



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.190 OF 2010

JARVIN GITONGA KARIUKI.....APPLICANT

VERSUS

LUCY NJERI MUTUURA.....1ST RESPONDENT
GEOFFREY GICHURA MUTUURA.....2ND RESPONDENT

RULING

The applicant has filed an originating summons in which he seeks determination of three points, namely:

- i) whether he is the lawful purchaser of land parcel Nos.25581, 25582 and 25583;
- ii) whether the said parcels of land should be transferred to the him; and
- iii) whether the transfer documents should be executed by the respondents.

While the origination summons is pending determination of the above questions, the applicant has brought the instant chamber summons for orders of injunction to restrain the respondents from selling, disposing of, developing or in any other way dealing with the suit properties.

The application is premised on the grounds that the applicant purchased the suit properties from the respondents' deceased father, Robert Mutuura Gichura by a written agreement dated 21st January, 2002. That the said Robert Mutuura Gichura died before he could transfer the properties. When the succession cause was filed by the respondents in Nkr. H.C.SUCC.Cause No.15 of 2008, the respondents included the suit properties as part of the estate of the deceased. This led the applicant to file a caveat under the provisions of the **Probate and Administration Rules**. As a result thereof, the court confirmed the grant but excluded the entire L.R.No.4730/63 from which the suit properties were to be curved out. The applicant has further averred that he has now learnt that the respondents are intent on selling the suit properties.

In reply, the 2nd respondent and counsel representing the respondents have sworn affidavits, the combined effect of which are that, the suit properties were never sold by the deceased; that the sale agreement does not specify that the parcels of land the deceased is alleged to have disposed of were to be curved from the suit property; that the applicant was in breach of the agreement for failing to complete his part of the bargain within the stipulated period; that no consent was obtained from the Land Control Board; that if

this application was allowed, the effect would be to restrain the respondents from dealing with the entire L.R. No.4730/63; and that the application is *res judicata* an application in Nkr. H.C.SUCC.Cause No.15 of 2008.

I have considered these arguments as well as written submissions and authorities cited by counsel for the applicant. Being an application for interlocutory injunction, the parameters for consideration as enunciated in See **Giella Vs. Cassman Brown & Co. Ltd.** (1973) EA 358 case must be satisfied. Has the applicant demonstrated the existence of a *prima facie* case? Is the loss likely to be suffered by the applicant if the order sought is not granted, such that no award of compensation will be sufficient? If the court is in doubt as to the two questions above, it must decide the matter on a balance of convenience. The sale agreement dated 21st January, 2002 alleged to be between the deceased and the applicant will be the crux of the trial.

At the moment, the respondents have expressed doubts as to its authenticity and whether its terms were fulfilled. They have averred that due to closeness of the 1st respondent to the deceased, the sale agreement cannot be genuine as the deceased never disclosed the transaction to him. That averment *per se* does not question the signature alleged to be that of the deceased. Indeed the deceased was not under any obligation to disclose to the 1st respondent or any other person that he was disposing of his property.

It is also deposed that the parcels in question were to be carved out of L.R. 4730/63 or 4730/158. That question can only be determined at the hearing of the main suit. Similarly an explanation why the transaction was not completed by the time the deceased died is for evidence before the trial court.

Regarding consent of the Land Control Board, it has been deposed by the applicant without evidence or averment to the contrary that the suit properties are within the Municipality of Nakuru. The respondents have not shown that they are agricultural land. A plea of *res judicata* will be raised, where, it is proved among other things, that the issues being raised in the present matter were also the subject of the former matter and that they were determined on merit. The ruling in Nkr. Succ. Cause No.15 of 2008 did not determine the rights of the parties with finality but was determined on a technical point.

In short, from the sale agreement, the order in Nkr.H.C.Succ. Cause No.15 of 2008, that the suit property be excluded from the confirmed grant and the rest of the averments, I am satisfied that the applicant has a *prima facie* case with a probability of success at the trial.

In the result, there shall be an injunction in terms of paragraph 2 of the chamber summons dated 28th September, 2010 in respect of the portions claimed by the applicant.

Costs to the applicant.

Dated, Signed and Delivered at Nakuru this 22nd day of February, 2011.

**W. OUKO
JUDGE**