determining the issue of damages and is therefore not of relevance at this state.

The upshot of the above is that I do grant prayer (3) & (4) of the Chamber Summons dated 2nd September 2005. I award costs of the application to the applicants.

Dated signed and delivered this 13th day of October 2005

H. M. OKWENGU

JUDGE