



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 230 OF 2017**

**STEPHEN WAWERU GITHUTHA.....PLAINTIFF**

**VERSUS**

**WAWERU KIHARA.....1<sup>ST</sup> DEFENDANT**

**DANIEL MUCHINA MWATHI.....2<sup>ND</sup> DEFENDANT**

**RULING**

***(Suit by plaintiff alleging that the defendants procured a transfer of his land by alleging that the plaintiff is dead; defendants refuting the allegation and claiming that the plaintiff willfully sold the land; injunction; prima facie case; no evidence tendered by plaintiff that the land was transferred by transmission as claimed; but also defendants not availing any sale agreement or evidence of any sale to them by the plaintiff; court being in doubt; balance of convenience considered; status quo to be maintained pending hearing of suit ).***

1. This suit was commenced on 31 May 2017 by way of plaint. In his plaint, the plaintiff has pleaded that on 19 June 1978, he became a member of GEMA Holdings Limited, presumably a land buying company, and that he held one share. He has averred that he eventually became registered as proprietor of the land parcel Gilgil/Gilgil Block 1/5384 (Kekohey) on 9 February 1994 and that he immediately took possession of the land and started utilizing it. On 29 November 2015, he got information that the defendants have entered his land and have started ploughing it and he reported the matter to the Naivasha Police Station. He did some investigations at the Naivasha Land Registry and discovered that the defendants have presented documents to the Land Registrar, to the effect that the plaintiff is dead and that thereafter the land was transmitted on 11 August 2003. After this transmission, which the plaintiff avers was fraudulent, the defendants shared the said land parcel Gilgil/Gilgil Block 1/5384 (Kekohey) and registered themselves as owners of the resultant subdivisions being numbers 12117-12125. In the suit, the plaintiff wishes to have these titles cancelled, alongside orders of eviction and permanent injunction against the defendants.

2. Simultaneously with the plaint, the plaintiff filed an application for injunction, seeking to have the defendants restrained from dealing with the suit properties until this suit is heard and determined. It is that application which is the subject of this ruling. In his supporting affidavit, the plaintiff/applicant has more or less repeated his averments in the plaint. He has also annexed copies of the Green Cards to the parcel No. 5384 and the parcel Nos. 12117-12125. He has also submitted documents to prove that he was a shareholder of GEMA Holdings Limited.

3. The defendants/respondents have opposed the subject application through the replying affidavit of the 1st defendant/ respondent. He has averred that he did purchase the land parcel No. 5384 in the year 2003 and that he paid the sum of Kshs. 130,000/= to the plaintiff after which the plaintiff transferred the land to him. He has asserted that this was on a willing buyer willing seller basis and that a sum of Kshs. 30,000/= was even paid to the plaintiff's son. In the year 2014, he embarked on a subdivision of the said land. In November 2015, he was summoned by the CID Naivasha, owing to a complaint made and he gave his side of the story. An inquiry file was opened which resulted in the Director of Public Prosecutions writing a letter that the transfer to the 1st respondent was not fraudulent. He has deposed that after subdivision, he sold the subdivision No. 12117 to the 2nd defendant.

4. The applicant filed a supplementary affidavit whereupon he refuted selling the land to the 1st respondent.

5. I have considered the matter alongside the written submissions of counsel for the applicant and respondents. This being an application for injunction, I stand guided by the principles laid down in the case of *Giella vs Cassman Brown (1973) EA 358*, wherein it was stated that to succeed in an application of this nature, the applicant needs to demonstrate a prima facie case with a probability of success; show that he stands to suffer irreparable loss if the injunction is not allowed; and if the court is in doubt, it will decide the application on a balance of convenience.

6. The applicant in his pleadings has averred that he was the original owner of the land parcel No. 5384 and has alleged that the land was transferred to the 1st respondent after a claim that the plaintiff was dead. He has averred that the land was thus fraudulently transferred to the 1st respondent by way of transmission. On his part, the 1st respondent has claimed that he purchased the said land on a willing buyer/willing seller basis.

7. From the evidence tendered by the applicant, nowhere has he tabled any evidence to demonstrate that the land parcel No. 5384 was transferred to the 1st respondent by way of transmission. There would be nothing easier than to provide the case number where a succession was conducted, or table the confirmed grant, if indeed this is the basis of his case. Neither has he provided any death certificate that one would expect to have been supplied to the Land Registrar of Naivasha if indeed the transfer to the 1st respondent was made on an allegation that the plaintiff was deceased. In fact, save for the empty claim of the applicant that the land was transferred to the 1st respondent by pretense that the applicant is deceased, I have no such evidence before me.

8. On the other hand, the respondents have not supplied the sale agreement vide which it is claimed that the applicant sold land to the 1st respondent. Neither have they tendered the transfer instruments that the applicant is expected to have executed if indeed he sold the land to the 1st respondent.

9. The situation that I have is one of doubt, and being in doubt, it is best that I decide this application on a balance of convenience. In my view, the balance of convenience tilts towards maintaining the status quo. I therefore issue an order stopping the respondents from selling, charging, or entering into any adverse dealings over the land parcels No. Gilgil/Gilgil Block 1/1211- to 12125 (inclusive)(Kekopey) until this case is heard and determined. I also make an order that no party is to make any structures on these parcels of land until this case is finalized. The current status quo as to possession of the land, to be maintained until the case is concluded.

10. As to costs, the same will be in the cause.

11. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 18<sup>th</sup> day of October 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of : -**

Mr. Magata holding brief for Mr. Gichuki for the plaintiff/applicant

No appearance on the part of Ms. Nancy Njoroge for the defendant /respondent

Court Assistant :Carlton Toroitich

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**