



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 102 OF 2017

**CLAIRE NJERI GITHUNGURI (Suing as the Administrator of the Estate of
JOYCE MUTHONI GITHAE (DECEASED)).....PLAINTIFF/APPLICANT**

VERSUS

EDWIN MWENDA GITHUNGURI.....1ST DEFENDANT/RESPONDENT

JANE WANJIRU KARONDO.....2ND DEFENDANT/RESPONDENT

THE CHIEF LAND REGISTRAR.....3RD DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR KIRINYAGA.....4TH DEFENDANT/RESPONDENT

RULING

This is in respect to two applications both filed by the Plaintiff/Applicant. The first application is dated **21ST JUNE 2017** and it was initially placed before **ANGIMA J.** on 22nd June 2017 and subsequently on 28th June 2017 wherein the Judge made some orders which I shall refer to later. The second application is dated **12TH JULY 2017**.

In the application dated **21ST JUNE 2017**, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of the suit filed herein, the 2nd Respondent by herself and her agents and/or employees be restrained from entering upon or in manner (sic) dealing with the properties comprised in L.R No. MWERUA/BARICHO/700 and L.R Nos MWERUA/BARICHO/720, 721, 722, 723 and 724 or interfering in any manner whatsoever with the Applicant's quiet possession thereof.

4. Spent.

5. Spent.

6. That this Court be pleased to visit the locus in quo to ascertain the facts pleaded before it.

7. That this Court be pleased to make any further orders it deems mate and just in the circumstances.

The application is based on the grounds set out therein and supported by the affidavit of **CLARE NJERI GITHUNGURI** the Plaintiff herein who has obtained a grant of letters of Administration Ad Litem for purposes of instituting this suit on behalf of the Estate of **JOYCE MUTHONI GITHAE** (the deceased herein). The gravamen of the application is that at all material times, the deceased and the 1st defendant were registered as proprietors of land parcels No. MWERUA/BARICHO/700, 721, 722, 723 and 724 (the suit property herein) to hold in trust for the beneficiaries of the Estate of the deceased but around December 2016, the plaintiff discovered that the 1st defendant had transferred the said property to himself and the 2nd defendant with the connivance of the 3rd and/or 4th defendants yet she is in possession of the original titles thereto. That the plaintiff was completely un-aware of any disposition of the suit property to the 1st and 2nd defendants and although a demand was made to the 1st and 2nd defendants, it was ignored and so the plaintiff petitioned the High Court for issuance of grant of letters of Administration with a view to protecting the interests of all the beneficiaries to the Estate including the 1st defendant and an order was issued which the 4th defendant is yet to register. That on 15th and 16th June 2017 thugs armed with crude weapons and acting at the behest of the 2nd defendant descended on the suit property and proceeded to cut down trees of incalculable value and also desecrated the graves thereon. Those actions have occasioned loss and damage to the Estate which may include the plaintiff being thrown out of the ancestral land/home. Annexed to the supporting affidavit are the death certificate of the deceased, copies of title deeds of the suit property, certificate of search, grant of letters of administration ad litem issued to the plaintiff in **MILIMANI HIGH COURT SUCCESSION CAUSE No. 387 of 2017 on 13TH APRIL 2017** and an order issued by the same Court on **24TH MAY 2017**, photographs of the suit property and various correspondences – annexures **CNG 1 – CNG 10**.

The application is opposed and the 1st and 2nd defendants have filed a Preliminary Objection both to the entire suit and the application on the grounds, inter alia, that the suit is defective and the suit property does not form part of the deceased's Estate and is therefore not available for distribution and the plaintiff does not have the locus standi thus rendering this suit a candidate for dismissal.

