



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 25 OF 2019

PETER KIARIE WAKANG’U

(Suing as the legal representative of

the estate of the late Wakang’u Tumuti).....PLAINTIFF

VERSUS

PETER KAHURA GITERE

KENNETH KIMARI GITERE

DAVID GITERE WAKANG’U

(Sued as the legal representatives of

the estate of Gitere Kahura).....1ST DEFENDANT

GITERE KAHURA INVESTMENTS LIMITED.....2ND DEFENDANT

SAWA ENERGY LIMITED.....3RD DEFENDANT

RULING

The plaintiff brought this suit on 5th February, 2019 through a plaint dated 4th February, 2019. The plaintiff claimed that Wakang’u Tumuti, deceased (hereinafter referred to only as “the deceased”) and Gitere Kahura, deceased (hereinafter referred to only as “Kahura”) were brothers-in-law and business partners. The plaintiff claimed that through an agreement of sale dated 23rd August, 1978, the deceased and Kahura using the 2nd defendant, Gitere Kahura Investments Limited as an investment vehicle purchased from Dr. Samuel Mundati Gatabaki and Nancy Wanja Gatabaki a portion of all that parcel of land known L.R No. 5980 measuring 60 acres (hereinafter referred to as “the suit property”). The plaintiff claimed that the deceased was a beneficial owner of a portion of the suit property measuring 30 acres while Kahura owned the remaining 30 acres. The plaintiff claimed that the suit property was a coffee estate. The plaintiff claimed that although Kahura owned a portion of the suit property measuring 30 acres as aforesaid, the 1st defendants who were the legal representatives of his estate had been encroaching on the portion of the suit property owned by the deceased. The plaintiff claimed that using the 2nd defendant as a cover, the 1st defendants unlawfully deployed contractors and earth moving equipment to clear coffee plantation on the deceased’s portion of the suit property and in the process denied the plaintiff who was the legal representative of the deceased access to the property.

The plaintiff claimed that there was a pending dispute over the suit property between the 1st and 2nd defendants on the one hand and Dr. Samuel Mundati Gatabaki and Nancy Wanja Gatabaki on the other hand and as such the 1st and 2nd defendants’ interference with the suit property was premature, malicious and intended to defeat the plaintiff’s interest in the property. The plaintiff claimed that unless restrained by the court, the 1st and 2nd defendants would continue to interfere with the plaintiff’s portion of the suit property.

Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 4th February, 2019 seeking a temporary injunction restraining the 1st and 2nd defendants whether by themselves or through their agents, servants, employees or any other person acting on their behalf from trespassing, engaging in construction and/or interfering in any other way with L.R No. 5980 and/or fraudulent subdivisions thereof pending the hearing and determination of the suit. The plaintiff also sought an order that the OCS Runda Police Station be compelled to ensure that the orders of the court sought if granted were complied with. The application which was supported by the affidavit of the plaintiff sworn on 4th February, 2019 was brought on the grounds that I have set out earlier in this ruling. The plaintiff contended that the deceased and Kahura negotiated and equally contributed to the purchase of the suit property from Dr. Samuel Mundati

Gatabaki and Nancy Wanja Gatabaki on 23rd August, 1978. The plaintiff averred that soon after purchasing the suit property, the deceased and Kahura took possession of their respective portions of the suit property measuring 30 acres each and commenced separate coffee farming despite the fact that the sale agreement had not been completed.

The plaintiff averred that on 13th January, 2019, the 1st defendants without a genuine title and in disregard of the boundary that separated the portion of the suit property owned by the deceased and that owned by Kahura deployed contractors on the suit property to clear out coffee plantation from the suit property in order to prepare the property for sale and/or construction. The plaintiff averred that the activities complained of were being undertaken by the 1st defendants under the cover of the 2nd defendant without a valid title since no title had been issued to the defendants by Dr. Samuel Mundati Gatabaki and Nancy Wanja Gatabaki in respect of the suit property owing to a pending dispute between the parties. The plaintiff averred that attempts to stop the 1st and 2nd defendants' illegal activities on the suit property had failed and that the plaintiff's right to property was at risk of being infringed unless the court intervened.

