REPUBLIC OF KENYA

HIGH COURT AT MERU

Civil Suit 89 of 1998

P.C.E.A - CHOGORIA HOSPITAL ..... PLAINTIFF

VERSUS

1. ROBERT MIRITI

2. ELIAS KABOI

3. SILAS MUGO

4. WILKINSON NJERU

5. HILDAH MURUNGI

6. RAGH NJAGI

7. LYDIA NKINGA

8. MUCHARA NTIBA

9. FRANCIS MIRITI

10. JOSEPH NJERU

11. DORCUS MUKWANJERU

12. JUSTUS GACHOBI

13. JOHN JERU HOSEA

14. RUFUS N.G. MUKANGU

15. FESTUS N. KANGETEE

16. ANASTASIA ITHIMA

17. MUKOBWA MATERI.....DEFENDANTS

RULING

This is an application through a CHAMBER SUMMONS dated and filed on 10th August 1998 under

order 39 Rules 1 & 2 of the Civil Procedure Rules by the law firm of M/S DAUTI KIBANGA & CO. ADVOCATES on behalf of the PRESBETYRIAN CHURCH OF EAST AFRICA - CHOGORIA HOSPITAL (the plaintiff) against ROBERT MIRITI and SIXTEEN OTHERS (the defendants) for essentially the following orders:-*

(a) That the defendants, their agents, servants and employees be restrained by a temporary injunction from interfering, trespassing and/or in any other manner claiming ownership IRIGA DISPENSARY (the suit property) until the finalization of this suit.

(b) That the DISTRICT OFFICER, MUTHAMBI DIVISION, be stopped from hearing this dispute unless and/or until expressly directed by an order of this court.

(c) That this court be pleased to make and/or issue suchfurther orders as may meet the ends of justice.

The application is supported by the affidavit evidence of one FESTUS NKONGE, the Administrator, of CHOGORIA HOSPITAL (the plaintiff) and the oral submissions before me by Mr. Dauti kibanga Advocate.

The defendants have opposed this application and have filed grounds of opposition through the law firm of M/S MITHEGA & ARITHI ADVOCATES. There is also a replying affidavit sworn by the first defendant on his own behalf and on behalf of the other sixteen defendants. Several exhibits have been annexed to that affidavit.

In addition Mr. Mithega has made oral submissions before as in opposing of this application. I have taken into account all the affidavit evidence, all the oral submissions of both learned advocates and I have also looked at all the annexures to the said affidavits.

The law applicable to this application is order 39 Rule 1 (a) of the Civil Procedure Rules which provided that: where, in any suit, it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit the court may , by order, grant temporary injunction to restrain such act of make such other order for the purpose of staying and preventing the wasting, damaging, alienation sale, removal or disposition of the property until the disposal of the suit or further orders are made.

The granting of an interim or temporary Injunction is an exercise of judicial discretion. The conditions for the granting of the same have now been settled by the courts, The then VICE - PRESIDENT of the EAST AFRICAN COURT OF APPEAL SPRY had this to say in the case of GIELLA V. CASSMAN BROWN & CO. LTD 1973 E.A 358 at page 360 letter E:

"The conditions for the granting of an interlocutory injunction are now. I think, are well settled in EAST AFRICA: and applicant must show a Prima Facie case with a probability of success. SECOND: an XXX interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequantely be compensated by an award of damages. THIRDLY: If the court is In doubt it will decide an application on the balance of convenient, (see E.A. INDUSTRIES vs. TRUFOCDS 1972 EA 420)". The plaintiff instituted this suit against the defendants on the 10th August 1998 through a plaint of the same date. It is a short plaint and paragraphs 3,4,5, and 6 can easily be reproduced in this ruling without much a do. These are:

"3. The plaintiff is the legal, equitable and registered owner of P.C.E.A. IRIGA DISPENSARY comprised in all that parcel of lend known as MUTHAMBI/IRIGA/346 and have been operating it since 1966.

4. On or about the year 1998 or thereabouts, the defendants, who are members of the Roman Catholic Church and other non- P.C.E.A. CHURCHES, without any reasonable cause and/or excuse, illegally and wrongfully constituted themselves into a Committee and started laying ownership claims over the said DISPENSARY.

5. THAT the defendant's unlawful and illegal actions have interfered with the peaceful running of the said dispensary and may ground the operations of the said dispensary

6.THE plaintiff's have suffered damage".

The plaintiff prayed for two orders in the suit: a declaration that IRIGA DISPENSARY is the property of the plaintiff; and a permanent order of injunction directed against the defendants jointly and/or severally, their agents, servants and/or in any other manner, claiming ownership rights over the said Dispensary.