In his replying affidavit, the 1st defendant **EDWIN MWENDA GITHUNGURI** has deponed that the deceased was his mother and that the land parcel No. MWERUA/BARICHO/700 was acquired by him and the deceased from one **ROBINSON NJERU GITHAE** and was registered in their joint name and it no longer exists as it has been sub-divided into parcels No. MWERUA/BARICHO/2060, 2102, 2103 and 2104 and sold to the 2nd defendant. That land parcels No. MWERUA/BARICHO/720, 721, 722, 723 and 724 were also acquired by the deceased from one **DANCAN MUNENE GITHAE** and are jointly registered in his names and that of the deceased while land parcels No. MWERUA/BARICHO/725, 726 and 727 were also acquired by the deceased and his late sister one **GRACE GACERI** and are registered in the names of **GRACE GACERI**. That the deceased was married to one **STANLEY MUNGA GITHUNGURI** and after they divorced, the deceased bought the suit property. That the plaintiff and another sister **LILLIAN WANJIRU GITHUGURI** opted to stay with their father and have never lived on the suit property nor did they contribute towards the acquisition of the same. That the suit property is registered in the joint names of the deceased and the 1st defendant and therefore when one proprietor dies, the surviving proprietor becomes the sole proprietor and in the circumstances, the suit property is not the subject of administration and neither is it held by him in trust for anybody. That he applied for new title deeds to the suit property after the original title deeds were stolen when his house was broken into and he sold the suit property to the 2nd defendant with all the developments thereon. That the plaintiff has no right, Constitutionally or otherwise, over the suit property and this application should therefore be dismissed.

On her part, the 2nd defendant **JANE WANJIRU KARONDO** averred that land parcel No. MWERUA/BARICHO/700 no longer exists having been sub-divided into MWERUA/BARICHO/2060, 2102, 2102, 2103 and 2104 which are all registered in her names including the suit property all of which she purchased from the 1st defendant free from any encumbrances. That on 21st December 2016, she

issued a demand notice to one **JUDY GITHAE** who had occupied part of her land to vacate and she took possession thereof and embarked on developing it. That at the time she purchased the suit property, the 1st defendant was the registered proprietor and the plaintiff has no interest whatsoever in the said property. That after a demand notice was issued to her, she was summoned at **BARICHO POLICE STATION** and investigations revealed that she was the legal owner of the suit property and so no charges were preferred against her and it was only after she received a demand notice dated 13th February 2017 that she realized that a restriction had been placed on the suit property through a letter and not a Court order. That she has not been served with any Court order and the suit property is not the subject of any succession proceedings as it belongs to the 1st defendant. She is therefore not interfering with anybody's property and it is the plaintiff who is interfering with her quiet possession of the suit property and she has filed **KERUGOYA ELC CASE No. 93 of 2017** against the plaintiff. That this application should therefore be dismissed with costs.

The second application is dated 12TH JULY 2017 and seeks the following orders:

1. Spent.

2. That this Court be pleased to cite and find the following persons in contempt of its orders issued by HON. JUSTICE ANGIMA on 28th June 2017 and forming part of the Court record and the said persons be committed to civil jail for a term of six (6) months and/or be ordered to purge the contempt of Court on terms that this Court deems mate and just.

(a) JANE WANJIRU KARONDO

(b) JAMES IGATI MWAI

3. That the contempt of Court be purged and the subject suit properties be returned to the status quo ante prior to the aforesaid defiant and brazen act of contempt of Court.

4. That the loss and damage occasioned by the Respondent's action to the suit properties be assessed by this Honourable Court and damage be awarded to the Plaintiff/Applicant.

5. That the National Police Service and in particular the Officer Commanding Station Baricho ensure compliance with the orders of this Court as issued on 28th June 2017 by HON. JUSTICE ANGIMA pending the hearing and determination of this suit.

6. That this Honourable Court be pleased to issue any further orders as it deems fit and just.

7. That the costs of this application be borne by the Respondents.

That application is based on the grounds set out therein and is also supported by the affidavit of the plaintiff which is largely a rehash of her earlier affidavit in support of the application for injunction. She adds however that on 28TH JUNE 2017 HON. JUSTICE ANGIMA made order as follows:

