



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 173 of 2009

WALLACE WAGOCHO MWAMBURA.....PLAINTIFF

VERSUS

HIRAM GITONGA MWAMBURA).....1ST DEFENDANT

STEPHEN WAWERU MWAMBURA).....2ND DEFENDANT

THE CHAIRMAN KIGUMO LAND CONTROL BOARD).....3RD DEFENDANT

RULING

The subject matter of this ruling is the motion dated 27/1/2010 taken out by Wallace Wagocho Mwambura, the plaintiff herein, pursuant to the provisions of section 3A of the Civil Procedure Act. In the aforesaid motion, the plaintiff is seeking for an order of mandatory injunction to compel Hiram Gitonga Mwambura and Stephen Waweru Mwambura, the 1st and 2nd defendants herein to withdraw the objection registered with the Kigumo Land Control Board on the sale of the parcel of land known as **L.R. No. Loc. 2/Gacharage/1985**. The applicant also sought for an order directing the chairman, Kigumo Land Control Board, the 3rd defendant herein, to issue the relevant consents to enable the plaintiff sell the land to Anna Wangui Kasango. The plaintiff filed an affidavit he swore in support of the motion. The 1st and 2nd defendants filed the replying affidavit of Hiram Gitonga Mwambura to oppose the application.

I have considered the oral submissions made by learned counsels from both sides. I have also considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed for and against the motion. The substantive suit is expressed in the plaint dated 17th November 2009 in which the plaintiff has prayed for judgment against the defendants in the following terms:-

- (i) ***An order compelling the 1st and 2nd defendants to withdraw the objection to the sale of L.R. No. LOC 2/GACHARAGE/1985 which they have lodged with Kigumo Land Control Board.***
- (ii) ***An order requiring the 1st and 2nd defendants to remove the buildings and tea bushes on L.R. No. LOC 2/GACHARAGE/1985 which they have been using.***
- (iii) ***Costs of suit and interest.***

The defendants on their part have filed a defence with a counter-claim to deny the plaintiff's claim. In the counter-claim the defendants have sought for an order of declaration to the effect that the plaintiff is the registered owner of the aforesaid parcel of land in trust for himself, them and three others namely Sospeter Gichimu, Stephen Waweru and Isaac Ruga.

It is the submission of the plaintiff that he got registered as the proprietor of the parcel of land known as L.R. No. Loc 2/Gacharage/1985 by way of transmission having inherited the same from Mwambura Makeba alias Mwambura Makaba, deceased vide Nakuru H.C.S.C. No. 220 of 1988 on 23rd October 1989. It is said that the defendants never objected to the confirmation of grant hence they are actuated by malice when they

sought to block the plaintiff from enjoying his rights to dispose of his property. The plaintiff avers that he wants to sell his land to enable him purchase another parcel of land in Naivasha but the defendants raised an objection at the Kigumo Land Control Board hence he has failed to obtain the necessary Land Control Board consent to effect the transfer to the prospective buyer.

The defendants on their part opposed the application by relying on the averments contained in the replying affidavit of Hiram Gitonga Mwambura. The defendants aver that this court has no jurisdiction to grant the mandatory order of injunction. They alleged that the plaintiff was registered as the owner of the aforesaid property in trust for them, Gitonga Mwambura, himself, Stephen Gichimu, Julius Kamau and Ruga Isaac who contributed money to prosecute Nakuru H.C. Succession Cause No. 220 of 1988. It is said the land was set aside to be sold to reimburse them the costs they incurred in filing the aforementioned succession cause and to subdivide the land into 10 portions. They further alleged that the plaintiff went contrary to the family agreement and has purported to sell the land. This later action prompted them to raise an objection before the Land Control Board. It is not in dispute that the plaintiff intends to sell the aforesaid parcel of land. It is also admitted by the defendants that they have frustrated the plaintiff's sale transaction by lodging an objection before the Land Control Board. There is no doubt that the plaintiff and the defendants are brothers. They are sons of the late Mwambura Makaba. The certificate of confirmation of grant issued vide Nakuru H.C. Succession Cause No. 220 of 1988 indicates that the parcel of land known as Loc. 2/Gacharage/624 was to be subdivided into three portions whereupon Gitonga Mwambura (1st defendant) and Stephen Waweru Mwambura (2nd defendant) were to each get 5 acres and the Wallace Wagocho Mwambura (plaintiff) was to get one (1) acre. It was not noted in the certificate of confirmation of grant that the plaintiff was to hold the property in trust. I agree with the arguments put forward by the 1st and 2nd defendants that the plaintiff most probably holds the property in trust. In the defence, it is further alleged that the 1st defendant holds the five acres in trust for himself, the plaintiff, Stephen Gichimu, Julius Kamau and Ruga Isaac while the 2nd defendant held the other 5 acres in trust for himself, Patrick Njirii Muthoni, Gichimu and Milka Wambui. It would appear from the pleadings and the averments of the defendants that the trio (i.e. the plaintiff, 1st and 2nd defendants) each holds the respective land transmitted to each in trust. When dealing with an application for a mandatory order of injunction, the principles are well settled. That is to say that the order can only be granted in the clearest of cases. In my view this is not one of those clearest cases. The issues revolving around the existence or otherwise of a trust can only be sorted out by the rigorous of a trial where parties will have a chance to interrogate the witnesses by cross examination.

The end result is that the motion is for dismissal which I hereby order. This being a dispute between members of the same family, I will order costs to abide the outcome of the substantive suit.

Dated and delivered this 7th day of May 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Muguku for respondent and Nganga holding brief for Nancy Njoroge for applicant.