



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT  
AT THIKA  
THIKA LAW COURTS  
ELC.579 OF 2017

SAMUEL KIMANI MUTU.....PLAINTIFF/APPLICANT

- VERSUS -

ABRAHAM MWANGI MUTU & 10 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* dated *2<sup>nd</sup> June 2017*, brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rules 1 and 4 and Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of law. The orders sought are:-

1) *Spent.*

2) *That temporary injunction be issued restraining the Defendants either acting by themselves or through their agents, servants or any other persons acting for/or on their behalf from trespassing into the portion of land occupied by the Plaintiff on the land parcel No.Ndarugu/Gacharage/490, and from harvesting the Plaintiff's tea plants, thereon pending the hearing and determination of this application.*

3) *That the costs of this application be provided for.*

The application is premised upon the grounds stated on the face of the application and on the *Supporting Affidavit* of *Samuel Kimani Mutu*. These grounds are:-

a) *The Plaintiff and the 1<sup>st</sup> Defendant have had exclusive possession and/or occupation of 4 acres and 2 acres respectively out of the land parcel No.Ndarugu/Gacharage/490 and have applied to the High Court at Nairobi in Civil Suit No.462 of 2005 praying for a declaration that they are entitled to be registered as proprietors of the portions they occupy as aforesaid in the said parcel of land in place of the current registered proprietor, one Philomena Mutu, pursuant to the provisions of Section 38 of the Limitation of Actions Act Cap 22, Laws of Kenya, which suit is still pending.*

b) *The Plaintiff during the period he had been in occupation of the 4 acres, has planted tea plants thereof which he has been harvesting and delivering the tea leaves to Theta Tea Factory, his tea growers numbers being TH 530043 and TH 530099.*

c) *The 1<sup>st</sup> Defendant together with all the other Defendants who are his wife and siblings have trespassed and invaded the Plaintiffs said portion of land where they have forcibly harvested the Plaintiff's said tea to date to the detriment of the Plaintiff.*

d) *Despite the Plaintiff's effort to resolve the matter through the local administration, the Defendants have been adamant and continue to harvest the plaintiff's said tea plants.*

e) *The Plaintiff stands to suffer irreparable loss and damage unless a temporary injunctive order is made to restrain the Defendants pending the hearing and determination of this suit.*

In his *Supporting Affidavit*, the Applicant averred that he has been in exclusive possession and occupation of **4 acres** out of the land parcel **No.Ndarugu/Gacharage/490**, while the 1<sup>st</sup> Defendant herein has had exclusive possession and/or occupation of **2 acres**, out of the said parcel of land. He reiterated that there is a pending **Civil Case No.462 of 2005** at **ELC Milimani**, filed by the Plaintiff, the 1<sup>st</sup> Defendant and their mother **Serah Wanjiku Mutu**, seeking a declaration that they are entitled to be registered as proprietors of their respective portions of land by prescriptions against the current registered owner, **Philomena Njambi Mutu**. It was his contention that during the month of **February 2017**, the 1<sup>st</sup> Defendant and his family invaded his portion of land and unlawfully trespassed thereon. Further that they assaulted him and members of his family and they have been forcibly harvesting his tea leaves. He annexed copies of hospital documents to confirm that he had been assaulted. That even with an attempt to resolve the matter out of court, the Defendants have refused to stop harvesting the said tea leaves from his tea plantation. He urged the Court to allow his application.

