



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 747 OF 2017

WAIRIMU GITAU alias WAIRIMU WAWERU

(Suing in her capacity as the Co - Administratrix of the

Estate of the late Johanna Gitau Muchiri (deceased).....1ST PLAINTIFF

HANA NJOKI GITAU (Suing as the holder of

General Power of Attorney in favour of WAIRIMU WAWERU).....2ND PLAINTIFF

VERSUS

THE ADMINISTRATOR OF THE ESTATE OF EDWARD GITAU NJENGA

(DECEASED).....1ST DEFENDANT

KAJIADO COUNTY LANDS REGISTRAR.....2ND DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....1ST INTERESTED PARTY

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2ND INTERESTED PARTY

RULING

The application before the Court is the Plaintiff's Notice of Motion dated 31st May, 2017 brought pursuant to Section 45 of the Law of Succession Act, Section 1, 1A, 1B, 3, 3A & 63 of the Civil Procedure Act, Order 40 rules 1(1) & Order 51 rule 1 of the Civil Procedure Rules, Section 26 (1) (a) and Section 80 (1) of the Land Registration Act, Articles 40 & 159 (2) of the Constitution and all the other enabling provisions of the law.

The application is based on the grounds that the suit property was acquired by the late Johanna Gitau Muchiri vide a letter of transfer dated 12th January, 1984 from the Ol Kejuado County Council (presently County Government of Kajiado) and which was at the time known as Plot no. 305/117/Residential - Ngong T/ship (now Ngong Township Block 1/382) hereinafter referred to as the 'suit property' and the same did not have title. Pending the Nairobi Succession Cause No. 668 of 2006, the late Edward Gitau fraudulently caused the registration of the suit property to him name and obtained a Certificate of Lease. The suit property was subsequently distributed to the 1st Plaintiff vide the said Nairobi Succession Cause and a Certificate for Confirmation of Grant dated 6th October, 2014 issued. The 1st Plaintiff realized the suit property had been registered in the name of the late Edward Gitau allegedly on 31st January, 1994. The registration of the suit property in the name of the late Edward Gitau is fraudulent as at 3rd February, 2014 the 1st Plaintiff paid a sum of Kshs. 41, 640 on account of rent arrears while the suit property was

still registered in the name of the late Johanna Gitau Muchiri.

The application is supported by the affidavit of HANA NJOKI GITAU who deposes that on 21st October, 2015 when the 1st Plaintiff went to effect transfer of the suit property in her name at the Ol Kejuado County Council, she discovered that a Certificate of Lease had been issued to Edward Gitau on 31st January, 1994. She avers that upon inquiry the 1st Plaintiff was issued with a letter that had allegedly been written on 13th December, 1993 by the deceased requesting for a Consent to transfer the suit property to Edward Gitau. Further that the Ol Kejuado County Council thereafter issued a consent to transfer vide a letter dated 14th December, 1993. She avers that the issuance of the Certificate of Lease to Edward Gitau is a forgery because as at 3rd February, 2014 when the 1st Plaintiff paid rent arrears for the suit land, it was still in the name of the late Johana Gitau Muchiri. She states that they are apprehensive that if the orders sought are not granted the 1st Plaintiff will lose her proprietary rights over the suit property which had been given to her vide the abovementioned Nairobi Succession Cause. She further avers that the Plaintiffs' are ready and willing to provide written undertaking as to damages suffered by the 1st Defendant upon granting the injunction.

The application was unopposed as the Defendants' failed to enter appearance nor file replying affidavit to oppose the application. I note from the affidavit of service that they were all duly served.

The Plaintiffs' filed written submissions which I have considered.

