



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 194 of 2010

LUCY WAIRIMU GITAU.....1ST PLAINTIFF/APPLICANT

ELVIS NJUGUNA GITAU.....2ND PLAINTIFF/APPLICANT

(Suing as the Legal Representative of the Estate of WILLIE GITAU GACHURU deceased)

VERSUS

FRANCIS NDICHU GITHONGO.....DEFENDANT/RESPONDENT

RULING

1. Coming up before me for determination is a Chamber Summons dated 21st April 2010 brought under Section 3A of the Civil Procedure Act, Order 39 rules 1,3, and 9 of the Civil Procedure Rules and all other enabling provisions of the law. It contains the following prayers:-

(a) That the Respondent be restrained by an order of temporary injunction from entering, trespassing, cultivating, cutting trees, alienating, transferring, disposing, wasting or in any other way dealing with L.R. NO. GATAMAIYU/KAGWE/893 (the "Suit property") until the suit herein is heard and finally determined.

(b) That the costs of this application be paid by the Respondent in any event.

2. The application is premised on the grounds on the face of the application and the Supporting Affidavit of ELVIS NJUGUNA GITAU in which he stated as follows:-

- That his father, Willie Gitau Gachuru, died intestate on 25th May 2002.
- That Letters of Administration were granted to him and his 3 siblings on 22nd September 2008.
- That on 26th January 1999 Willie Gitau Gachuru entered into a Sale Agreement with the 1st Applicant Lucy Wairimu Gitau for the sale of the Suit Property to the deceased for a sum of Ksh. 655,500/=.
- That Willie Gitau Gachuru paid the full purchase price in cash to the 1st Applicant in the presence of several witnesses who also signed the Sale Agreement. The Sale Agreement is produced.
- That Willie Gitau Gachuru and the 1st Applicant thereafter completed the application to the Land

Control Board for consent to transfer the Suit Property and a copy thereof was produced.

- That on 13th April 1999 Willie Gitau Gachuru and the 1st Applicant received Land Control Board consent to transfer the Suit Property. A copy of the consent letter was produced.
- That the Respondent without any justification and without the knowledge of the 1st and 2nd Applicants fraudulently transferred the Suit Property into his name and fraudulently obtained a title deed to the Suit Property from the Land Registrar, Kiambu. A copy of the extract of the Register was produced.
- That the 1st Applicant denies having sold the Suit Property to the Respondent.
- That since 1999, his family has been occupying and working on the Suit Property while the Respondent has never been in occupation of Physical possession of the Suit Property.
- That the Respondent's name still appears on the Land Register at Kiambu Lands office as the proprietor of the Suit Property despite the fact that the same was fraudulently inserted.
- That the Respondent did not acquire a good title to the Suit Property and unless restrained by the court, the Suit Property is in danger of being dealt with by the Respondent in a manner prejudicial to the Applicants.

3. The application is uncontested. The Respondent has not filed a Replying Affidavit.

4. In deciding whether to grant the temporary injunction I wish to refer to and rely on the precedent set in the case of **Giella vs Cassman Brown (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

5. Has the Plaintiff made out a prima facie case with a probability of success? In the case of **Mrao versus First American Bank of Kenya Ltd & 2 others (2003) KLR 125**, a prima facie case was described as:-

“a prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

6. Have the Applicants established a prima facie case with a probability of success? There is no question on the fact that the 1st Applicant herein was the registered proprietor of the Suit Property at all material times, specifically in the year 1999. This information is derived from the extract of the Land Register which shows that on 4th December 1990, a title deed over the Suit Property was issued to her. Further, the copy of the Sale Agreement that was availed to this court contains the details of the sale of the Suit Property by the 1st Applicant to Willie Gitau Gachuru. There were several witnesses to this transaction in which payment of the full purchase price of Ksh. 655,500/= was made by Willie Gitau Gachuru to the 1st Applicant. Further to that, documents proving that Land Control Board consent was obtained to this particular transaction and the corresponding transfer document was also produced. From this point going forward, it is not clear how the Respondent came into the picture and had the Suit Property transferred into his name and a Title Deed issued to him on 9th July 2001. In my mind, I am convinced that the Applicants have established a prima facie case with probability of success in this matter.

7. Will the Applicant suffer irreparable injury incapable of being compensated by an award for damages? In considering whether this condition has been fulfilled, I wish to note that the 2nd Applicant lives on the Suit Property and have been in occupation thereof since 1999 to date. The Respondent has never been in possession of the Suit Property. Further, I note that land is unique and no one parcel can be equated in value to another. The value of the Suit Property can be ascertained and there is a valid argument that damages would be available. However, it would not be right to say that the Applicants can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **J.M. GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

8. In whose favour does the balance of convenience tilt? I rule that the Applicants having established their legal right in respect to the Suit Property and the fact that title thereto lies with the Respondent, the balance of convenience lies in favour of the Applicants who stand to lose if the orders sought are not granted.

9. Overall, I am satisfied that the Applicants have met the conditions for the grant of a temporary injunction. Accordingly, I hereby allow their application. I award the costs to the Applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI This 19TH DAY OF APRIL 2013.

MARY M. GITUMBI

JUDGE

In the presence of:-

.....**Advocate for the 1st & 2nd Plaintiff/Applicant**

.....**Advocate for Respondent**

.....**Court Clerk**

MARY M. GITUMBI

JUDGE