



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL NO. 861 OF 2013**

**ANTHONY NJENGA KINYURU..... PLAINTIFF**

**VERSUS**

**GEOFFREY KIRURI GACHARA..... DEFENDANT**

**RULING**

By an originating summons dated 16<sup>th</sup> July 2013 and filed in court on 17<sup>TH</sup> July 2013 the plaintiff interlia seeks an order that he be declared the proprietor of land reference **NO. Muguga/Gitaru/1386** measuring 0.621 hectares and Land Reference **NO. Muguga/Gitaru/1388** measuring 1.361 hectares by virtue of having been in adverse possession for the period prescribed in the limitation of Actions Act Cap 22 Laws of Kenya.

The plaintiff simultaneously with the **(OS)** filed a Notice of Motion application under order 40 Rule (1) and (2) and seeks an order of injunction thus:-

**“That an injunction be granted restraining the Defendant by himself or his servants, agents or licencees from entering into alienating, disposing, offering for sale or in any way interfering with and/or being on the land reference NO. Muguga/Gitaru/1386 and Land Reference NO. Muguga/Gitaru/1388 pending the hearing and determination of the originating summons herein.**

The application is firstly predicated on the grounds set out on the face of the application and secondly on the grounds contained in the supporting affidavit sworn by **Anthony Njenga Kinyuru** the plaintiff herein on 16<sup>th</sup> July 2013 and the further supporting affidavit sworn on 12<sup>th</sup> August 2013. The plaintiff has set out the following grounds in support of the application:-

1. That the plaintiff/Applicant is a beneficiary of the estate of **Sarah Wanjiku Njenga (deceased)** who was registered owner of the said land reference no. **Muguga/Gitaru/1386** and **Muguga/Gitaru/1388** while the defendant is not a beneficiary of the deceased estate.
2. That the Defendant illegally and fraudulently transferred and registered the land reference **NOS. Muguga/Gitaru/1386** and **Muguga/Gitaru/1388** into his names.
3. That the plaintiff/Applicant has been in occupation on the said land parcels **Muguga/Gitaru/1386** and **1388** since 1998.

4. That the Applicant will suffer irreparable loss and damage if the orders sought are not granted.
5. That the Defendant will not be prejudiced in any way as the said land parcels are registered under his names and will always be there.

The plaintiff through the supporting affidavit avers that his mother **Ngendo Njenga** (deceased) was the daughter of his grandfather, **Julius Njenga (deceased)** and she was not married. That the grandfather had 3 wives, **Gachoki Njenga, Sarah Wanjiku Njenga** and **Teresia Mukami Njenga**. The plaintiff depones that **Sarah Wanjiku Njenga** (deceased) was survived by **Ngendo Njenga** and **Geoffrey Kinyuru Njenga** who are both now deceased. The plaintiff further deposes that **Sarah Wanjiku Njenga** was on 26/11/1997 registered as proprietor of Land Parcels **Muguga/Gitaru/1386** and **Muguga/Gitaru/1388** (the suit properties) and that she died intestate on 11<sup>th</sup> December 1999 and Grant of Letters of Administration to her estate were on 2/5/2001 issued to **Teresia Mukami Njenga and Geoffrey Kinyuru Njenga** in **HC Succession Cause NO. 2680 of 2001** and a certificate of confirmation of Grant was issued on 21/10/2003.

The plaintiff further depones that the Defendant and his sister one Grace **Wamuhu Gachara** fraudulently and secretly filed another **succession Cause NO. 608 of 2003** and were issued with Grant of Letters of Administration on 23<sup>rd</sup> July 2003 which they used to cause the suit properties to be transferred to the Defendant's name. The Plaintiff avers that the Defendant and the sister were not entitled as beneficiaries to the suit properties as the sister **Sarah Wanjiku Njenga** had been married to **Julius Njenga (deceased)** and they could not inherit from Julius Njenga's family their deceased sister having become part of the **Njenga** family. The plaintiff contends the grant of letters of administration issued to the Defendant and his sister in **HC Succession Cause NO.608 of 2003** were fraudulently obtained since prior letters of administration to the deceased estate had been issued in **H.C succession NO. 2680 of 2000**. In consequence whereof the plaintiff states that **Geoffrey Kinyuru Njenga** and **Teresia Mukami Njenga** who both held the letters of administration issued in **HC Succession cause NO. 2680 of 2000** filed **civil case NO. 34 of 2004 (OS)** against the Defendant where the plaintiffs sought determination of the following questions:-

1. Who as between the plaintiffs and the Defendant are the lawful heirs to the estate of the late **Sarah Wanjiku Njenga**.
2. Alternatively, whether the estate of the said **Sarah Wanjiku Njenga** shall be administered in accordance with the certificate of confirmation issued by this court in **Succession Cause NO. 2680 of 2000** or in accordance with the certificate of confirmation issued by the court in **Succession Cause NO. 608 of 2003**.

The plaintiff further depones that he and his family have been in possession of the suit properties since 1998 and have carried out developments thereon and that the possession has been adverse to the Defendant. The plaintiff claims that the Defendant has recently threatened to evict the plaintiff as he has intentions to dispose of and/or sell the suit properties unless he is restrained by the court.

The Defendant opposes the application for injunction and has filed a preliminary objection dated 1<sup>st</sup> August 2013 and asserts that the plaintiff's claim is incompetent for failure to attain the prescribed time required for a claim of adverse possession. In this regard the Defendant states that he only became registered owner of the suit properties in the year 2003 and therefore the claim for adverse possession against him cannot arise since the prescribed period of 12 years has not elapsed.

