



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.102 OF 2017

TRUPHENA ATEMO MUTOKA.....1ST PLAINTIFF

WANYAMA JOSEPHINE AKHULA.....2ND PLAINTIFF

VERSUS

LEVY MAKALI SIMIYU.....1ST DEFENDANT

LUKE OPWORA.....2ND DEFENDANT

LANDEX GROUP LIMITED.....3RD DEFENDANT

RULING

Order 1A Rule(3) of the Civil Procedure Rules provides that:

“A Party to Civil proceedings or an advocate for such a Party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.” Emphasis added.

The overriding Objective of the Civil Procedure Act and the Rules is to facilitate ***“the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”*** The Courts are now required to take charge of proceedings and not to leave the parties and Counsel to dictate on how and when to be heard on their applications.

Parties and their legal advisers must therefore be warned that Courts will no longer take a laid down approach to litigation or accommodate parties who do not assist the Court in achieving those objectives. Parties who frustrate those objective stand the risk of the Court dismissing their applications or penalizing them with costs in appropriate cases.

The Plaintiff filed this suit on 14th August 2017 seeking the main order restraining the 1st and 2nd defendants, their agents, servants and/or any other person from selling, transferring or alienating the land parcel No. EAST BUKUSU/SOUTH KANDUYI/13394 (the suit land herein) to the 3rd defendant or any other person without the consent of the Plaintiff. The Plaintiff further sought an order of injunction to restrain the 3rd defendant from dealing with the 1st and 2nd defendants or any other third Party with respect to the land in dispute.

Simultaneously with that Plaint, the 1st Plaintiff filed a Notice of Motion seeking a temporary injunction against the 1st and 2nd defendants restraining them, their agents, servants and/or assigns from disposing of the suit land to the 3rd defendant or any other person pending the hearing and determination of the application inter-parte.

That application was placed before **OMBWAYO J** at the **ELC ELDORET** who issued the following Orders on 16th August 2017

1 “Bungoma District Land Registrar be and is hereby restrained from carrying on any transaction in respect of property No. E. BUKUSU/S. KANDUYI/13394 until hearing of the application inter-partes herein.

2. The matter be heard on 21.9.2017.

3. Serve within 7 days.”

On 21st September 2017, the parties appeared before **MUKUNYA J** and since the defendants had not filed any response to the said

application they were granted 14 days to do so. The Judge also made the following order;

“Application dated 12.8.2017 shall be heard on 2.11.2017 the interim orders are extended to that date.”

The record is silent on what transpired on 2nd November 2017 and clearly this matter was not heard on that day. On 7th June, 2018, the 3rd defendant filed a Notice of Motion dated 4th June 2018 seeking the main prayer that the Orders issued on 16th August 2017 be vacated having lapsed by operation of the Law. In support of that application, the 3rd defendant's Director **ISAAC OPICHO MUKHWANA** filed a supporting affidavit in which he deponed, inter alia, that the 3rd defendant purchased the suit property from the 1st and 2nd defendants on 22nd June 2017 at a consideration of Kshs.5,000,000 and there were no encumbrances thereon. That the Plaintiffs having obtained ex-parte orders on 16th August 2018 stopping any dealings on the suit land, the same were registered against the title to the property and the ex-parte orders were by consent extended to 2nd November 2017. However, the Plaintiffs have not taken any steps eight(8) months down the line to have the application prosecuted and this delay is detrimental to the 3rd defendant who is a bona fide purchaser.

The 1st Plaintiff filed a replying affidavit to the application and averred that she is the wife of the 1st defendant with whom they had jointly purchased the suit land which is their matrimonial home. In August 2017, she received information that the 1st defendant had secretly transferred her interest thereon to the 2nd defendant and the suit land had been registered in the joint names of the 1st and 2nd defendants who had then transferred the same to the 3rd defendant thus necessitating the filing of this suit. Her then advocate **Ms. MUKHOOLI** assured her that she would fix the application and the main suit for hearing and so she awaited for word from her then advocate about the hearing date. In May 2018, she discovered that the Case had not been fixed for hearing and so she instructed **Ms. ELIZABETH CHUNGE ADVOCATE** to act for her. That the 3rd defendant has threatened her and filed Criminal proceedings alleging that she colluded with the 1st and 2nd defendants to defraud it of money through false pretense which is not true. That she is not guilty of un-reasonable delay neither is the 3rd defendant a bona fide purchaser. That the error of her advocate should not be visited on her and she will be prejudiced because the suit land is her home which was sold without her consent.

Neither of the defendants filed any further affidavits to rebut the averments in the 1st Plaintiff's replying affidavit. When the Parties appeared before me on 10th July 2018, it was agreed that this Court delivers its ruling on the basis of the affidavits filed herein.