The application is contested and **Abraham Mwangi Mutu**, swore a *Replying Affidavit* and averred that the instant application is *misconceived, frivolous, vexatious, bad in law and an abuse of the court process* and hence should be dismissed with costs. He also admitted that indeed the Plaintiff/Applicant is his blood brother and his co-defendants are his wife and children. He denied that the Defendants have forcefully entered into the Plaintiff's land. He contended that the suit land **No.Ndarugu/Gacharage/490**, was acquired and registered in the name of

their deceased father **Mutu Kimani**, who passed away on **19<sup>th</sup> June 1991**, as per the copy of the *death certificate* marked **AMM1**. It was his further contention that their deceased father took possession of the suit land sometimes in the **year 1958**, and the green card was opened on **24<sup>th</sup> March 1958**, in the name of their deceased father. However, the suit land was later fraudulently registered in the name of **Gathina Kungu** (now deceased) who later transferred it to his son **George Mutu Gathina**. He also contended that upon the demise of **George Mutu Gathina**, the suit land was transferred to his wife **Philomena Njambi Mutu**, through a **Succession Cause No.2807 of 1998**, while all this time the Plaintiff and Defendants were living and utilizing the suit property.

It was his further contention that their family has been in possession and occupation of the suit land and his father was survived by his two wives being their mother **Serah Wanjiku Mutu** and their step mother **Mary Njeri Mutu**, the Plaintiff and himself. He admitted that they have lived on the suit land since **1958**, but the land is currently registered in the name of **Philomena Njambi Mutu** and therefore there is pending case in **Milimani ELC** being **Case No.462 of 2005**, seeking for a declaration that their family is entitled to be registered as proprietors of the suit land by virtue of adverse possession.

He further contended that the Plaintiff is not the registered owner of the suit land and he therefore has no *locus standi* to claim that which does not belong to him. Further that there is no subdivision of the suit land done by the surveyor and hence the issue of boundaries does not arise and no individual title has been issued to the Plaintiff to enable him claim interest on the said land. It was his further contention that the issues raised in the application are the same pending in **Nairobi HCCC No.462 of 2005**. Which has not been determined and hence this Court lacks jurisdiction to hear and determine this suit. He urged the Court to dismiss the instant application.

The application was canvassed by way of written submissions which this Court has carefully read and

considered. The Court has also considered the pleadings in general and the annexures thereto. The Court has also considered the relevant provisions of law and the cited authorities and it renders itself as follows:-

The application herein is anchored under Sections 1A and 1B of the Civil Procedure Act, which behave the court to take into account the overriding object of the Act while exercising its power under the said Act. These overriding objectives are to facilitate the **just, expeditious, proportionate** and **affordable** resolution of civil disputes. Further under Section 3A of the said Act, the Court is donated inherent power to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of court.

The Applicant is seeking for injunctive orders which prayers are governed by Order 40 Rule 1 of the Civil Procedure Rules which provides under Order 40 Rule 1(a) as follows:-

***Where in any suit it is proved by affidavit or otherwise—***

***(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or***

***(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,***

***the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.***

Therefore for an order of injunction to be granted, there must be evidence that the suit property is in danger of being **wasted, damaged, or alienated** by any party to the suit and court may issue such a temporary injunction to prevent such acts of **waste, danger, alienation, removal or disposition** of the property.

It is therefore clear from the reading of Order 40 Rule 1 that the grant of temporary injunction order is discretionary and as usual such discretion must be exercised judicially. See the case of **Nyutu & Others... Vs... Gatheru & Others (1990) KLR 554**, where the Court held that:-

***“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised. It must be based on common sense and legal principles.”***

Taking into account the above provisions of law, and the facts presented to this court, together with the available evidence and the annexures thereto, the Court is now called upon to determine whether the Applicant is deserving of the orders sought. Of course at this stage the Court is not called upon to determine the disputed issues with finality or definitively especially based on affidavits evidence. The Court is called upon to decide whether the Applicant has met the threshold for grant of injunctive orders. The threshold to be considered in the one laid down in the case of **Giella..Vs..Cassman Brown & Company Ltd 1973 (KLR) 358**, which are:-

***“First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”***

First the Applicant has to establish that he has a prima-facie with probability of success at the trial. Prima-facie case was described in the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2**

Others (2003)KLR 125, to mean:-

**“A case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.**

Has the Applicant herein established that he has a *prima-facie* case with probability of success?

