



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 133,134,258 of 2010 & 177 OF 2007

**SAMUEL NG'ANG'A NDIRANGU.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WAMBUI MWANGI.....2<sup>ND</sup> PLAINTIFF**

**STANLEY KAMAU NDIRANGU.....3<sup>RD</sup> PLAINTIFF**

**EUNICE MUTHONI KARIUKI.....4<sup>TH</sup> PLAINTIFF**

**LUCY WANJIRU MURATHA.....5<sup>TH</sup> PLAINTIFF**

**EUNICE RUGURU NGANGA.....6<sup>TH</sup> PLAINTIFF**

**PHARIS KARIUKI MURATHA.....7<sup>TH</sup> PLAINTIFF**

**SILVESTER MOMANYI MARUBE.....8<sup>TH</sup> PLAINTIFF**

**KANIU WAMARA KANIU.....9<sup>TH</sup> PLAINTIFF**

**TERESIAH GATHONI MARA.....10<sup>TH</sup> PLAINTIFF**

## VERSUS

JOSEPH KIMANI IRUNGU.....DEFENDANT

## RULING

On 30/2/2011, a consent record was recorded by counsel to the effect that HCC 133/2010, 134/2010, 258/2010 and 177/2007 be consolidated. The lead file is HCC No. 133 of 2010.

In **HCC 133/2011, Samuel Ng'ang'a Ndirangu & 9 Others Vs Joseph Kimani Irungu and 134/2010, David Muchai Wang'anga & 11 Others Vs Wilson Siiya**, the plaintiffs seek orders that they be declared the owners of the suit properties listed at paragraph 3 of the plaints and the Defendants be restrained from interfering with the suit property whose head title is 186691/1 (Mau Narok). In **HCC 258/2010, Bahati Women Group Company Ltd. Vs Joseph Muturi Mathenge & 25 Others** and **177/2007, Consolata Wangechi & 403 Others Vs Joseph Mathenge Muturi & 4 Others**, Bahati Women Group seeks a final declaration that the provisional titles issued to the Defendants fraudulently be revoked or surrendered; the Plaintiffs claim to be shareholders in the Bahati Women's Group (5<sup>th</sup> defendant) and seek an order of injunction against the defendants to restrain them from interfering with, subdividing or disposing of the parcel **LR 8669/1** and that the 1<sup>st</sup> to 4<sup>th</sup> Defendants be struck off as the Directors of Bahati Women Group. The court directed that the plaintiffs will be those in HCC 133/10, 134/10 and (defendants in 177/07 and 258/10) where the defendants will be the plaintiffs in 177/07, 258/10.

For determination are the applications which were filed in the respective cases. In HCC 133/10 and 134/10, the Applicants filed applications dated 9/6/2010 in which they seek interim orders of injunction to restrain the defendants from interfering with the suit lands. In **HCC 177/07**, was an application dated 6/11/07 seeking to restrain the defendants from alienating land LR 18669/1. Mr. Ogola is counsel for the Applicants while the Respondents are represented by Mr. Githui.

The applications dated 9/6/2010 are supported by the affidavits sworn on 9/6/2010 by **Samuel Ng'ang'a Nderitu** in HCC No. 133 of 2010 and **David Muchai Wanganga** in 134/2010 and a further affidavit sworn by David Muchai Wanganga on 6/1/2011. Counsel also filed submissions.

The dispute herein involves property originally owned by Bahati Women Group i.e. LR. No. 8669/1. The plaintiffs contend that they are the registered owners of the suit parcels which they are in possession and have been cultivating but that about June 2010, the defendants entered the said land and started ploughing it; that the Applicants will suffer irreparably if the defendants are not restrained. Mr. Ogola, counsel for Applicants submitted that the land was initially registered under the Registration of Titles Act but was converted to the Registered Land Act by the then directors of Bahati Women Group. At the time of conversion, the original title was with the former directors who did not want to surrender it. A provisional title was issued and after surrender of the provisional title, title deeds were issued to the applicants. The Applicants complain that the defendants have denied them access to their pieces of land. David Muchai who swore the affidavit in support of the applicants deponed that the problems experienced in Bahati Women Company Ltd have been created by the directors; that in **JR 58/2010 Republic Vs Ex-parte – Joseph Mathenge Muturi & 6 Others**, Justice Emukule ruled that the plaintiffs are the bona fide directors. In his submission, Mr. Ogola urged that one of the issues for determination is that Elizabeth Wanjiku who swore the affidavit in support of the application, on behalf of the Bahati Women Group Company Ltd does not have the authority to swear it and there is a Judicial Review applicaiton seeking to determine whether or not she is a director of the company.