1. The plaintiff's Notice of Motion dated 21st June 2017 be heard on 13th July 2017 before the ELC JUDGE at KERUGOYA

2. The file is hereby transferred to the ELC at KERUGOYA for trial and disposal

3. The caretaker who has been in occupation shall continue being in occupation until the next date

4. Today's costs in the cause.

That order was made in the presence of the plaintiff and the 2nd defendant was represented by her advocate **JAMES IGATI MWAI** who is also being cited for contempt. On **10TH JULY 2017**, the 2nd defendant's caretaker in the suit property one **PETER MUGO** telephoned the plaintiff and informed her that **JAMES IGATI MWAI** and a gang of close to thirty (30) persons had descended on the property armed with crude weapons and proceeded to threaten him after which they demolished the house, tore down the fence and carted away the iron sheets. That the caretaker further informed her that **JAMES MWAI IGATI** was present in his motor vehicle No. KBQ 398 F during the exercise and a search at the records of the National Transport and Safety Authority disclosed that the said vehicle is registered in the names of the 2nd defendant and **JAMES IGATI MWAI**. That on 11th July 2017, the same gang returned to the suit property and defiantly ferried away trees, destroyed crops and demolished all the houses and structures under the supervision of **JAMES IGATI MWAI** and the 2nd defendant which act was in manifest defiance and contempt of the orders issued by this Court and efforts to seek protection from the Police have been futile. Paragraphs 29 to 30 of the supporting affidavit seeks to answer the averments in the replying affidavit of the 1st and 2nd defendants sworn in reply to the plaintiff's application dated **21ST JUNE 2017** but in my view, they are not really relevant for purposes of this application.

That application is also opposed and **JAMES IGATI MWAI**, who is an advocate of this Court and had conduct of this suit on behalf of the 1st and 2nd defendants before **MR. DUNCAN MUYODI** filed a notice of appearance on **27TH SEPTEMBER 2017**, has deponed, inter alia, that this Court is not the right forum to agitate the issues raised herein and that although the suit property was registered in the names of the deceased and the 1st defendant, the 1st defendant automatically became the registered owner thereof upon the demise of the deceased. Further, that the plaintiff was not granted the orders sought in her application for interlocutory injunction and neither was the caretaker in occupation since the 2nd defendant took possession as far back as December 2016 after a notice to vacate had been issued to one **JUDY** who was utilizing them. That the said caretaker ought to have sworn an affidavit and what he (caretaker) told the plaintiff is therefore hearsay and in any case, there were over thirty (30) persons who descended on the property and so the caretaker should have taken their photographs if he really saw them. That the 1st defendant does not hold the suit property in trust but is the sole proprietor thereof.

The 2nd defendant deponed in her replying affidavit that she is the sole proprietor of the suit property having take possession thereof in 2014 after purchasing them from the 1st defendant. She denied having descended on the suit property on 15th and 16th June 2017 as alleged by the plaintiff. She added further that on 28th June 2017, she was not aware of this suit as she had not been served and therefore had not instructed any advocate to act for her and further, the order did not restrain her from continuing to utilize her land. She also denied having demolished any house and stated that when she took possession of the suit property, there was nobody living on it. The 2nd defendant therefore denied that she is in contempt of any order of the Court as none was served on her.

In a further affidavit however, the plaintiff insisted that both **MR. JAMES IGATI MWAI** and the 2nd defendant are in contempt of the orders issued by **HON. ANGIMA J.** issued on **28TH JUNE 2017** and that if the caretaker was not in occupation of the suit property, **MR. JAMES IGATI MWAI** would have vehemently opposed the issuance of the said order.

The two applications were canvassed simultaneously by way of written submissions which were filed both by **MR. MARETE ADVOCATE** for the plaintiff and **MR. MUYODI ADVOCATE** for the 1st and 2nd defendants.

I have considered the two applications, the rival affidavits and annextures thereto as well as the submission by counsel.

Before I delve into the merits or otherwise of the two applications, I must first determine the Preliminary Objection filed on **28TH JUNE 2017** by **MR. IGATI MWAI ADVOCATE** then acting for the 1st and

2nd defendants in which he raises the following issues:

- 1. That the application dated 21st June 2017 and the entire suit is bad in law, frivolous, vexatious and an abuse of the Court process.**
- 2. That the suit land is not available for distribution by the succession process.**
- 3. That the application and the suit contravene the mandatory provisions of Order 5 Rule 1, 3, 5 and Order 51 Rule 13 (2) of the Civil Procedure Rules.**
- 4. That the Applicant has no locus standi.**

Being a Preliminary Objection that questions, inter alia, the locus standi of the plaintiff, it must be determined at the earliest opportunity. A Preliminary Objection, as is now clear from the case of **MUKISA BISCUIT COMPANY LTD VS WEST END DISTRIBUTORS 1969 E.A 896,**