It is evident from the pleadings that the Plaintiff and 1<sup>st</sup> Defendant are blood brothers. It is also not in doubt that they both live in land parcel *No.Ndarugu/Gacharage/490*, which is registered in the name of **Philomena Njambi Mutu**. It is also evident that the Plaintiff and 1<sup>st</sup> Defendant together with their mother **Serah Wanjiku Mutu**, have filed an **Originating Summons No.462 of 2005, at Milimani ELC** seeking to be declared as the proprietors of the suit property instead of the said **Philomena Njambi Mutu** by virtue of the provisions of Section 38 of the Limitation of Actions Act Cap 22, Laws of Kenya. It is also not in doubt that the said **Originating Summons No.462 of 2005**, is still pending and therefore at the instance, this Court cannot find and hold that the parties herein are the absolute proprietors of the suit property, *No.Ndarugu/Gacharage/490*. That is an issue that will have to await the determination of the **Originating Summons 462 of 2005**, which is still pending at **Milimani ELC**. The Court would therefore not make a determination that would pre-empt the findings and conclusion of the pending **Originating Summons No.462 of 2005**, given that it was the earlier suit. The parties have all pleaded and admitted that they have been in possession and occupation of the suit property since **1958**. As the Court has held hereinabove, that is a determination reserved for **Originating Summons No.462 of 2005**.

The Applicant has alleged that the Defendants have invaded his portion of land that he had been utilizing and wherein he has planted his tea bushes. That the Defendants have now been wasting his tea bushes/plantation and have thus prevented him from harvesting the said tea leaves. Apart from that allegation, there is no evidence attached to the instant application to confirm such invasion. Without any attached tangible evidence of the said invasion or trespass, the Court cannot hold with certainty that the suit property is in danger of being wasted or damaged.

Injunction orders are granted where there is a real danger or threatened danger of wastage or damage, but not imagined threat. See the case of Stephen **Juma & Another...Vs...Executive Committee Kenya Sugar Growers Association, Kisumu HCCC No.5 of 2004**, where the Court held that:-

**“The purpose of seeking injunction is to protect the right of the Plaintiff from violation or threatened violation....The right must have crystallized or matured in favour of the Applicant and it must not just be based on apprehension or anticipation”.**

Without any evidence of actual violation of the Plaintiff’s right having been attached, the Court finds it difficult to hold and find that there is any danger of waste or damage of the suit property that would require prevention by issuance of any order of injunction. The Court also takes into account that there is still a pending **Originating Summons No.462 of 2005**, in which the outcome is unknown. At this juncture, the Court cannot hold and find that the Plaintiff herein is the absolute and indefeasible owner of the suit property. The Court comes to a conclusion that the Plaintiff/Applicant has not established that he has a *prima-facie* case with probability of success at the main trial.

On the second limb, though the Applicant has alleged that the Defendants have been harvesting his tea leaves, that evidence has not been availed. Further the alleged harvested tea can be quantified and the Plaintiff can thereafter be compensated by an award of damages. See the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, where the Court held that:-

**“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.**

Although the Plaintiff alleged that he was assaulted by the Defendants, the Court has not seen any criminal charges that have been preferred against the Defendants herein in relation to the said Assault. However, there is a ***Civil Suit No.396 of 2017 at Chief Magistrate's Court at Thika***, wherein the Plaintiff has sought for general damages for assault against the Defendants herein. That gives credence to the fact that whatever loss the Plaintiff might suffer, he may adequately be compensated by an award of damages. Therefore the Court finds that the Plaintiff has failed to establish the 2<sup>nd</sup> threshold of ***Giella...Vs...Cassman Brown co. Ltd(Supra)***.