According to the plaintiffs, the defendants were purportedly allocated land by people who held themselves out to be directors but they have nothing to show that they are proprietors of the land. The Applicants exhibited the titles to the land all issued to them in 2007.

The Defendants opposed the applications based on affidavits sworn by the defendant Joseph Kimani Irungu dated 1/7/2010 and Elizabeth Wanjiku Kimani dated 20/7/2010 (133/1010); The affidavit of Wilson Siiya dated 1/7/2010 (134/2010); affidavit of Esther Wangui Njoroge dated 1/8/2007 in 177/2007 and submissions filed by Mr. Githui. The defendants want the applicants enjoined from interfering with the land LR 18669/1(Mau Narok) owned by Bahati Women Company Ltd. According to the defendants, the title for LR. 18661/1 still exists because it was never surrendered. It was urged that Kamere Advocate wrote a letter dated 29/9/2009 (**EWK.3**) indicating that he has been holding the title. Mr. Githui urged that in conveyancing, no one piece of land can have two titles and that the existence of two titles is evidence of fraud. Mr. Githui denied that the court ever ordered the surrender of the title in HCC 375/00 as alleged because the suit was struck out and the appeal dismissed; that in Judicial Review 58/10, the directorship of Bahati Women Group was challenged but the court directed that a meeting be held to elect new directors. Counsel also urged that Judicial Review 58/10 validated all actions taken by Elizabeth Wanjiku who holds herself out as a director of Bahati Women Group.

I have considered the applications, the affidavits, annexures, submissions by counsel. At this stage, all that this court needs to determine is whether the plaintiffs have demonstrated that they have met the conditions precedent to the grant of or order of interlocutory injunction as set out in **Giella V Cassman Brown Co. Ltd (1977) EA 358**. The plaintiffs have to demonstrate that they have a prima facie case with a high probability of success or that if the order of injunction is not granted, the plaintiffs will suffer irreparable loss that can not be compensated in damages and lastly, if the court is in doubt, to decide the application on a balance of convenience.

The applications before me are made at an interlocutory stage and this court is alive to the fact that it cannot adjudicate on any fact with finality. That is for the full hearing.

Whereas the plaintiffs herein claim to be bona fide members of Bahati Women Co. Ltd, who have been issued with land titles after surrender of the original title, the defendants claim that the land has never been subdivided, and has been fraudulently allocated to non-members. Before the titles were issued to the Plaintiffs/Applicants, a provisional certificate was applied for vide gazette notice No. 1025 of 21/2/2003, **Ex.DKW.24** (David Muchai's affidavit in 177/2007). The provisional certificate was issued for 90 days pending objections. It seems no objection was raised. As of 2003, when the application for provisional certificate was made, the title must have been unavailable because it is not until 2009 that Mr. Kamere claimed to have been in possession of the original title. If the Respondents were aware that the title was available, they should have objected to the issuance of the provisional certificate. It will be upto the Respondents that are alleging fraud on the part of the applicants to prove it at the full hearing. However, at this stage the Applicants have in their possession titles issued under the Registered Land Act. I do appreciate that one piece of land cannot have two titles. The applicants' titles are a first registration in terms of **Section 143(1)** of the **Registered Land Act**. The said titles are indefeasible and absolute and only subject to the overriding interests set out under section 30 of the Registered Land Act. **Section 143 Registered Land Act** provides as follows:-

**“143(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

**(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”**

In the case of **Ambale Vs Masolia (1986) KLR 241**, the court said this of a first registration;

**“(1) There is no doubt that the registration of the land in the name of the church was a first registration under the Registered Land Act (Cap.300).**

(2)....

**(3) On a proper construction of section 143 of the Registered Land Act, even if the alleged fraud or mistake was shown, the title of the church was indefeasible”.**

The title held by the respondents was issued under the **Registration of Titles Act (RTA) Cap 281 Laws of Kenya. Section 23** of the **Registration of Titles Act** provides as follows:-

**“23.(1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.**

**(2) A certified copy of any registered instrument, signed by the registrar and sealed with his seal of office, shall be received in evidence in the same manner as the original.”**

It is Mr. Githui’s submissions that the respondents having been registered first, the first title prevails. See **Gitwany Investment Ltd v Tajmal Ltd & Others [2006]2 EA 76**. That may be the legal position but in this case, the applicants have other titles issued after a purported surrender of the title that the respondents hold. In the **Gitwany** case, the court found no evidence of fraud attributed to either party. The issue of fraud if at all, will be dealt with at the substantive hearing of the suit. As things stand the applicants are now in possession based on titles issued to them in 2007. To avoid further confusion, that status should not be disturbed until this matter is heard and determined.