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued as a preliminary point may dispose the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

Other than alleging that the application dated 21st June 2017 contravenes the provisions of the **Civil Procedure Rules,** it is not demonstrated how the said rules have been contravened. The issue as to whether the suit land is or is not available for distribution is a matter to be determined on evidence. It is not therefore a proper Preliminary Objection. The only issue raised by the 1st and 2nd defendants and which qualifies as a proper Preliminary Objection is the question of the locus standi of the plaintiff. It is common knowledge however that prior to filing this suit, the plaintiff had on **13TH APRIL 2017** obtained a Limited Grant ad litem in **NAIROBI HIGH COURT SUCCESSION CAUSE No. 387 of 2017** for purposes of **“filing, prosecuting and defending suit on behalf of the deceased”**. That Grant clothed her with the requisite capacity to file this suit and therefore, the plaintiff’s locus standi cannot be in doubt. The Preliminary Objection was therefore an afterthought filed without any serious grounds and I must dismiss it straight away.

The plaintiff’s first application seeks the main order of an interlocutory injunction restraining the 2nd defendant by herself, her agents and/or employees from entering or dealing with the suit property pending the hearing and determination of this suit. The principles that guide a Court considering such an application were set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** as follows:

- 1. The Applicant must establish a prima facie case with a probability of success.**
- 2. An interlocutory injunction will not normally be granted unless the Applicant shows that he will suffer irreparable injury that cannot be otherwise compensated by an award of damages and,**
- 3. If in doubt, the Court will determine the application on the balance of convenience.**

In **NGRUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012,** the Court of Appeal said the following as to what constitutes a prima facie case:

“The Applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the Applicant’s case is

more likely than not to ultimately succeed”

The Court then added the following”

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”

And in the case of ***FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.A 772***, the Court observed that in considering such an application, it should take the course that appears to carry the lower risk of injustice should it turn out to have been ***“wrong”***.

In his submissions on this application, counsel for the 1st and 2nd defendant has stated, inter alia, that the plaintiff has not met the test set out in the ***GIELLA*** case (supra) for the main reason that the 2nd defendant is the registered proprietor of the suit property which was vacant when she took possession in 2014 and there is no evidence that the titles to are illegal and therefore, a party, like the plaintiff, who has no registered interest in the suit property, cannot have a prima facie case with a probability of success to entitle her to an interlocutory injunction. Further, that the plaintiff has not demonstrated what irreparable injury she will suffer if the order of temporary injunction is not granted.

It is not in dispute that the 2nd defendant is the registered proprietor of the suit property having purchased the same from the 1st defendant. It is also common knowledge that prior to that, the suit property was registered in the joint names of the 1st defendant and the deceased. The plaintiff’s case however, from her plaint dated 21st June 2017, is that the suit property was registered in the names of the 1st defendant and the deceased to hold in trust for the beneficiaries of the Estate of the deceased which include both the plaintiff and the 1st defendant. The plaintiff has therefore pleaded that any disposition of the suit property to the 1st or 2nd defendant was done illegally as she still holds the original titles thereto. The law is that the mere registration of land in the name of a party does not relieve him of his obligation as a trustee – ***Section 25 (2) of the Land Registration Act***. See also ***KANYI VS MUTHIORA 1984 K.L.R 712***. Ultimately however, whether or not the plaintiff will establish her case based on trust or whether or not the suit property was fraudulently transferred to the 2nd defendant are issues to be determined at the trial and cannot be considered at this stage. In my view, the application dated 21st June 2017 can best be determined on the balance of convenience.