On 14th February, 2019, the court granted interim orders restraining the 1st and 2nd defendants from interfering with coffee plantation on the suit property, excavating the property and carrying out construction thereon pending further orders by the court. The said orders were extended on 14th March, 2019. On 11th July, 2019, the court on application by the plaintiff directed the Officer Commanding Kiambu Police Station to assist in the enforcement of the said orders made on 14th February, 2019 and extended on 14th March, 2019.

The plaintiff's application dated 4th February, 2019 was opposed by the 1st and 2nd defendants through a replying affidavit sworn by David Wakang'u Gitere on 13th March, 2019 and Notice of Preliminary Objection dated 12th March, 2019. David Wakang'u Gitere stated that he was one of the legal representatives of the estate of the late Gitere Kahura (Kahura) and also a director of the 2nd defendant, Gitere Kahura Investments Limited. In summary, he stated as follows in response to the plaintiff's claim and application for injunction: By an agreement of sale dated 23rd August, 1978 between Samuel Mundati Gatabaki and Nancy Wanja Gatabaki (hereinafter referred to as "the Gatabakis") and the 2nd defendant, the Gatabakis sold to the 2nd defendant a portion of L.R No. 5980 measuring 60 acres (the suit property) at an agreed price of Kshs. 2,000,000/-. The said agreement of sale was explicit as to who the parties to the agreement were. The suit property was registered in the name of the 2nd defendant as L.R No. 5980/4. Neither the deceased nor the plaintiff held shares in the 2nd defendant or were directors of the company. The alleged oral agreement between the deceased and Kahura in relation to the suit property was not reduced into writing as required by law and as such could not override the provisions of the written agreement dated 23rd August, 1978. The 2nd defendant acquired the suit property lawfully and procedurally from the Gatabakis. All the requisite approvals and consents were obtained for the subdivision of the hitherto large parcel of land owned by the Gatabakis namely, L.R No. 5980 and the transfer of a portion thereof namely, L.R No. 5980/4 (the suit property) to the 2nd defendant. The Gatabakis gave possession of the suit property to the 2nd defendant and to no one else. The full purchase price for the suit property was made by the 2nd defendant. The deceased did not make any payment towards the purchase price for the suit property. Due to the failure on the part of the Gatabakis to co-operate in the completion of the agreement between them and the 2nd defendant, the 2nd defendant was forced to file a suit against them in 1982 for specific performance namely, HCCC No. 2752 of 1982, Gitere Kahura Investments Ltd. v. Samuel Mundati Gatabaki and Nancy Wanja Gatabaki which suit was compromised by the parties through a consent judgment.

David Wakang'u Gitere stated further that the Gatabakis approved the subdivision of L.R No. 5980 that gave rise to the suit property and received full payment for the property including additional payment for the land that they surrendered for public utility on behalf of the 2nd defendant. He stated that the suit property was vested upon the 2nd defendant by a court order that was issued in the aforesaid suit on 16th May, 1986 and registered on 7th March, 1997. He stated that the 2nd defendant was the registered owner of the suit property.

David Wakang'u Gitere stated further that the plaintiff placed no evidence before the court in proof of his claim to a portion of the suit property. He stated that during the lifetime of the deceased, the deceased did not at any time claim that he owned a portion of the suit property. He stated that even after the death of the deceased, the portion of the suit property claimed by the plaintiff was not mentioned in the succession proceedings as forming part of the deceased's estate. He stated that the 2nd defendant had had exclusive possession of the suit property and that the plaintiff placed no evidence before the court showing that he was in possession of the suit property or that he was engaged in coffee farming. He urged the court to dismiss the plaintiff's application with costs. He annexed several documents to his affidavit as exhibits.