As to whether the applicants are absolute owners of the suit land, they do have titles in respect of the pieces of land. The titles were exhibited. The defendants have one title. However, the defendants allege that the acquisition of the land is fraudulent and that it was done by unscrupulous directors who knew the title to have been kept at Mr. Kamere’s office but went ahead to apply for a provisional title. If that is the case, then the titles were obtained fraudulently but that would only be proved at a full hearing.

Although Mr. Githui submitted that the defendants in HCC 133/2010 and 134/2010 are on the land by virtue of being buyers, but that averment is not supported by any evidence. Joseph Kimani Irungu, Defendant in 133/2010 deponed in his affidavit dated 1<sup>st</sup> July, 2010, that he is on the land by virtue of his wife Elizabeth Wanjiku Kimani being a director in Bahati Women Group and shareholder. It means that the said defendant had no recognized right over the said parcel of land over which he wants to have the applicants removed. On the other hand, Wilson Siinya, the defendant in HCC 134/2010 deponed that he entered into a contract with Bahati Women Company Ltd to use the land for 2 years. The said contract is questionable in light of the fact that the Applicants hold titles to the same land and there is a dispute as to the ownership. Besides, it is questionable whether the directors who purportedly entered into a lease agreement with the said defendants are the bona fide directors of Bahati Women Company Ltd. Till that dispute is resolved, one of the disputing parties cannot be heard to lease out the land to a 3<sup>rd</sup> party.

Can Elizabeth Wanjiku depone on behalf of the company? To determine whether those in office are lawfully elected, the court would require to see the minutes of the last meeting when elections were done and the Registrar to produce returns filed with him. J. Emukule in his ruling dated 20/5/2011, in Judicial Review 58/10, directed that a consultative meeting be called by the Registrar of Companies within 30 days of that date to arrange a date for holding the Annual General Meeting to elect directors of Bahati Women Company within 30 days of the meeting. In that ruling, the applicants were to remain directors till the elections were to be held within 30 days, of the consultative meeting. This court has not been informed whether or not the Annual General Meeting was ever convened as directed. From my understanding of that ruling, if the elections were not held, the then directors cannot purport to be legally in office. That includes Elizabeth Wanjiku. In **HCC No. 22/01 Mumias Sugar Co. Ltd v Oniango [2005]1 KLR**, the court held that an affidavit sworn on behalf of a company, the deponent had to show that he has the authority to swear it and failure to show that renders the affidavit fatally

defective. Elizabeth Wanjiku did not indicate whether or not she had the authority to depone to the affidavit on behalf of the company. Apart from her affidavit there are other affidavits on record by the defendants which this court will consider at this stage before the substantive hearing of this matter. In my view, this court cannot determine the issues of directorship at this stage.

The members of Bahati Women Company Ltd have been embroiled in litigation all steaming from disputed leadership. That can be glanced from the four cases before this court which have been consolidated. Several other cases have been referred to, JR. 58/2010, HCC 375/2000 and many others. The counsel have in their submissions alluded to the issues that arise in these suits but they are not for my consideration at this stage. Some of the issues are also the legality directors of the company, whether Annual General Meeting hold on 3/4/2000 was proper. Whether Elizabeth Wanjiku Kimani had authority to execute documents on behalf of the Company; whether legal process was followed in obtaining the applicants' titles; whether the applicants' titles are valid; whether title held by respondents is still valid. All these issues will be fully addressed at the hearing by adducing of evidence. At this stage, I only need to consider whether, without going into detail, the plaintiffs/applicants meet the threshold precedent to grant of an order of injunction. In this case, the land in question is in dispute. I cannot say with certainty that who it belongs to as the above noted issues will resolve that question at the full hearing. However, I have found above that there was a process where the plaintiffs' titles were issued upon surrender of the head title and due process was followed in doing that led to the issuance of the disputed titles. I find on a balance of convenience that the applicants' possession of the suit land should not be interfered with pending the hearing and determination of these suits. I also order that the applicants shall not in any way dispose of or interfere with the suit property in any manner adverse to the respondents' interests pending hearing and determination of the suit.

Costs will abide the hearing and determination of the suit.

**DATED and DELIVERED this 6<sup>th</sup> day of July, 2012.**

**R.P.V. WENDOH**

**JUDGE**  
**PRESENT:**

Ms Chege holding brief for Mr. Githui for respondent

Ms Kamuyu holding brief for Ms Otieno for the applicant

Kennedy – Court Clerk