



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
LAND AND ENVIRONMENT COURT
CIVIL CASE NO.144 OF 2012

ALBERT NJERU GITHAE

suing Rep. WANGUI GITAHE.....PLAINTIFF

VERSUS

WILSON KIMOTHO MAINA GITHAE..... DEFENDANT

R U L I N G

The Plaintiff, Albert Njeru Githae is a holder of letters of administration ad litem of all the estate of one Eva Wangui Githae who died domiciled in Kenya on the 14/5/1994 which estate devolves to and vests in his personal representatives but limited to the purpose only for filing suit for recovery of land parcel **No.Gatarakwa/Gatarakwa Block.111/487** and until further representation are granted by the court. At the time deceased died, she was the proprietor the above mentioned parcel of land.

The defendant is a son to the deceased and a brother to the plaintiff. It is alleged by the plaintiff that the defendant unlawfully and through fraud had the suit land transferred from the deceased to himself a fact that the plaintiff and other beneficiaries came to know in 2009. Upon learning the fraud, the plaintiff reported to the police. The police investigated the matter arrested to defendant and charged him in court with two counts of forgery contrary to Section 345 as read with Section 349 of the penal code. He was also charged with the counts of making false document contrary to Section 347 (d) (1) as read with section 349 of the penal code. Furthermore he was charged with conspiracy to defraud contrary to Section 317 of the penal code, uttering false document contrary to Section 353 of the penal code and lastly with the count of obtaining registration by false pretenses contrary to Section 320 of the penal code. He was however acquitted by the court.

The defendant has already sold part of the land and the purchaser have already put up structures on the parcels. The plaintiff therefore prays for cancellation of those titles obtained at that to Land Registrar be rectified in favour of the said deceased estate to safeguard the interest of the plaintiffs and other beneficiaries to the said estate and eviction orders to issue against the buyers who are allegedly trespassed to the said land.

The defendant filed a defence in response to the plaint where he states that he is the one who paid for the land in dispute and has been in occupation and complete control of the said land parcel and has developed it extensively as his own parcel of land and that during the transaction, he did not prepare any documents and was merely requested to sign the same. He was lawfully acquitted by the High Court according to the laws of Kenya. He claims to have sold the entire land in a lawful manner and that the purchasers have developed the same. The plaintiff replied to this defence and referred to it as a sham, mere denial and

raises no triable issues.

In the Notice of Motion dated 2/7/2012, the plaintiff prayed for orders restraining the defendant, his servants and/or persons claiming under him from selling, sub-dividing, developing or otherwise interfering with the suit land pending the hearing and determination of the suit on grounds that the plaintiff and other beneficiaries to the said estate stand to suffer irreparable losses if the orders are not granted. The application is supported by the plaintiff's affidavit sworn and filed on 2/7/12.

In response to this application the defendant filed a replying affidavit sworn by himself on 18/7/2012 and filed on the same date.

The gist of the plaintiff's affidavit is that the defendant unlawfully and fraudulently transferred the deceased's property to his name and is in the process of selling and sub-dividing the land to other persons. The plaintiff is warranted that the estate is likely to suffer irreparable loss. While the gist of the defendant's replying affidavit is he was the one financing his mother to buy the land in dispute and his mother gave him back the land in 1978. He fenced the land and maintained the boundaries throughout and developed the land using his money. He has subdivided and sold the land to third parties and he believes that the application is a belated attempt to evict the purchaser.

The parties filed and exchanged submissions. The gravamen of the plaintiff's submissions is that the suit land belongs to the estate of the late Eva Wangechi Githae however, the defendant has fraudulently registered it in his name. The deceased died in 1994 and the suit land was transferred to the defendant's name on 24/4/2009. A transfer document purportedly signed by the deceased on 24/4/2009 was presented to the Land Registrar by the defendant. The plaintiff argues that all these acts coupled with the fact that the defendant knew that the land was still in the deceased's name is evidence of a calculated move to commit fraud.

The plaintiff argues that there is prima facie evidence that the defendant committed fraud. No formal subdivision has been done by the lands office.

The defendant on his part submitted that the transaction were open and all the family members were aware of the said transaction. The defendant submits that he is not averse to orders of status quo being granted pending the hearing of the cause. He argues that the plaintiff is guilty of non disclosure and that injunction cannot issue to restrain what has already taken place.

Having read the application and all the affidavits on record and submission of parties, this court finds that the plaintiff has satisfied the court that he has a prima facie case that can go to trial. The fact that the deceased died in 1994 and it is being purported that she signed a transfer in 2009, 15 years after her demise is an issue for trial by the court. The defendant cannot claim that he was a layman and therefore he did not know what the advocates were doing.

Section 45 of the Succession Act prohibits intermeddling with the estate of the deceased. The defendant in dealing with the property of the deceased without letters of administration was simply intermeddling with the estate of the deceased. The allegation by the defendant that he was merely requested to sign the documents and did not have any other role is self-defeating as no court should believe that a person who executes a transfer of land document does not know its import. It beats logic and is not believable that the defendant appeared with his mother before the advocate on 24/4/2009 when it is crystal clear that his mother died in 1994. Moreover it is strange that the deceased applied and obtained consent when she was in the grave 15 years after death. The court finds that the plaintiff has established a prima facie case with a likelihood of success.

On the issue of irreparable loss, the plaintiff has satisfied the court beyond peradventure that if a temporary injunction is not granted, the estate of the deceased is likely to suffer irreparable loss as already purchasers have begun erecting structures on the disputed parcel of land.

Ultimately this court grants prayer 3 in the Notice of Motion dated 2/7/2013. Costs in the cause.

Dated, signed and delivered at Nyeri this 11th day of October 2013.

A. OMBWAYO

JUDGE