



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.254 OF 2013

LYDIA NJANJA GICHUKIPLAINTIFF

**PETER KIBUTHU GICHUKI (suing as Administrators of the estate of MOSES GICHUKI
KIBUTHU (deceased))**

VERSUS

SIMON KAMAU BEN NGUGI..... DEFENDANT

RULING

By a notice of motion dated 29th March, 2012 the plaintiffs, Lydia Njanja Gichuki and Peter Kibuthu Gichuki, brought this application against the defendant seeking, among other orders that pending the hearing and determination of this suit, a temporary injunction be issued to restrain the defendant either acting by himself, his agent and or any other person acting on his behalf from collecting rent there from and/or in any way interfering with Nakuru/Municipality Block 3/144("suit Land")

The application is supported by the affidavit of the Peter Kibuthu Gichuki sworn on 29th March, 2012 and is premised on the grounds that the deponent is one of the administrators of the estate of Moses Gichuki Kibuthu (his father) who died intestate in 1994: That the deceased acquired the suit land in 1978 from the Municipal Council of Nakuru and did not during his lifetime transfer the suit land to any person or engage in any form of dealings with the suit land: That in the year 2004 they learnt that someone had started constructing on the suit land and was collecting rent thus denying the plaintiffs the opportunity to collect rent, put up any developments or access the suit land. They reported this matter to the police who carried out investigations and established that the respondent had been issued with a title deed in 2008 in his name having purchased the land from a person known as Moses Gichuki Kibuthu in 2007. Criminal proceedings were initiated against Lawrence Mwangi, being the person who had presented himself as the deceased.

On 11th April, 2012 the application was heard *ex parte* and a temporary injunction granted restraining the defendant either by himself, his agent and or any other person acting on his behalf from collecting rent or in any way interfering with the suit land pending the hearing and determination of this application.

The respondent in his replying affidavit sworn on 1st November, 2012 deposes that he is the legal proprietor of the suit land having purchased the same from the registered owner Moses Gichuki Kibuthu with whom he entered into a formal sale agreement drawn by a firm of advocates: That since the vendor was not previously known to him and had all the proper documentation he had no reason to suspect that he was not the real Moses Gichuki Kibuthu : That when he took possession of the suit land there were no developments thereon as the plot was initially used a dumpsite. He initiated the process of fixing the

beacons on the suit land and singularly erected the developments therein therefore stopping him from collecting rent would amount to a violation of his property rights.

While this application was pending for hearing the defendant filed a notice of motion on 2nd November, 2012 seeking that the order granted on 11th April, 2012 be suspended, discharged or set aside pending the hearing and determination of his application.

When this application came up for interparties hearing on 8th November 2012, counsels for the respective parties agreed by consent that the aforementioned applications be heard together, the plaintiff's supporting affidavit in his application be treated as a reply to the defendant's application and that the order granted on 11th April, 2012 be varied by suspending the portion of the order restraining the defendant from collecting rent for a period of 30 days.

The two applications were urged before me by way of written submissions. Counsels for the respective parties reiterated the contentions by their clients which contentions/ submissions I have considered.

The applications herein being for a temporary injunction, the burden is on the applicants to satisfy the conditions set down in **Giella v Cassman Brown & Co. Ltd. (1973) EA 358**, namely that they have a *prima facie* case with a probability of success, that unless an injunction is granted, they might otherwise suffer injury which cannot adequately be compensated by an award of damages; and should the court be in doubt, it will determine the matter on a balance of convenience.

From the material before court it is common ground that the suit land belonged to a man called Moses Gichuki Kibuthu. It is also common ground that the defendant did not buy the suit land from the plaintiffs' late father having died in 1994. The plaintiffs have exhibited letters of Administration confirmed on 12th November, 2009 showing that they are the administrators of the estate of Moses Gichuki Kibuthu. By dint of the provisions of Section 79 of the Law of Succession Act Chapter 160 Laws of Kenya, only the executor or administrator of the estate of a deceased person has power to deal with the property of the deceased. Such property only vests in him as personal representative of the deceased, to hold on his behalf and on behalf of the other beneficiaries of the deceased. There is no evidence before court that the persons who entered into a sale agreement with the defendant are in any way connected with the property of the deceased or are administrators of the estate of the deceased. The criminal case against Lawrence Mwangi, the seller, is an indicator that there was something wrong with their transaction. Without any evidence to the contrary, the applicants are *pri ma facie* the only persons entitled to deal with the properties in the name of the late Moses Gichuki Kibuthu.

I am persuaded that the applicants have demonstrated a *prima facie* case with a probability of success. Although the respondent is the registered owner of the property, most likely put up the developments on the suit land and claims that he is an innocent purchaser who bought the suit Property for valuable consideration, the respondents' ownership of the suit property is subject to the applicants' beneficial ownership thereon. See Sections 28, 29 and 30 of the Registered Land Act, Chapter 300 laws of Kenya (now repealed). Also see Article 40(6) the Constitution.

I find and hold that, as beneficial owners of the suit property, the rights and interests of the applicants over the suit property must be protected. The balance of convenience also tilts in their favour.

The upshot of the foregoing is that the plaintiffs application dated 29th March 2012 is allowed with costs and the defendant's application dated 1st November, 2012 is dismissed.

I further order that an estate agent be appointed jointly by the plaintiffs and the defendant to collect rent from the suit premises and deposit the rent collected in court with effect from 1st September, 2013 until this suit is heard and determined or until the parties reach an out of court settlement.

Dated and Signed this 21st day of August 2013.

L N WAITHAKA

JUDGE