The Defendant has further filed a replying affidavit sworn on 1<sup>st</sup> August 2013 where he depones that the suit properties are the subject matter in **HCCC NO. 34 of 2004(OS)** where the plaintiff herein is the applicant. The Defendant states that the issues in that suit are substantially the same as the issues in this suit and that the plaintiff is merely opening several fronts to ventilate the same claims.

The Defendant claims to be the owner of the suit properties the same having been devolved to him vide **HC Succession cause NO. 608/2003** vide a confirmed grant which has not been set aside and/or annulled. The Defendant denies that the possession of the plaintiff of the suit properties has been adverse

and states that he has always asserted his rights and that he has merely been prevented by the existence of **HCCC NO. 34/04(OS)** which has challenged the Defendants rights to the inheritance of the suit properties from taking back possession.

The plaintiff in the further supporting affidavit repeats the contents of the replying affidavit and reaffirms the real issue in contention was whether the Defendant was entitled to inherit the suit properties from **Sarah Wanjiku Njenga** (deceased) and whether the grant of letters of administration issued to the Defendant on 23/7/2003 were fraudulently obtained.

The Defendant's further replying affidavit sworn on 11<sup>th</sup> September 2013 re asserts his right to inherit his deceased sister who he states died intestate without leaving any other dependants or beneficiaries and thus the properties that were registered in her name were devolved to the Defendant legally in Succession Cause **NO. 608 of 2003**. The Defendant states the suit **HCCC NO. 34/2004 (OS)** raises the same issues as are raised by the plaintiff herein and the same is pending.

The parties filed written submissions, the plaintiff on 15<sup>th</sup> April 2014 and the Defendant on 13<sup>th</sup> June 2014. I have carefully considered the pleadings the affidavits and the annexures thereto and the parties submissions and the issue for determination is whether on the basis of the material placed before the court the plaintiff has established a prima facie case with a probability of success to entitle him to an interlocutory order of injunction.

Both the plaintiff and Defendant admit there were two succession causes in regard to the estate of **Sarah Wanjiku Njenga (deceased)** being H.C Succession cause **NO. 2680 of 2000** and H.C Succession cause **NO. 608 of 2003** and two separate grants of letters of administration were issued and that the letters of administration issued in HC succession cause **NO. 608 of 2003** were used to transmit the suit properties to the Defendant on 23/9/2003. None of the letters of administration have been revoked and/or cancelled. The plaintiff further agree that the administrators appointed in HC Succession cause **NO. 2680 of 2000** filed **HCCC NO. 34 of 2004 (OS)** where the Defendant herein is named as the Defendant seeking a determination as to which grant of letters of administration should be used to administer the estate of Sarah Wanjiku Njenga (deceased) and this suit is pending and the plaintiff herein as infact been substituted as the plaintiff as the personal legal representative of **Geoffrey Kinyuru Njenga**. Given that the right of the Defendant to inherit the suit properties was under challenge in the said **HCCC NO. 34 of 2004** it follows that the process of succession had not been finalized as the court had not as yet determined which letters of administration were to be applied in the administration of the estate of the deceased.

The plaintiff has variously alleged (without any particulars) the letters of administration issued to the Defendant and his sister in H.C Succession cause **NO. 608/2003** were fraudulently obtained. It is unclear if that were so, why the applicants in **HCCC NO. 34 of 2004 (OS)** did not apply for the letters to be revoked under the provisions of the Law of Succession Act section 76 Cap 61 Laws of Kenya.

Section 76 of the Act provides

**76. A grant of representation whether or not confirmed may at any time be revoked or annulled if the court decides, either on application by any interested party or its own motion.**

**(a) that the proceedings to obtain the grant were defective in substance,**

**(b) that the grant was obtained fraudulently by the making of a false statement or by the concealment from the court of something material to the case,**

**( c) that the grant was obtained by means of untrue allegation of a fact essential in point of law to justify the grant notwithstanding that the allegation was made in ignorance or inadvertently,**

**(d) .....**

(e) .....

Quite clearly therefore it is within the province of the succession court to interrogate the validity or otherwise of the grant of letters of administration and the parties having chosen to seek the determination of the court in **HCCC NO. 34 of 2004** as to which of the letters of administration were the valid ones this court cannot properly adjudicate on the issue when it is pending in the earlier suit.

Assuming the grant of letters of administration to the Defendant and his sister were not in issue the preliminary objection taken by the Defendant would have credibility as it would be quite obvious that the plaintiff would not have held the suit properties adversely (if indeed he was in adverse possession) against the Defendant for a period of 12 years. The period of adversity against the Defendant could only begin from the time he became the registered owner and the period before he was registered owner cannot count against him. The case of **Muraguri Githito –vs- Mathenge Thiongo (2009) eKLR** referred to the court by the Defendant is clear on this point.

In the premises therefore it is my holding and finding that the plaintiff has not demonstrated he has a prima facie case with a probability of success against the Defendant and cannot therefore satisfy the conditions for the grant of temporary injunction as enuciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** and that the plaintiffs application is for dismissal.

I accordingly find the plaintiffs Notice of Motion dated 16<sup>th</sup> July 2013 to be lacking in merit and order that the same be dismissed with costs to the defendant.

Order accordingly.

Ruling dated, signed and delivered this...**26<sup>th</sup>** ....day of...**September.....2014.**

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... For the Defendant