On the third limb, the Court finds that it is indeed in doubt as to whether the Defendants herein have invaded the Plaintiff's/Applicant's portion of land. The Court will therefore decide the application on the balance of convenience. The Court will also be guided by the findings in the case of ***Films Rover International Ltd...Vs...Cannon films Sale Ltd (1963) 3 ALL ER 772***, where the Court held that:-

***"It will take the account that appears to carry the lower risk of injustice should it turn out to have been wrong"***

Having considered the available evidence and the annexures thereto, the Court has seen the ***Originating Summons No.462 of 2005***, in which the Plaintiff, 1<sup>st</sup> Defendant and their mother ***Serah Wanjiku Mutu*** have filed against ***Philomena Njambi Mutu***. In the said Originating Summons, the Plaintiffs are seeking for orders that the 2<sup>nd</sup> Plaintiff (who is the Plaintiff herein), is entitled to be registered as the proprietor of the suit property instead of the current registered owner ***Philomena Njambi Mutu***. It was further pleaded that the said Plaintiffs are in exclusive and uninterrupted use of the said parcel of land in the following manner:-

- **Serah Wanjiku Mutu - 1 acre**
- **Samuel Kimani Mutu (Plaintiff) - 4 acres**
- **Abraham Mwangi Mutu (1<sup>st</sup> Defendant – 2 acres.**

The existence of the above stated Originating Summons has been acknowledged by both the Plaintiff and 1<sup>st</sup> Defendant. Therefore both the Plaintiff and 1<sup>st</sup> Defendant have acknowledged the pleadings and averments in the said Originating Summons. If that is the case, then it means that the Plaintiff/Applicant has been utilizing 4 acres and 1<sup>st</sup> Defendant 2 acres.

Further, the Court has also seen the ***Report*** from the ***Chief of Rwambura Location***, in which he has acknowledged that the suit land is temporary subdivided into three portions which portions are cultivated by ***Abraham Mwangi Mutu, Isaack Njenga Njuguna*** and ***Samuel Kimani Mutu***. In his report, the said ***Chief, Joseph Macharia Kamau*** has advised each party to utilize his portion as they await the outcome of the ***Originating Summons 462 of 2005***.

Therefore taking into account the above observations, the Court finds and holds that the balance of convenience herein would tilt in favour of maintaining the existing status quo. The status quo herein is the one stated in the ***Originating Summons No.462 of 2005***, wherein Plaintiff/Applicant has been utilizing 4 acres and the 1<sup>st</sup> Defendant 2 acres and Serah Wanjiku Mutu 1 acre. That should be the status quo that should be maintained.

See the case of ***Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR***, where the Court of Appeal held that:-

***"The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial"***.

Having now carefully considered the available evidence, the ***Court finds*** that the instant ***Notice of***

**Motion** application dated 2<sup>nd</sup> June 2017 is not merited. The same is **dismissed entirely with costs being in the cause.**

However, the Court finds that the lower risk of injustice herein is to maintain the existing status quo as described in the **Originating Summons No.462 of 2005.** That is the status quo that should be maintained until the final determination of this suit or further orders of the Court.

Further, this Court has noted that the issue of whether the Plaintiff and the 1<sup>st</sup> Defendant are entitled to be registered as the proprietors of the suit land is yet to be determined in **Originating Summons No.462 of 2005.** The said Originating Summons was filed earlier and as provided by Section 6 of the Civil Procedure Act, this matter should await the final determination of the said **Originating Summons No.462 of 2005.** Section 6 provides as follows:-

***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.***

For the above reasons, the **Court finds that the best option herein is to have this suit stayed until Originating Summons NO.462 of 2005 is heard and determined. This suit is therefore stayed.**

It is so ordered.

Dated, Signed and Delivered at Thika this 24<sup>th</sup> day of November 2017.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Macharia for Plaintiff/Applicant

1<sup>st</sup> Defendant (in person)

Lucy - Court clerk.

1<sup>st</sup> Defendant – My advocate is on the way.

**L. GACHERU**

**JUDGE**

**Court** – Ruling read in open court in the presence of Mr. Macharia for Plaintiff/Applicant and presence of 1<sup>st</sup> Defendant (Abraham Mwangi Mutu) and absence of the advocate for the Defendants.

**L. GACHERU**

**JUDGE**

24/11/2017