I have considered the application and the rival affidavits. What is clear is that although the 1st Plaintiff's application dated 12th August 2017 sought an order of temporary injunction to restrain the defendants from disposing the suit land to the 3rd defendant, that application came too late because the suit land had as far back as 22nd June 2017 been sold to the 3rd defendant vide an agreement dated the same day and which is annexed to the 3rd defendant's replying affidavit. A Court cannot restrain by temporary injunction an event that has already taken place. Therefore, the orders issued by **OMBWAYO J** on 16th August 2017 and extended by **MUKUNYA J** on 21st September 2017 really served no purpose because the suit land had already been transferred to the 3rd defendant in June 2017. However, the parties themselves agreed to extend those orders upto 2nd November 2017.

The 1st Plaintiff has blamed her then advocate for failing to have the application fixed for hearing which made her instruct another advocate. She has also deponed that the suit land was purchased jointly by her and the 1st defendant who is her husband and that she did not give her consent to the sale of the same to the 3rd defendant. In support of her case, she has annexed an agreement (annexture TAM 1(a) and (b)) showing that indeed she and the 1st defendant purchased the suit land at a consideration of Ksh.2,400,000 from one **PETER JOE MUNGE MWATHI**. This was not rebutted by the 3rd defendant. That notwithstanding it is clear that the Orders granted by **OMBWAYO J** on 16th August 2017 and extended by **MUKUNYA J** on 21st September 2017 lapsed by operation of the Law since they were not extended thereafter. The 3rd defendant is therefore right in seeking the prayer that the interim orders of temporary injunction issued on 16th August 2017 be vacated.

Having said so, there is still pending before this Court the Plaintiff's Notice of Motion dated 14th August 2017 seeking the main prayer in paragraph 3:

“That this Honourable Court be pleased to issue a temporary injunction order against the 1st and 2nd defendants / Respondents restraining them either by themselves, their agents, servants and/or assign from disposing of the suit land to the 3rd defendant or any other person pending the hearing and determination of the main suit.”

Such an application is to be determined in accordance with the well known principles set out in the case of **GIELLA V CASSMAN BROWN & CO. LTD 1973 E.A. 358** which are:

- 1. The Applicant must show a prima facie case with a probability of success.***
- 2. , that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages;***
- 3. If the Court is in doubt, it will determine the application on the balance of convenience.***

A temporary injunction pending trial is an equitable remedy granted at the discretion of the Court. The main consideration being the preservation of the property in dispute pending trial. In order to avoid any further delays in this matter, I will determine that application as there is enough evidence on the record to enable me do so.

The 1st Plaintiff's averment that the suit land is matrimonial property has not been rebutted. It is supported by the agreement which I have already referred to above in which the 1st Plaintiff and 1st defendant jointly purchased the suit land. Her claim to the suit land is therefore not hollow and clearly, she has surmounted the first test in the **GIELLA Case** (supra). If the suit land is disposed by the 3rd defendant to another party, that will be a violation of the Law as regards co-ownership of property and how it can be transmitted to a third party.

I would, in the circumstances, agree with **WAKI J** (as he then was) that where there is a clear transgression against the Law, no amount of money can atone for such infringement – **MOHAMED V COMMISSIONER OF LANDS & OTHERS KLR (E&L)1.**

And even if this Court was in doubt with regard to the first and second tests set out in this **GIELLA Case** (supra) and determine the application on the balance of convenience, it would tilt in favour of the 1st plaintiff taking into account the un-controverted plea that the suit land is matrimonial home.

The Court would not wish that the 1st Plaintiff is rendered homeless.

Ultimately therefore, this Court makes the following orders:

- 1. An order of injunction is issued restraining all the defendants, their servants, agents assigns or any other person acting through them from transferring land parcel No. E. BUKUSU/KANDUYI/13394 to any person pending the hearing and determination of this suit.**
- 2. The Land Registrar Bungoma is similarly restrained from carrying out any transaction on the said parcel of land pending the hearing and determination of this suit as ordered by OMBWAYO J on 16th August 2017.**
- 3. The parties to comply with all the pre-trial directions before the Deputy Registrar and have this suit heard and determined within the next twelve (12) months.**
- 4. Costs shall be in the cause.**

BOAZ N. OLAO

JUDGE

26TH JULY 2018

Ruling dated, delivered and signed in open Court at Bungoma this 26th day of July 2018.

Ms. Wakoli for 3rd defendant present

Mr. Wattanga holding brief for Ms. Chunge for Plaintiff present

1st plaintiff present

BOAZ N. OLAO

JUDGE

26TH JULY 2018