Mr. Festus Nkonge has sworn in his supporting affidavit that the suit property has, since it was started in 1966 and inaugarated in 1973, been developed,managed and run by the plaintiff: that sometimes this year the defendants started laying claim over it, claiming the same as an Harambee Dispensary without saying under whose management: that on or about the 5th June 1998 the defendants constituted themselves with a management committee. He produced the minute of that Committee as his exhibit marked "FN-1'": and that on 19th June 1998 the defendants issued a notice to the plaintiff, assaing it to pull out of the suit property. He produced a copy of that notice as an exhibit marked "FN-2".

The plaintiff's case is therefore base on the premises that: it is the registered owner of land parcel NO. MUTHAMBI/IRIGA/346 on which is constructed the suit property: that it has developed, managed and run the suit property since 1966 and therefor it now owns it, to the exclusion of the defendants.

To be able to. Succeed in this application at this stage the plaintiff must satisfy the court that claim over the suit property has a possibility of success.first the plaintiff would be required to show, on affidavit evidence and other admissible evidence, that it is the registered owner of the parcel of land in question on which this dispensary is built. Apart from what is pleaded in the plaint, there is no other evidence tendered to court to support this claim. Mr. Festus Nkonge has not deponed, in any paragraph of his supporting affidavit, that the plaintiff is the registered owner of the land on which the dispensary is built. He has not annexed to his affidavit any documentary proof in support of that claim. His contention, and that of Mr. Dauti Kibanga, Is that the plaintiff has been running this dispensary since it started in 1966 and since it was inaugarated in 1973 and that it has developed and managed it.

Therefore, I presume, the plaintiff now wishes the court to hold that it is the rightful owner of the suit property, that it has established a prima facie case with a probability of success and is entitled to the orders of temporary injunction.

In opposing this application the defendants have submitted, through Mr. Mithega vide grounds of opposition dated an filed on 18th August 1998, that the plaint disclose no cause of action; that the plaintiff is not the owner of the suit land or any of the building and properties therein; that the suit land is public utility and it is reserved for that purpose.

In support of the defendants' claims is the affidavit of ROBERT MIRITI 1st defendant, who deponed that IRIGA DISPENSARY is constructed on land preference No. MUTHAMBI/IRIGA/346 measuring 0.72 HA or thereabouts, which is registered in the name of Meru County Council and it is reserved for Community Centre. He anexed a certified copy of the register as an exhibit marked "RM-1".

I have looked at this exhibit and 1 note that the Meru County Council was indeed registered on 22.1.1969 as the proprietor of this parcel. The entry is the property section (basement..? hows that it was reserved a Community Centre. This is, according *to* Mr. Mithega and there is no rebutal evidence, a first registration and therefore section 143 of the registered land act Chapter 300 Laws of Kenya would apply. The plaintiff is not shown anywhere on this title as having any interest in the land in question.

Mr. Robert Miriti has further deponed on how the said dispensary came to be constructed on this land. He deponed that the preparations for the constructions of the dispensary started in 1965 on Harambee Self help basis. Several Harambees were held and donations were received including contributions from farmers. He annexed to his affidavit a certified true copy of an internal memo, written by the SECRETARY/ MANAGER of KIRIONI FARMERS CO-OP. SOCIETY LTD on 30.8.1972 in which the

said Secretary/Manager sent a contribution of Kshs. 226/40 as a contribution from Meru members towards IRIGA HARAMBEE DISPENSARY. That memo, is exhibited as "RM II".

Mr. Mithega submitted that the value of the Kenya shilling In 1972 was high and therefore Kshs. 226/40 was substantial in 1972. 1 have no doubt about that in the absence of any evidence to that contrary.

The effect of that memo, was to show that financial contributions towards the construction of this dispensary were being made by members of the public as a self help project. Indeed Mr. Miriti deponed further that the project was completed In early 1970's and it was duly registered as Self-Help Project in the name of IRIGA CLINIC on21st October 1971 and given a registration certificate No. 1205. He annexed to his affidavit a-copy of a letter dated 18.8.98 written by the SOCIAL DEVELOPMENT ASSISTANT to DISTRICT SOUTH DEVELOPMENT OFFICER THARAKA NITH1 DISTRICT (RM III) and certificate of registration (RM IV).

Mr.Mithega has explained the discrepancy in the dated of registration. This project was initially registered on 21.10.71 and certificate No. 1205 issued. In the course of time that certificate was misplaced* When this suit was filed, the defendants saw the Social Development Assistant for issuance of a renewal certificate of registration.

The SDA refered them to the District Social Development Officer (RM III) who then issued another certificate (RMIV) but retaining the original registration Number of 1205/71. Mr. Miriti further deponed that the project (Dispensary) was opened by Mr. Mathenge, then the District Officer Muthambi, on 10th June 1973. A letter to that effect dated 7th August 1998 from Asst. Chief of IRIGA Sub-Location was annexed to the affidavit and is marked RM V". This letter reads:

" THE COUNCILLOR MUTHAMBI LOCATION P.O. BOX 40 MARIMA.