In their Notice of Preliminary Objection dated 12th March, 2019, the defendants contended that the plaintiff's suit was time barred and that the affidavit filed in support of the injunction application was defective for offending the provisions of Order 19 Rules 3 and 5 of the Civil Procedure Rules. The defendants contended further that since the plaintiff had no proprietary interest in the suit property, he had no *locus standi* to bring this suit.

On 29th July, 2019, the 2nd defendant appointed the firm of AGN Kamau Advocates to act for it in place of Chaudhri & Associates Advocates which was hitherto acting for both the 1st and 2nd defendants. In addition to the replying affidavit sworn by David Wakang'u Gitere on 13th March, 2019, he swore a further affidavit on 28th October, 2019 on behalf of the 1st defendants only in opposition to the plaintiff's application. In the further affidavit, he stated that it was irregular for the plaintiff to lump Peter Kahura Gitere, Kenneth Kimari Gitere and David Wakang'u Gitere together as 1st defendant in the suit. He stated that the plaintiff's suit was defective for misjoinder of parties. He stated that as at the time the suit was filed, Peter Kahura Gitere was deceased having died on 28th July, 2010. He stated that a suit cannot lie against a deceased person. David Wakang'u Gitere stated further that the title held by the 2nd defendant in respect of the suit property was legal and not fake as claimed by the plaintiff and that the plaintiff had no title or any interest in the suit property recognized by law.

On 19th July, 2019, the 3rd defendant which was not a party to the suit when the same was filed brought an application to be joined as a party to the suit. In addition to the order for joinder, the 3rd defendant sought orders varying, reviewing and/or setting aside the orders made by the court on 14th February, 2019 and 11th July, 2019 and allowing it to continue with the construction that it had commenced on the premises

known as L.R No. 5980/67 pending the hearing and determination of the suit and/or further orders by the court. The 3rd defendant also sought an order restraining the plaintiff and the Officer Commanding Kiambu Police Station from in any way interfering with its construction activities on L.R No. 5980/67 pending the hearing and determination of the suit or further orders by the court.

The 3rd defendant's application which was supported by the affidavit of its Managing Director, Abudin Mohamed Sheikh sworn on 19th July, 2019 was brought on the grounds that: On 18th March, 2019, the 3rd defendant entered into a lease agreement with one, David Itibi Gitere in respect of L.R No. 5980/67 under which the said David Itibi Gitere leased to the 3rd defendant L.R No. 5980/67 for a period of 30 years for the purposes of constructing and operating a petrol station. Pursuant to the said lease, the 3rd defendant took possession of the premises and commenced construction of a petrol station and related amenities. The 3rd defendant had assembled on site construction materials worth colossal sums of money. The 3rd defendant had also paid contractors and the construction of the petrol station was at an advanced stage. On 14th February 2019 and 11th July, 2019, the plaintiff obtained orders against the 1st and 2nd defendants which the plaintiff was using with the help of the Officer Commanding Kiambu Police Station to harass the 3rd defendant, its employees and contractors at the construction site. Since David Itibi Gitere who had leased L.R No. 5980/67 to the 3rd defendant was not a party to the suit, the orders obtained against the 1st and 2nd defendants were not binding upon him and as such could not be used to harass, intimidate and frustrate the 3rd defendant's project. The 3rd defendant acquired L.R No. 5980/67 legally and had invested heavily on the same which investment was likely to go to waste as a result of the activities complained of. The 3rd defendant was likely to suffer substantial loss unless the court intervened. The 3rd defendant was an innocent lessee and its rights over L.R No. 5980/67 were likely to be infringed unless the orders issued on 14th February, 2019 and 11th July, 2019 were reviewed, varied and/or set aside and the injunction sought against the plaintiff and the Officer Commanding Kiambu Police Station granted.