The purpose of an interlocutory injunction is primarily to preserve the property in dispute pending the determination of the main suit. There is conflicting evidence as to who was in occupation of the suit property by the time **HON. ANGIMA J.** issued the orders dated **28TH JUNE 2017**. As per paragraph five (5) of the plaintiff’s affidavit in support of the application for temporary injunction, she deposed that her agents and relatives were being threatened with forceful eviction from the suit property. On the other hand, it is the 2nd defendant’s case that she took possession of the suit land in 2014. When the parties appeared before **HON ANGIMA J.** on **28TH JUNE 2017**, one of the orders made by the Judge was as follows:

“The caretaker who has been in occupation shall continue being in occupation until next hearing date”

That order was extended by this Court on **13TH JULY 2017** despite **MR. MWAI** ‘s argument that there was ***“nothing on the ground”***. The caretaker in question is one **PETER MUGO** an agent of the plaintiff and who on 10th July 2017 informed her that a gang had descended on the suit property, demolished the house, tore down the fence and cart away iron sheets. Subsequently, on 11th and 12th July 2017, the said gang ferried away trees and destroyed crops. This Court takes the view therefore that it is the plaintiff who has always been in possession of the suit property and that is why **HON. ANGIMA J.** made the

order referred to above. If the 2nd defendant took possession of the suit property in 2014 as she alleges, it is not clear why three (3) years later, the plaintiff's agent was still on the site. Courts have taken the view that a party in occupation of property in dispute is entitled to an injunction if there is a threat of eviction therefrom by the other side before the case is heard and determined. See for instance the Court of Appeal's decision in the case of **GEORGE ORANGO ORAGO VS GEORGE LIEWA JAGALO & TWO OTHERS C.A CIVIL APPEAL No. 62 of 2009 (KISUMU) (2010 e K.L.R).**

The essence of **HON ANGIMA J.**'s order dated 28th June 2017 was clearly to allow the plaintiff continue in occupation of the suit property.

It is also clear from the record herein that even after **HON. ANGIMA J.** had issued the orders dated **28TH JUNE 2017**, a gang descended on the suit property and damaged a building and other properties. Part of the plaintiff's annexures are photographs of damaged houses and cut trees – annexures **CGN 1 – CGN 5**. That fact is not disputed only that the 1st and 2nd defendants as well as **JAMES IGATI MWAI** have denied being part of the gang. That issue is the subject of the plaintiff's second application which I shall be addressing shortly. What is clear however is that in view of that proved damage of the suit property including the desecration of graves, it is in the interest of justice that this Court grants orders to forestall any further damage until this suit is heard and finally determined. The prayer for an interlocutory injunction pending trial is therefore well merited in the circumstances and I allow it.

The other prayer sought in the application dated 28th June 2017 include directing the area Chief and OCS Baricho Police Station to ensure strict compliance with this Court's order and also for the Court to visit the locus in quo to ascertain the pleaded facts. One of the duties of the Police under the **National Police Service Act** and specifically **Section 24** thereof is the maintenance of law and order. The Police do not therefore need any prompting from this Court or anyone else for that matter to perform that which the law mandates them to do. Therefore where the Police are satisfied that there is a violation of another's right by damaging of property, that is a criminal act which calls upon the Police to act and the aggrieved party need not seek any orders from this Court. And with regard to the request that this Court visits the locus in quo to ascertain the facts pleaded, that shall not be necessary since the photographs of the scene are clear, self explanatory and the veracity of what is depicted therein has not been challenged. That invitation is therefore also declined.

The application dated **12TH JULY 2017** seeks the main order that the 2nd defendant and her then counsel **MR. JAMES IGATI MWAI** be cited for contempt of the orders issued by **HON. ANGIMA J.** on **28TH JUNE 2017**. There is no doubt in my mind that the said orders were flagrantly disobeyed on 10th, 11th and 12th July 2017. In response to that application, the 2nd defendant has deponed in her replying affidavit dated **29TH SEPTEMBER 2017** that she is not in contempt of the said orders because she was not restrained from continuing to utilize her land, that she was not served with the said order and also that there was nobody living on the suit property when she took possession of it. In paragraph three (3) and four (4) of that replying affidavit, the 2nd defendant has deponed as follows:

3: “That I am the proprietor of land parcels number MWERUA/BARICHO/720, 721, 722, 723 and 724. Annexed are copies of the title deeds and certificates of official searches marked as JWK 1 “.