Issues and Determination

Upon perusal of the materials presented by the Plaintiffs in respect of his claim including the written submissions, I find that the issues for determination are

- Whether the Plaintiff is entitled to the temporary injunction sought.
- Whether this Court has jurisdiction to handle the dispute relating to the suit property which had already been subject of the Nairobi High Court Succession Cause No. 668 of 2006,

The principles of granting interlocutory injunction were settled in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** where the court held inter alia that for an injunctive order to be granted the Applicant has to demonstrate it has prima facie case with a probability of success, and it stands to suffer irreparable loss or injury which cannot adequately be compensated in damages. If the court is in doubt, it should decide the application on a balance of convenience. In line with the said principles, I wish to interrogate the evidence presented as to whether the Plaintiff has established a prima facie case with probability of success.

Even though the application is unopposed, I note that the 1st Defendant obtained a Certificate of Lease on 31st January 1994. The Land Registration Act at Section 26 (1) states as follows: **"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -**

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party;
or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. '

I note the said Certificate of Lease was issued while the deceased Johana Gitau Muchiri was still alive but he never challenged it. Annexure 'HNG 10' is a letter from the Ol Kejuado County Council dated 14th December, 1993 giving a consent to the deceased to transfer the suit land to Edward Gitau Njenga. In the said letter, the clerk to the County Council in granting the consent referred to the deceased letter dated

13th December, 1993 seeking for it. This is evident that it is indeed the deceased who initiated the transfer of the suit land to the Edward Gitau Njenga and I am unable to see any fraud as alleged. I am persuaded by the case of **Ahmed Ibrahim Suleiman and Another vs. Noor Khamisi Surur (2013) eKLR** where Justice J.M. Mutungi stated that ' **the Plaintiff having been registered as proprietor and having been issued with a certificate of lease over title No/ Nairobi/Block 61/69 are in terms of section 26(1) of the Land Registration Act entitled to the protection of the law**'.

Section 24 (b) of the Land Registration Act stipulates as follows: ' **subject to this Act, the registration of a person as a proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto.....**'

These provisions make it clear that the 1st Defendant by virtue of being registered as a Lessee in 1994 is vested with the leasehold interest together with the expressed rights and privileges belonging to it.

What is interesting is that the Kajiado County Government received the payment of land rates from the 1st Plaintiff and yet they already had in their custody a letter dated 14th December, 1993 (annexure HNG 10) which was consent granted by the defunct Ol Kejuado County Council allowing the deceased JOHANA GITAU MUCHIRI to transfer suit land to EDWARD GITAU NJENGA. I find that the Plaintiffs' have not furnished the Court with any materials to prove the alleged fraud by the 1st and 2nd Defendants culminating in the 1st Defendant acquiring the Certificate of Lease over the suit property. Further the Certificate of Lease was obtained more than ten (10) years before the Nairobi Succession Cause was filed. The issues they raise cannot be determined at this interlocutory stage but will require oral evidence to enable the court arrive at a proper conclusion of this matter.

I note that the Plaintiffs' and 1st Defendant are family members who have been through the Nairobi Succession Cause No. 668 of 2006 where the estate of JOHANA GITAU MUCHIRI was distributed as per the Certificate for Confirmation of Grant marked as annexure 'HNG 6'. The Court does not have the power to overturn the wishes of a deceased who advanced his property to a person when he was still alive. It is my considered opinion that the Plaintiffs have a recourse in the Nairobi Succession Cause to move the Court in accordance with the provisions of Section 42 of the Law of Succession Act which provides as follows: '**Where—**

(a) an intestate has, during his lifetime or by will, paid, given or settled

any property to or for the benefit of a child, grandchild or house; or

(b) property has been appointed or awarded to any child or grandchild under the provisions of section 26 or section 35 of this Act, that property shall be taken into account in determining the share of the net intestate estate finally accruing to the child, grandchild or house.'

From the above, it is clear that Plaintiffs' have not established a prima facie case to meet the threshold for the grant of orders of injunction. I consequently dismiss the Plaintiffs' Notice of Motion dated the 31st May, 2017.

Costs will be in the cause

Dated signed and delivered in open court at Kajiado this 27th September, 2017.

CHRISTINE OCHIENG

JUDGE

REPRESENTATION.

M/s Obedo for plaintiff

No appearance for defendants