The 1st defendants supported the application by the 3rd defendant through a replying affidavit sworn by David Wakang'u Gitere on 28th October, 2019. In the affidavit, David Wakang'u Gitere stated that the parcel of land that was leased to the 3rd defendant by David Itibi Gitere represented David Itibi Gitere's share in the 2nd defendant. He stated that the 3rd defendant had a right to be added to the suit because orders could be made in the suit prejudicial to its interest.

The 3rd defendant's application was opposed by the plaintiff through a replying affidavit sworn on 4th November, 2019. In the affidavit, the plaintiff averred that as at the time the 3rd defendant purported to enter into a lease agreement with David Itibi Gitere in respect of L.R No. 5980/67, there was already an order in force issued by this court restraining among others the said David Itibi Gitere from interfering with the suit property. The plaintiff averred that in the circumstances, the lease agreement between the 3rd defendant and David Itibi Gitere was entered into in violation of the said court order and as such could not form a basis for a cause of action. The plaintiff averred that the 3rd defendant was well aware of the said court order and as such it was a party to the contempt of court that was committed during the execution of the said lease agreement. The plaintiff averred further that the lease agreement that was relied on by the 3rd defendant as a basis for its application was void on account of the fact that the purported L.R No. 5980/67 and/or L.R No. 5980/7 which was the subject of the lease was nonexistent. The plaintiff averred that L.R No. 5980 that was owned by the Gatabakis had not been subdivided and as such no valid titles for the subdivisions thereof had been issued. The plaintiff averred that the court could not issue orders in respect of a nonexistent piece of land. The plaintiff wondered how the 3rd defendant managed to obtain approvals for its petrol station project and a change of user of L.R No. 5980/67 from agricultural to light industry without a valid title in respect of the property. The plaintiff averred that the 3rd defendant was not an innocent lessee and that it came to court with unclean hands. The plaintiff averred that the 3rd defendant could not be permitted by the court to continue construction on a nonexistent parcel of land and that such an order would amount to allowing the 3rd defendant to profit from an illegality. The plaintiff averred further that the 3rd defendant's remedy if any was against David Itibi Gitere. The plaintiff averred that the orders issued on 14th February, 2019 and 11th July, 2019 should remain in force pending the hearing and determination of the suit.

On 7th November, 2019, the 3rd defendant was added as a party to the suit. The court made further orders that, the 3rd defendant's application dated 19th July, 2019 was to be heard together with the plaintiff's application dated 4th February, 2019 as concerns the remaining orders and that the two applications were to be heard by way of written submissions. There was a further order that the 3rd defendant would rely on the affidavit in support its application in opposition to the plaintiff's application dated 4th February, 2019. Following those orders, the 3rd defendant, the plaintiff, the 1st defendants and the 2nd defendant filed their written submissions on 16th December, 2019, 27th November, 2019, 21st February, 2020 and 27th February, 2020 respectively.

I have considered the plaintiff's and the 3rd defendant's applications together with the affidavits filed in support thereof and in opposition thereto. I have also considered the defendants' Notice of Preliminary Objection. Finally, I have considered the written submissions by the parties' respective advocates and the various authorities cited in support of the submissions. I will consider the plaintiff's application dated 4th February, 2019 first because it was first in time and also because the determination thereof will have a bearing on the 3rd defendant's application dated 19th July, 2019. The plaintiff's application seeks a temporary injunction restraining the 1st and 2nd defendants from interfering with L.R No. 5980 in any way and/or the fraudulent subdivisions thereof pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for temporary injunctions are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, that was cited by the plaintiff, it was held that an applicant for an interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 also cited by the plaintiff in his submissions and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the