4: “That I bought the said parcels of land from the 1st defendant and I took possession of all of them in the year 2014 and I have been cultivating the said parcels of land since then”

As already found above, if the 2nd defendant took possession of the suit property in 2014, no explanation has been offered as to why the plaintiff's caretaker **PETER MUGO** was still in occupation of the property in 2017 as found by **HON. ANGIMA J.** when he made the order directing that the said caretaker continues in occupation. The 2nd defendant has also pleaded in paragraph twelve (12) of the same affidavit that the plaintiff has not demonstrated any contempt. When a Court orders one party to “**continue being in occupation**” of property in dispute and another party invades it and does acts thereon

which are inconsistent with the occupier's interests, that is a clear violation of a Court order and makes such a party liable to proceedings for contempt. It cannot therefore be correct to depone, as **MR. JAMES IGATI MWAI** has done in paragraphs eight (8) of his replying affidavit dated 23RD AUGUST 2017 that no interlocutory orders were granted by **HON. ANGIMA J.** on 28TH JUNE 2017. The orders directing the caretaker to remain in occupation was a clear and un-ambiguous order and the Judge did not have to state in so many words that houses and trees should not be damaged etc etc. Therefore whoever went to the suit property and damaged the house, trees and crops was clearly in contempt of the orders issued by **HON. ANGIMA J.** on 28TH JUNE 2017.

The 2nd defendant has also deponed in paragraphs eight (8) and fourteen (14) of her replying affidavit that she was never served with the order issued on 28TH JUNE 2017 and therefore she cannot be in contempt of that order. The Court record shows that the order issued on 28TH JUNE 2017 was made in the presence of **MR. JAMES IGATI MWAI** then acting for the 1st and 2nd defendants. In such circumstances, the 2nd defendant cannot claim to have been ignorant of the said order nor hide under the guise of not having been served with it because her advocate was present in Court when it was issued. In the case of **SHIMMERS PLAZA LTD VS NATIONAL BANK OF KENYA LTD C.A CIVIL APPEAL No. 33 of 2012 (2015 e K.L.R)**, the Court addressed this issue as follows:

“Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in Court on instructions of a party, then it behooves him/her to report back to the client all that transpired in Court that has a bearing in the client's case”.

See also **JUSTUS KARIUKI MATE & ANOTHER VS MARTIN NYAGA WAMBORA C.A CIVIL APPEAL No. 24 of 2014.**

From the foregoing, I make the following findings:

- 1. That on 28TH JUNE 2017, HON. ANGIMA J. made a clear order that the caretaker in occupation of the suit property shall continue in such occupation.***
- 2. That caretaker was an agent of the plaintiff.***
- 3. On 10th, 11th and 12th July 2017, a gang invaded the suit property in defiance of that order, threatened the caretaker, demolished a house and fence and destroyed crops as well as desecrating graves and carting away properties.***
- 4. That the conduct of the said gang was clearly in contempt of the Court order issued on 28TH JUNE 2017.***
- 5. That JAMES IGATI MWAI and the 2nd defendant had knowledge of the order issued on 28th June 2017.***

Most importantly however, the plaintiff had the onus of establishing that **JAMES IGATI MWAI** and the 2nd defendant were part of the gang that descended on the suit property on 10th, 11th and 12th July 2017 and committed the acts as alleged against them. The standard of proof in contempt proceedings is higher than proof on the balance of probabilities though almost, but not exactly beyond reasonable doubt – see **MUTITIKA VS BAHARINI FARM LTD C.A CIVIL APPLICATION No. 24 of 1985 NBI (1985 e K.L.R)**. In paragraphs nineteen (19), twenty (20) and twenty one (21) of her supporting affidavit dated 12th July 2017, the plaintiff depones s follows:

19: “That in a brazenly defiant and brutally executed act, one JANE WANJIRU KARONDO and her agent JAMES IGATI MWAI who is infact her advocate on record have contemptuously defied the orders of HON. JUSTICE ANGIMA made on 28th July 2017”

20: “That I was indeed dumbfounded and left in shock and fear when on Monday 10th July 2017 the said caretaker telephoned me and informed me that a gang of close to thirty (30) persons descended upon the property armed with crude weapons and riding motor-cycles stating that they had done so on the orders of the plaintiff (sic) herein as well as her advocate JAMES IGATI MWAI”.

