



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 3 OF 2017**

**AUGUSTINE BARASA KHISA NAWANJE.....PLAINTIFF**

**VERSUS**

**EUNICE MUGURE MUCHORI (*Suing as an administratrix of the estate***

***of the late JOHN MUCHORI BAIYA) .....DEFENDANT***

**RULING**

1. The plaintiff's application dated **4/4/2017** seeks an order of temporary injunction restraining the defendant and her agents from entering, trespassing, transferring and/or in any other manner interfering with the plaintiff's possession, ownership and/or interest in the land comprised in **Plot No. 30 Nyasi Settlement Scheme** measuring approximately **5 acres** pending the hearing of the suit.

2. The grounds upon which the application is based are set out in brief at its foot. The plaintiff states that he is the legal and beneficial owner of the suitland, having purchase the same at a consideration of **Kshs.25,000/=** from the initial owner one **Stephen Fwamba** vide an agreement dated 9/2/1980; that the plaintiff has been in uninterrupted possession and use of the suitland for more than 35 years and currently stays on the land; the defendant fraudulently and illegally included the suitland in the list of assets forming the estate of **John Muchori Baiya** while it does not form part of that estate, and that a Certificate of Confirmation of Grant has been issued showing that the defendant allocated the suitland to herself. It is also alleged that the defendant has brought prospective purchasers to view the suitland.

3. The application is opposed by the defendant who filed a replying affidavit she sworn on **18/4/2017**. In the reply she stated that she is the widow of John Muchori Baiya; that she is the administratrix to her deceased husband's estate; that she is the registered proprietor of the land by way of transmission of the suitland, now referred to as **Trans-Nzoia/Nyasi/30**, that the land formerly belonged to her late husband's estate; that her deceased husband purchased the suitland from one Stephen Fwamba, who is now deceased; that all proper procedures had been followed in the purchase of the suitland which involved the Settlement Fund Trustees; that the land was transferred to her deceased husband in the year **1991** following approval by the Land Control Board; that the defendant procured a discharge of charge from the Settlement Fund Trustees after which she was issued with a title; that the plaintiff tried to "grab" the land in the year **2013**, without the defendant's knowledge but was chased away by neighbours who knew the land had been sold by Fwamba to her now deceased husband, and that the plaintiff does not live on the land.

4. The defendant has also stated that upon the advice of her lawyer she believes that the alleged agreement between the plaintiff and Fwamba was null and void for want of Land Control Board Consent. She accuses the plaintiff of forging the alleged agreement.

5. Among the documents that the plaintiff included as an exhibit is his supporting affidavit sworn on 4/4/2017 is a copy of a letter dated 16/5/2016 from the Land Adjudication and Settlement Department, Trans-Nzoia District. The letter is addressed to the Director, Land Adjudication and Settlement. From the said letter it is evident that the transfer to the defendant's deceased husband by Fwamba occurred in the year 1991 and that the same was authorized by the Land Control Board.

6. The plaintiff avers in his supporting affidavit that he learnt of the disposal of the suitland to the defendant's deceased's by reading that letter. If the letter is dated **16/5/2016**, what was the plaintiff doing all that time since **1991**? The answer is that the plaintiff had filed **Kitale SRMC No. 181 of 1991 Augustine Barasa Nawanje –vs- Stephen Fwamba**. It is noteworthy that the defendant's husband was not made a party to the proceedings therein.

7. Also, it is conceded that though an order issued in that case ordering the defendant therein to execute all necessary transfer forms in respect of Plot No. 30, Nyasi Settlement Fund Trustee Farm to the plaintiff's name in default of which the Executive Officer should sign the same, the plaintiff never effected transfer of the suitland to his name.

8. It is not clear whether the transaction between the plaintiff and Stephen Fwamba was consented to by the Land Control Board. One thing is clear from all these records though: that Fwamba had refused to sell the land to the plaintiff hence the suit.

9. The conditions upon which applications for temporary injunctions are determined were set out in the celebrated case of **Giella-vs- Cassman Brown & Co. Ltd [1973] EA 358 at page 360**. This court is now faced with such an application for a temporary injunction, and the defendant is registered as proprietor, and the plaintiff is admittedly no longer in physical possession of the land. Has a prima facie case been made out by the plaintiff?

10. The rights of a registered proprietor are protected by law, and are only subject to leases charges and other encumbrances and to the conditions and restrictions shown in the register and to such liabilities, rights and interest as affect the same and are declared by **Section 28 of the Land Act** not to require noting on the register unless the contrary is expressed in the register. None of these rights are claimed herein.

11. Though the plaintiff claims fraud in the plaint, it is subject to proof at the main hearing of the suit. However the claims of fraud herein appear quite weak; the plaintiff himself acknowledges that the land was transferred to the defendant's deceased husband in the year 1991 while the decree he has is dated **December, 1992**. The seller had also refused to sell the land to the plaintiff. The defendant's late husband had also not been made a party in **Kitale SRMC No. 181 of 1991 Augustine Barasa Nawanje –vs- Stephen Fwamba**.

12. In my view, all the circumstances analysed above do not reveal that the plaintiff has a *prima facie* case with a probability of success against the defendant and there is no need therefore to go into the second test for the grant of a temporary injunction laid in the celebrated case of **Giella –vs- Cassman Brown** quoted above.

The plaintiff's application dated **4/4/2017** is hereby dismissed with costs to the defendant.

Dated, signed and delivered at Kitale on this **28<sup>th</sup>** day of **September, 2017**.

**MWANGI NJOROGE**

**JUDGE**

**28/09/2017**

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Teti for Plaintiff

N/A for the Defendant

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGI**

**JUDGE**

**28/09/2017**