court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

It is on the foregoing principles that the plaintiff's application falls for consideration. From the material before me, I am not satisfied that the plaintiff has satisfied the conditions for granting the orders sought in his application. I am not satisfied that the plaintiff has demonstrated that he has a prima facie case against the defendants with a probability of success. The plaintiff's suit relates to L.R No. 5980. The injunction is sought over the whole parcel of land which the plaintiff claims to be measuring about 200 acres and/or its fraudulent subdivisions. The plaintiff has claimed that L.R No. 5980 has not been subdivided and that the same remains registered in the names of the Gatabakis. The Gatabakis who are alleged to be the registered owners of L.R No. 5980 are not parties to the suit although they are alleged to have given a letter through their advocates Gatheru Gathemia & Company Advocates supporting the plaintiff's claim. The basis of the plaintiff's claim is that Wakang'u Tumuti(deceased) and Gitere Kahura, deceased (Kahura) equally contributed to the purchase of a portion of L.R No. 5980 measuring 60 acres (the suit property). The plaintiff has claimed that the said 60 acres was purchased through the 2nd defendant and that the deceased was entitled to a portion of the suit property measuring 30 acres. The plaintiff has also claimed that the deceased and Kahura both took possession of their respective portions of the suit property soon after purchase and remained in occupation each cultivating coffee thereon until 13th January, 2019 when the 1st and 2nd defendants through their agents invaded the deceased's portion of the suit property and started uprooting coffee plantation in order to commence construction.

Apart from the letter dated 21st January, 2019 from the firm of Gatheru Gathemia & Company Advocates said to have been written on behalf of the Gatabakis in which the said firm has stated that the deceased was a joint purchaser of the suit property together with Kahura, the plaintiff placed no evidence before the court connecting the deceased to the suit property. Although the plaintiff claimed that the deceased and Kahura equally paid the purchase price for the suit property, no evidence of such payment was placed before the court. The agreement of sale dated 23rd August, 1978 through which the suit property was acquired does not mention the deceased as a co-purchaser of the property or a contributor to the purchase price. The agreement expressly states that the 2nd defendant was the purchaser of the suit property. The letter from Gatheru Gathemia & Company Advocates aforesaid on which the plaintiff has put heavy reliance does not set out any basis for the claim that the deceased was a joint purchaser of the suit property. The plaintiff had also put reliance on the letter dated 5th February, 2019 that was written by the 2nd defendant's former advocates, Chaudhri & Associates to the National Land Commission. I find nothing in that letter showing that the deceased contributed to the purchase of the suit property.

The plaintiff has also not placed any evidence before the court showing that either the deceased or the plaintiff has been in possession of the suit property. The plaintiff who claimed that the deceased had a coffee plantation on his portion of the suit property did not place before the court any evidence of coffee farming or cultivation. The deceased died on 22nd June, 1999 and grant of letters of administration in respect of his estate was issued to the plaintiff and one, George Mwangi Wakang'u on 20th December, 1999 by the High Court at Nairobi. The plaintiff did not produce any evidence before the court showing that a portion of the suit property claimed herein was listed as one of the deceased's property in Nairobi High Court Succession Cause No. 2265 of 1999 in which the said grant was issued. There is also no evidence that during his lifetime, the deceased made any effort to obtain a title for the portion of the suit property claimed by the plaintiff. The plaintiff has also claimed that the Gatabakis were not fully paid for the suit property. The court is at a loss as to why the plaintiff is claiming a property that was not paid for in full. I also find the plaintiff's contention that the Gatabakis were not paid the full purchase price inconsistent with his claim that the deceased paid half of the purchase price.

Without determining the matter with finality as I am not supposed to do that at this stage, I am satisfied on a prima facie basis from the material placed before the court by the 1st and 2nd defendants that the suit property which is now known as L.R No. 5980/4 was lawfully acquired by the 2nd defendant and that the 2nd defendant is the registered owner thereof. Although the plaintiff has claimed that the subdivision of L.R No. 5980 that gave rise to L.R No. 5980/4 was fraudulent and that the title held by the 2nd defendant for L.R No. 5980/4 is fake, the plaintiff neither pleaded fraud in his plaint nor placed before the court evidence of the alleged fraud. An allegation of fraud must not only be pleaded but must also be strictly proved. In Black's Law Dictionary, 9th Edition at page 731 fraud is defined as:

"a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

In Ratilal Gordhanbhai Patel v Lalji Makanji [1957] E.A 314, the court stated as follows at page 317:

"Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

As correctly submitted by the 1st and 2nd defendants, most of the information that the plaintiff relied on as proof of the 1st and 2nd defendants' alleged acts of fraud were not within his personal knowledge. As I have stated earlier, the Gatabakis whose land; L.R No. 5980 was allegedly subdivided fraudulently by the 1st and 2nd defendants are not parties to this suit. I am not satisfied from the material placed before the court by the plaintiff that the title held by the 2nd defendant over L.R No. 5980/4 is fraudulent and fake.

