

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 268 of 2004

DANIEL GITAU WAMUKUHA.....PLAINTIFF

VERSUS

NYANDARUA PROGRESSIVE AGENCIES.....1ST DEFENDANT

SALOME WANJIRU.....2ND DEFENDANT

SAMMY DAN TUM.....3RD DEFENDANT

MRS NYOIKE NGURE.....4TH DEFENDANT

MRS NGIGI.....5TH DEFENDANT

RUTH WANYOIKE.....6TH DEFENDANT

RULING

The Plaintiff has filed an application under **Order XXXIX Rule 1, 2, 3 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking orders of injunction to restrain the Defendants jointly and severally from entering, transferring or in any way dealing with the Plaintiff's three acres of land comprised in parcel No. 1171 pending the hearing of the suit filed by the Plaintiff. The Application is based on the legal grounds stated on the face of the Application. The Plaintiff has stated that he had purchased the said three acres from one Limuel Kamau Njoroge, a shareholder of the 1st Defendant. The Plaintiff stated that the 1st Defendant had purported to give, sell or allocate the said three acres belonging to the Plaintiff to the 2nd, 3rd, 4th, 5th and 6th Defendants. The Plaintiff has further stated that the acts of the 1st Defendant were unlawful and motivated by malice. The application is supported by the annexed affidavit of Daniel Gitau Wamukuha, the Plaintiff. The Application is opposed. Francis Wainaina Mugo, the Chairman of the 1st Defendant has sworn a replying affidavit opposing the Plaintiff's application. The summary of the said replying affidavit is that the 1st Defendant depones that the said parcel of land was fraudulently obtained by one Grace Wambui who had fraudulently transferred it to Limuel Njoroge and who in turn had transferred it to the Plaintiff. The 1st Defendant deponed that the share certificate No. 1422 annexed to the Plaintiff's application was not issued by the 1st Defendant and was therefore not genuine. The Defendants were basically stating that the Plaintiff did not have any legal rights over the said parcel of land.

At the hearing of the Application, Miss Njoroge, Learned Counsel for the Appellant submitted that the Plaintiff had purchased the said three acres from a genuine shareholder called Lemuel Njoroge. It was contended on behalf of the Plaintiff that the Plaintiff had executed an agreement as evidence of the said purchase. The Plaintiff had paid the purchase consideration. It was further contended that the directors of the 1st Defendant, in utter disregard of the Plaintiff's legal rights, had purported to sell the said parcel of land to a women group. The Plaintiff submitted that the said women group (represented by the 2nd to 6th Defendants) were attempting to plough the said parcel of land. Learned Counsel submitted that the Plaintiff had satisfied the conditions set in the case of **Giella –versus- Cassman Brown [1973]E. A. 358**. It was submitted that the Plaintiff would suffer irreparable damages if the injunction is not granted. The Plaintiff submitted the balance of convenience tilted in favour of the Plaintiff as the Defendants would not suffer any damage. Learned Counsel submitted that if the application for injunction

was granted the Defendants would not be affected in anyway.

Mr Cheche, Learned Counsel for the Respondents opposed the application. He submitted that if the District Commissioner took money from unsuspecting members of the public, the receipt of such monies was illegal. The Defendants submitted that they were in occupation of the suit land and had even ploughed the land. The Defendants further submitted that the Plaintiff had never been in occupation of the suit land. It was further contended on behalf of the Defendants, that they took occupation when the suit land was vacant. Learned Counsel further submitted that the balance of convenience tilted in favour of the Defendants who were in occupation and therefore stood to suffer. It was further submitted that the Plaintiff could not prove his claim when he was summoned by the officials of the 1st Defendant to explain how he came to own the suit land. It is only when the land had been sold that the Plaintiff came to court.

In reply, Miss Njoroge for the Plaintiff submitted that the Plaintiff had been in occupation of the suit land before the previous suit was struck out. She submitted that the Defendants took occupation of the land only when the Plaintiff's previous suit was struck out. She prayed that the Application for injunction be allowed.

I have considered the pleadings filed by the parties to this application. I have also considered the rival arguments made by respective counsels for the Plaintiff and the Defendants. The issue for determination by this court is whether the material placed before this court is sufficient to enable this court grant the Plaintiff the orders of injunction sought. The matter in dispute is in respect of the ownership of Plot No. 1171 at Nyandarua Progressive Agencies Ltd. While the Plaintiff contend that he is the rightful owner of the said plot, having purchased the same from one Limuel Njoroge Kamau, who was the original allottee, the Defendants argue that the said Limuel Njoroge Kamau was not a shareholder of Nyandarua Progressive Agencies Ltd and therefore could not have had a parcel of land which he could have transferred to the Plaintiff. I have perused the documents annexed to the Plaintiff's affidavit in support of the application. He has annexed a share certificate issued to Limuel Njoroge by Nyandarua Progressive Agencies Limited which showed that the said Limuel Njoroge was a share holder and entitled to land equivalent to three acres. The Plaintiff has further annexed receipts indicating that he was the recognised transferee of the said three acres of land. What emerges from the submissions made before me, is that the officials of the 1st Defendant, doubting the credentials of the Plaintiff as the owner of the said parcel of land, decided to repossess the same and sell it to the 2nd to the 6th Defendants. The question that begs for an answer is this; if the 1st Defendant was of the view that the Plaintiff did not pay the value of the said parcel of land, why did it not demand that the Plaintiff pays for the value of the said parcel of land instead of selling it to someone else? In my view, the fact that there is a possibility that the Plaintiff could not have paid the value for the said parcel of land is no reason why the 1st Defendant took it upon itself to repossess the said parcel of land and sell it to someone else. Two mistakes cannot make a right. There is no member of the 1st Defendant who had complained that he was deprived of land as a result of the said parcel of land being transferred to the Plaintiff. The said parcel of land was not available to be sold to the 2nd to the 6th Defendants. It was allocated to the Plaintiff. The only quarrel seems to be that the Plaintiff had not paid the requisite amount to the 1st Defendant but to the Provincial administration. The 1st Defendant should have pursued the 1st Defendant to pay the required amount failure of which the 1st Defendant would have sought recourse to the law before the Plaintiff was deprived of his parcel of land.

In the premises, I do hold that the Plaintiff has established a prima facie case to entitle him to the prayers of injunction sought. The Defendants, jointly and severally, are therefore restrained from depriving the Plaintiff ownership of Plot No. 1171 Nyandarua Progressive Agencies Ltd or in anyway interfering with his possession of the said parcel of land pending the hearing and determination of the suit filed herein.

The Plaintiff shall have the costs of this application.

DATED at NAKURU this 21st day of January 2005.

L. KIMARU

JUDGE