



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**CIVIL APPEAL NO. 107 OF 2014**

**MARY NUNGARI THUO.....APPELLANT**

**VERSUS**

**JONATHAN THUO GITHUA.....1<sup>ST</sup> RESPONDENT**

**PETER NJUGUNA GITAU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. This appeal is against the decision of the lower court made on 9<sup>th</sup> July 2013 in Nakuru CMCC No. 1202 of 2013. In that ruling, the lower court declined to grant an interlocutory injunction restraining the Respondents from interfering with the Appellant's possession of the land known as Title No. Bahati/Kabatini/ Block1/3168 (suit land) pending the determination of the suit.
2. By the Notice of Motion dated 21<sup>st</sup> July 2014, the Applicant is seeking a temporary injunction restraining the Respondents by themselves or otherwise from interfering with her possession or occupation of the suit land pending the determination of the appeal.
3. The application is supported by the Applicant's Affidavit sworn on 21<sup>st</sup> July 2014, and her Supplementary Affidavit sworn on 24<sup>th</sup> July 2014. The Application is opposed by 1<sup>st</sup> Respondent's Replying Affidavit filed on 12<sup>th</sup> November 2014 and the 2<sup>nd</sup> Respondent's Replying Affidavit filed on 11<sup>th</sup> November 2014.
4. The suit property was originally registered in the name of the 1<sup>st</sup> Respondent. He sold it to the 2<sup>nd</sup> Respondent for a consideration of Kshs. 1,000,000/=.
5. The Applicant's case is that this sale was illegal because it was done without her consent. She alleges that the suit land is matrimonial property on which she has resided with the 1<sup>st</sup> Respondent for 30 years. Therefore, she has acquired a beneficial interest which is protected by law. She has since been evicted from the suit property and is apprehensive that if the orders of injunction sought are not granted, her matrimonial home will be demolished.
6. The 1<sup>st</sup> Respondent contends that the Applicant was aware of and consented to the sale of the property and setting up of another matrimonial home at Nyandarua/Ngorika/968. However, the Applicant changed her mind because according to her, the purchase price was below the market price. In a family meeting also attended by the Applicant it was agreed that the property be sold for Kshs. 1,600,000/=.
7. The 2<sup>nd</sup> Respondent however refused to pay the additional Kshs. 600,000/= and opted to rescind the agreement on condition that the deposit of the purchase price is refunded with a 10% penalty for breach of the agreement. The 1<sup>st</sup> Respondent having already utilised the deposit, was forced to uphold the terms of sale as earlier agreed. He subsequently transferred the property to the 2<sup>nd</sup>

Respondent.

8. The 2<sup>nd</sup> Respondent who is currently registered as the owner of the land, contends that he is ready and willing to re-transfer the property back to the 1<sup>st</sup> Respondent and return the original title on condition that he is refunded the full Kshs. 1,000,000/= purchase price paid and the 10% penalty as provided for in the agreement.

### **SUBMISSIONS**

9. The Applicant's Counsel submitted that the Applicant, being the 1<sup>st</sup> Respondent's spouse, has acquired a beneficial interest in the land. That, it is recognised under **Section 28** of the **Land Registration Act, No. 3 of 2012** as an overriding interest which need not be registered. Under **Section 93** of this Act, any disposition of land, without the consent of a spouse is void. Hence the sale of the suit land by the 1<sup>st</sup> Respondent was unlawful and therefore void.
10. Counsel further submitted that the minutes of the meeting held 17<sup>th</sup> June 2013 do not prove spousal consent because firstly they were held after the property had been sold and secondly, the consent is from the family and not the spouse herself.
11. Counsel for the 2<sup>nd</sup> Respondent argued that the application is incompetent because it had been brought under the provisions of **Order 40 Rule 1** of the **Civil Procedure Rules**. As this court is exercising its appellate jurisdiction, the Applicant should have filed his application under the provisions of **Order 42 Rule (6) (6)**.
12. That the Applicant does not deserve the orders sought because she does not reside in the suit property. If the orders are granted, the 1<sup>st</sup> Respondent ought to be compelled to pay the penalty for breach of the agreement and the penalty.

### **ANALYSIS**

13. Before embarking on the substance of the application, I wish to dispose of a preliminary issue that was raised by Counsel for the Respondents' regarding the suitability of the procedure adopted by the Applicant.
14. It was submitted by Counsel that the application is incompetent because it was brought under **Order 40 Rule 1**. He was of the view that temporary injunctions under this order can only be granted in civil suits by the trial court. He argued that the application ought to have been filed under **Order 42 Rule 6 (6)** of the **Civil Procedure Rules** which grants this court power to grant stay of execution of a decree or order pending the determination of an appeal.
15. In my view, this objection has no merit. The application herein does not seek to stay any order or decree. The Applicant has approached this court seeking conservatory orders to protect her interest in the suit land pending the determination of the appeal. Her grievance stems from the actions of the Respondents and not primarily from the declaration of the lower court.
16. Therefore the principles that the court will consider in this application are those set out in **Giella V. Cassman Brown**, [1973] E.A. 358; whether the Applicant has established a *prima facie* case with a probability of success; that she will suffer irreparable damage if the orders sought are not granted and if the court is in doubt, it will decide the matter on a balance of convenience.
17. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd. V. First American Bank of Kenya Ltd. & 2 others**, [2003] eKLR as one in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
18. It was established that the suit property was matrimonial property. Section 93 protects a spouse who may not be registered as a co-owner and requires that spouse's consent before disposition of land. Specifically, subsection (3) (b) places an obligation on a transferee of land to inquire of the transferor if the spouse has consented to the assignment or transfer of land. Without the consent, the sale transaction is voidable at the option of the spouse whose consent was not obtained.
19. The minutes of the family meeting that was held on 17<sup>th</sup> June 2013, in which the Applicant was present, show that the family was aggrieved by the fact that the suit land was sold at Kshs. 1,000,000/= and not 1,600,000/=. The Applicant was aware of the sale transaction between the Respondents prior to the transfer of the suit property to the 2<sup>nd</sup> Respondent on 3<sup>rd</sup> October 2013.

- She consented to the sale of the property, albeit at a much higher price that agreed upon by the Respondents.
20. Whether this consent ought to have been obtained before the transaction commenced or it was sufficient is a matter for the trial court to determine. I am however not satisfied that the Applicant has established a *prima facie* case with a probability of success.
21. In addition, I find that in the instant case an award of damages will be sufficient compensation to the Applicant for any injury she may suffer. Lastly as stated earlier, her grievance is not in the sale of the property but in the sum for which it was sold. She also admitted that she is no longer residing in the property and her immediate concern is that the matrimonial home may be demolished. However, the 1<sup>st</sup> Respondent stated that he had built a home in another area and he has not refused to allow the Applicant to occupy it.

### **DETERMINATION**

22. For the above reasons, I find that the Applicant's application for injunctive orders has no merit and hereby dismiss. Each party to bear their own costs.

Orders accordingly.

**Dated, Signed and Delivered at Nakuru this 24th of April, 2015.**

**A. MSHILA**

**JUDGE**