21: “That I was further astonished when the caretaker as well as my Aunt who lives on the adjacent family property informed me that the said JAMES IGATI MWAI who is well known to them was actually present on site as the aforesaid gang proceeded to threaten the caretaker and demolish the house built on the property, tear down the fence and cart away the iron sheets of the demolished house”

In reply to those averments, **MR. JAMES IGATI MWAI** has deponed in paragraphs thirteen (13) and fourteen (14) of his affidavit dated 23RD AUGUST 2017 as follows:

13: “That it is stated in paragraph 19 that there were over 30 persons who descended on the properties with crude weapons and I wonder why the said caretaker did not take their photograph if he really saw them which shows that he is lying even in the hearsay given by him to the applicant”.

14: “That again in reply to paragraph 21 of the supporting affidavit, the applicant states that she was told which is hearsay and the person who told again (sic) should have sworn an affidavit as an annexure thereof as they are not parties to this suit”.

Although the plaintiff’s supporting affidavit has several photographs as annexures including a picture of a vehicle No. KBQ 298F which **MR. JAMES IGATI MWAI** concedes is registered in his names and those of the 2nd defendant, it is not clear why the person who took the photographs did not take pictures of **MR. JAMES IGATI MWAI** and the 2nd defendant to confirm that indeed they were part of the gang that descended on the suit property. Most crucially also, it is not clear why neither the plaintiff’s caretaker **PETER MUGO** nor her Aunt who, were present when the gang descended on the suit property did not themselves swear affidavits confirming that **MR. JAMES IGATI MWAI “who is well known to them”** was present at the site as deponed in paragraph twenty one (21) of the plaintiff’s supporting affidavit dated 12th July 2017 filed in support of the application for contempt. Nothing would have been easier than for the plaintiff’s caretaker and Aunt to depone to the fact that they saw **MR. JAMES IGATI MWAI “who is well known to them”** at the site in the company of the gang of over thirty (30) persons who descended on the suit property and caused the damage in question. In the absence of such evidence, the averments of the plaintiff with regard to the presence of the 2nd defendant and **MR. JAMES IGATI MWAI** at the site remains hearsay and inadmissible and in the circumstances, the plaintiff has not met the standard of proof required to cite the 2nd defendant and **MR. JAMES IGATI MWAI** for contempt. The fact that a vehicle registered in their names was photographed at the site does not in itself prove that the 2nd defendant and **MR. JAMES IGATI MWAI** were present given the fact that there were almost thirty (30) people in the gang. The best evidence as I have stated above and which was readily available to the plaintiff, was for the caretaker or indeed any other witness to swear an affidavit that **MR. JAMES IGATI MWAI** and the 2nd defendant were present at the site and took part in demolishing the house on the suit property as well as destroying other properties thereon. The evidence on record falls short of that required to cite the 2nd defendant and **MR. JAMES IGATI MWAI** for contempt and I must therefore reject that prayer.

The application dated 12th July 2017 also seeks orders that this Court assess the damage to be awarded to the plaintiff. Such a prayer cannot be granted at this interlocutory stage and in any event it is not even

among the remedies sought in the main plaint. That prayer is equally rejected. The up-shot of the above is that the plaintiff's application dated 12th JULY 2017 lacks merit and is hereby dismissed.

Ultimately therefore, and upon considering the plaintiff's Notice of Motion dated 21ST JUNE 2017 and the one dated 12TH JULY 2017, I make the following orders:

1. The Notice of Motion dated 21ST JUNE 2017 is hereby allowed in the following terms:

(a) That pending the hearing and determination of this suit, the 2nd defendant by herself, her agents and/or employees are restrained from entering upon or in any manner dealing with the properties comprised in L.R No. MWERUA/BARICHO/700 (and any resultant sub-divisions thereof), 720, 721, 722, 723 and 724 or interfering in any manner whatsoever with the plaintiff's quiet possession thereof.

(b) This suit be heard and determined within the next twelve (12) months.

2. The Notice of Motion dated 12th JULY 2017 is dismissed.

3. Costs shall be in the cause.

B.N. OLAO

JUDGE

20TH DECEMBER, 2017

Ruling delivered, dated and signed in open Court at Kerugoya this 20th day of December 2017

Mr. Chomba for Mr. Marete for the Plaintiff present

Ms Kiragu for Mr. Muyodi for the 1st and 2nd Defendants present

No appearance for the 3rd and 4th Defendants

Mr. Gichia Court clerk present

B.N. OLAO

JUDGE

20TH DECEMBER, 2017