Due to the foregoing, it is my finding that the plaintiff has not established a prima facie case against the defendants with a probability of success. On whether the plaintiff stands to suffer irreparable harm that cannot be compensated in damages if the orders sought are not granted, again, I am not satisfied that that would be the case. First, the plaintiff has failed to demonstrate that he has a prima facie case against the defendants and as such the court need not consider whether or not he is likely to suffer irreparable harm if the orders sought are not granted. Secondly, as I have stated earlier in the ruling, the plaintiff has not convinced me that either the deceased or the plaintiff has been in possession of the suit property. I am unable to see the harm that the plaintiff who has not been in possession of the suit property will suffer if the orders sought are not granted.

On the issue of balance of convenience, the same is only considered when the court is in doubt whether a prima facie case has been made out and whether the applicant would suffer irreparable harm if the injunction is not granted. In this case, I am not in doubt as to the foregoing. For that reason, it is not necessary to consider the balance of convenience.

The upshot of the foregoing is that the plaintiff's Notice of Motion application dated 4th February, 2019 has no merit. The disposal of the plaintiff's application takes me to the 3rd defendant's application dated 19th July, 2019. As I have stated earlier in this ruling, the 3rd defendant was joined as a party to this suit on 7th November, 2019. The only prayers remaining for determination in the 3rd defendant's application are those seeking; variation of the orders granted herein on 14th February, 2019 and 11th July, 2019 in favour of the plaintiff, permission to continue with construction on a parcel of land known as L.R No. 5980/67 pending the hearing of the suit or further orders by the court and an order of injunction restraining the plaintiff and the Officer Commanding Kiambu Police Station from interfering with its enjoyment of the said L.R No. 5980/67. I am of the view that this application has been overtaken by events. The orders made on 14th February, 2019 and 11th July, 2019 in favour of the plaintiff were interim orders pending the hearing and determination of the plaintiff's application dated 4th February, 2019. Since I have held that the application has no merit, the same shall be dismissed with the effect that the said orders shall stand discharged. It is not necessary therefore to review, vary or set aside the said orders in the circumstances. The same applies to the order seeking permission to continue with construction. The construction by the 3rd defendant was halted by the said orders of 14th February, 2019 and 11th July, 2019 which shall be discharged following the court's decision on the plaintiff's application aforesaid. The last order sought by the 3rd defendant should suffer the same fate. What the 3rd defendant referred to as harassment or intimidation by the plaintiff and the Officer Commanding Kiambu Police Station were acts aimed at enforcing the orders granted herein on 14th February, 2019 and 11th July, 2019. After the discharge of those orders, it will not be necessary to grant the injunction sought against the plaintiff and the Officer Commanding Kiambu Police Station complained of.

In the final analysis and for the foregoing reasons, I hereby make the following orders;

1. The plaintiff's Notice of Motion application dated 4th February, 2019 is dismissed with costs.
2. Consequently, the orders granted on 14th February, 2019 and 11th July, 2019 are discharged.
3. The 3rd defendant's application dated 19th July, 2019 is overtaken by events in view of the orders above.

Delivered and Dated at Nairobi this 1st day of October 2020

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kamau for the Plaintiff

Ms. Mbirwe h/b for Mr. Kamau for the 1st Defendant

Ms. Sumba for the 2nd Defendant

Mr. Ayieko for the 3rd Defendant

Ms. C. Nyokabi-Court Assistant