



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO.166 OF 2011

JOSEPH MWAI KAMURWA.....PLAINTIFF

VERSUS

JOSEPH GACHIRI & 3 OTHERS.....DEFENDANTS

R U L I N G

Joseph Mwai Kamurwa is the personal representative and administrator of the estate of Gachiri Njege (deceased) who died domiciled in Kenya on the 16/10/1964 leaving behind Dependants who died before petitioning the court for letters of administration.

The only child of the deceased, **Beatrice Wairimu Gachiri** petitioned for a grant which she obtained on the 23/4/2008. She filed a suit in the High Court against the defendants but died on the 7/5/2009 before the conclusion of the suit.

On the 27th June, 2011 letters of administration ad litem of all the estate of Gachiri Njege which devolves to and vests in his personal representative but limited to the purposes only to pursue a civil suit and until further representation were granted by the High Court of Kenya at Nyeri to **Joseph Mwai Kamurwa** of Karatina.

On the 16th November 2011 Joseph Mwai Kamurwa commenced suit by way of plaint seeking a declaration that **Iriani/Chehe/371** belongs to the estate of **Gachiri Njege** and that the same was to be registered in the name of **Joseph Mwai Kamurwa** as the administrator of the said estate.

He also sought an order that the Land Registrar, Nyeri District to rectify the register with regard to the property in issue and the registration of Joseph Gachiri Njege and Johnson Muriithi Kinyua be accordingly cancelled.

Accompanying the application was a Notice of Motion dated 14th November 2011 wherein the plaintiff was praying for an order restraining the 1st and 2nd respondents from interfering, trespassing, wasting or alienating and/or engaging in any dealings over the suit parcel. Moreover, he prayed for a stay of proceedings regarding the estate of the deceased pending the outcome of this case.

The application is grounded on allegations that the 1st defendant has identified a buyer of the property and has sold the property to the 2nd defendant. That upon buying the property, the 2nd defendant has subsequently in a bid to take possession entered the property on diverse dates, sought to prune and destroy the tea bushes therein and farmed on the parcel to the detriment of the estate despite the fact that the court had earlier issued preservative orders. Lastly the plaintiff alleges that he is likely to suffer

irreparable loss.

The application is supported by an affidavit sworn by the plaintiff whose import is that the property in dispute was registered in the name of the deceased at his death in 1964. In 1988, one Joseph Gachiri, the grandson to the deceased fraudulently applied to the Land Registrar for rectification of the name and inserted the name **Joseph** in the land register to read **Joseph Gachiri Njege** hence illegally transferring the said property from the rightful owner Gachiri Njege (deceased). He obtained title in the year 2007 and purported to sell the property to the 2nd defendant, Mr. Johnson Muriithi Kinyua. The 2nd Defendant obtained a title deed in his name and moved into the property where he decimated the house of the deceased daughter and evicted her from the property.

The 2nd defendant later approached K.T.D.A to have the tea on the land transferred to himself. The deceased's daughter instituted a civil suit for recovery of the land and the court issued preservative orders but unfortunately, she died before concluding the suit. The 2nd defendant has acquired a new zeal to re-enter and sell the property a fact that has caused the plaintiff to come to this court.

The 2nd defendant filed a replying affidavit and stated that he entered into a sale agreement with Joseph Gachiri Njege the 1st defendant herein for the sale of land parcel **No.Iriaini/Chege/371**. He sued the said Joseph Gachiri Njege at Kerugoya in the Senior Resident Magistrates court case No.41 8 of 2005 for specific performance when the said Joseph Gachiri Njege delayed to transfer the land to the 2nd defendant. The court issued an order that the land be transferred to the 2nd defendant. He was issued with a title deed and immediately entered the land and started utilizing it. He obtained orders to remove structures on the land.

Before buying the land, the 2nd defendant was informed by the 1st defendant that the latter had been given the land by the clan when he was young in 1959. He corrected the name in 1988 to insert his baptismal name. The 2nd defendant argues that he has obtained title and already taken possession and has been utilizing the same since January 2007 hence an injunction will amount to evicting the 2nd defendant.

The 2nd defendant also filed a defence in which he denied the allegation of the plaintiff and stated that this matter had been determined in Kerugoya SRM.CC.NO.418 of 2003.

The 1st defendant filed defence and a witness statement where he alleged that he was the 1st registered absolute proprietor of the suit land. That on 31/10/1998 he applied for correction of name to include his baptismal name, Joseph, which application was consented to by the Mathira Land Control Board and he sold the property to the 2nd defendant.

Having paraphrased the facts of this case, the court should now deal with the conditions for granting temporary injunctions. The conditions for granting an interlocutory injunction were stated by the Court of Appeal of East Africa in the celebrated case of **Giella -V- Cassman Brown & Co. Ltd. 1973 EA 338 where spry, VP said at page 360.E**

*“the condition for the grant of an interlocutory injunction are now, I think, well settled in E.A. **First**, an applicant must show a prima facie case with a probability of success. **Secondly**, an interlocutory injunction will not be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages **Thirdly**, if the court is in doubt, it will decide an application on the balance of convenience.”*

On the first issue, the applicant submits that the main cause of action is fraud that was committed by the 1st defendant who took advantage of the similar names with the deceased to have the land registered in his name. There is neither allegation nor evidence of fraud against the 2nd defendant. The allegation of fraud is made against the 1st defendant and 3rd defendant. The 3rd and 4th defendants filed their defence on the 13/12/2011 and denied allegation of fraud and stated that they acted lawfully and in good faith at all material times in relation to the transaction in issue as the 3rd defendant merely carried out its statutory duties under the Registered Land Act Cap 300 Laws of Kenya (repealed).

By failing to make allegation against the 2nd defendant and, failing to provide prima facie evidence that the he was party to the alleged fraud, the plaintiff has failed to satisfy the first condition set by the Court of Appeal of E.A in granting temporary injunctions. This position is bolstered by the provisions of **Section 26 (1) (a) of the Land Registration Act** which requires that the person holding title must have been party to the fraud for the court to cancel any registration.

On the 27th of January 2006, the Senior Resident Magistrate Court at Kerugoya issued an order that the suit land belongs to the plaintiff Johnson Muriithi Kinyua and therefor this court would be prohibited from determining the issue of ownership afresh unless on appeal or unless the order of the court granted on the 9/1/2006 is reviewed under the Civil Procedure Rules. The suit in the Magistrate's Court was determined before the filing of this suit and therefore there was a right of review of the decision of the court by any person aggrieved by the decision of the court. Under **Order 44 of the Civil Procedure Rules 2010** , any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is hereby allowed may apply for a review of judgment or order to the court which passed the decree or made the order without unreasonable delay. The applicant has not attempted to review the decision of the lower court.

On the second issue of the applicant **suffering irreparable injury**, the plaintiff has not established that the defendants will be unable to compensate him if temporary injunction is not granted and the plaintiff succeeds on trial. The burden of proof that the defendants will be unable to pay damages lies with the plaintiff applicant and not the defendants.

I will not belabor the 3rd condition as I'm not in doubt on the two principles.

The upshot of the above is that the application is dismissed with costs.

Dated, signed and delivered at Nyeri this 28th day of June 2013.

A. OMBWAYO

JUDGE