Dear Sir/Madam,

RE; PUBLIC UTILITY PLOT NO.MUTHAMBI/IRIGA/346

This is to let you understand that the above indicated plot is a public utility plot. This land initialy reserved for Iriga Community Centre during land adjudication and demarcation period way back in 1967/68. Presently this where IRIGA HARAMBEE DISPENSARY is built. Its construction took place as from 1971 and was completed in 1973. It was opened on 10th June 1973.

Thus the above public utility plot ought to remain as it is as per our council records. In subsequent. Iriga Developement Committee, in the court of years, there has been no minute passed indicating any change of user to it up to date.

Thank you.

GODFREY M.

ASST. CHIEF

IRIGA SUB LOCATION

CC: DC MERU SOUTH DISTRICT D.O. MUTHAMBI DIVISION LAND REGISTRAR - MERU SOUTH CLERK COUNTY COUNCIL OF THARAKA/NITHI CHIEF MUTHAMBI LOCATION

Mr. Miriti then explained in his affidavit how the plaintiff got Involved in this Dispensary. The then management Committee, led by Mr. Samson Bundi as the Chairman, approached the Medical Officer of Health, Meru General Hospital, for assistance but the M.O.H. advised them to get temporary assistance from other source since the Government was not in a position to supply drugs and man power at that particular time.

The Committee then approached Dr. Geoffrey of the plaintiff Hospital who agreed to assist on temporary basis on the understanding that the patients would have to pay for their treatment and that the plaintiff would then pull out the moment the Committee received any x assistance from the Government. A letter to that effect written to M.O.H. Meru on 27.4.98 before this suit was instituted is marked "RMVI" and attached to Mr. Miriti's affidavit. The plaintiff then moved in, I presume, with drugs and personnel and began to manage the dispensary to date. But, Mr. Miriti deponed that the said dispensary was never built by the plaintiff but by the entire Community of Iriga Sub/Location on Harambee basis.

Mr. Miriti has finally deponed that the Iriga Community started demanding the return to the Community of this dispensary in 1980 because the plaintiff over charged them for the treatment it was giving. The plaintiff has been refusing to do so. It is due to this that the Community decided to elect a Committee to press for the handing over of the dispensary to the Community, and indeed such a Committee was elected on 5th June 1998.

On that affidavit evidence and annexure it would seem to me that it is in fact the defendants who have a prima facie case with a probability of success rather than the plaintiff.

However, Mr, Kibanga submitted that the plaintiff also relied on the doctrine of adverse possession because it has been in occupation of the said dispensary, running and developing it since 1966, a period of just about 32 years now. From the affidavit evidence of Mr. Miriti and the annexures thereon work on this dispensary started in 1965 and was completed in early 1970's.

The dispensary as a Self-Help Clinic was duly registered on 21.10.1971 and it was inaugarated or opened on 10th June 1973. It couldn't have been in operation before then. If It was operation there is no such evidence before me. After inaugurating in June 1973 the Government declined to assist with drugs and personnel because it had no funds. The defendants turned to the plaintiffs soon thereafter. This must have been after 1973.

The plaintiff agreed and moved in Mr. Miriti deponed that the Community demanded the return of this dispensary from the plaintiff in 1980. No month or dated are given. It means that the peaceful and quiet enjoyment of the plaintiff was interrupted in 1980 and continued to be so interrupted to date. The only duration of that quiet and peaceful enjoyment was between June 1973 and 1980, a period of less than seven years.

For the doctrine of adverse possession to apply, the occupation and quiet enjoyment must have been for uninterruption period of twelve years at the very least. Quite obviously the plaintiff's claim, based on adverse possession, does not have the probability of succeeding.

The plaintiff is also required to show that, if injunction is not issued as prayed, it will suffer irreparable injury or loss which it cannot be compensated in damages. Festus Nkonge, as the plaintiff's administrator, has not deponed as to the extent of the plaintiff's investment in this dispensary which it will stand to lose and which the Community of Iriga Sub-Location cannot compensate by payment of damages.

In any case it is my view that the defendants should be allowed to run this dispensary and to seek assistance from the Government or any other person or authority. The bottom line is that the dispensary was built as a Self Help dispensary to serve the Community and the Community should be served and not die served. The plaintiff has failed to satisfy the conditions for the granting of interlocutory or temporary injunction.

The defendants have referred this issue to the Provincial Administration and to Ministry of Health. This, in my view, is quite proper. They had a right to do so because they are the ones who built this dispensary so that medical services can be rendered to them. The Ministry of Health can now provided those medical services. The role of the Provincial Admnistration is to facilitate the smooth transfer of the said dispensary from the plaintiff to the defendants. I therefore decline to grant an order prayed for, stopping the District Officer Muthambi Division from handling this matter. It is the official duty of the District Officer Muthambi to see to it that the suit property is peacefully given back to the defendants to run and

thereafter to facilitate the Government take over of the same. This application is therefore dismissed. Costs of the same will be paid by the plaintiff. It is so ordered.

A. G. A. ETYANG JUDGE.

2.10.98.