



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**LAND AND ENVIRONMENT CASE NO. 37 OF 2012**

**F I ..... PLAINTIFF**

**VERSUS**

**A H B.....DEFENDANT/RESPONDENT**

**NATIONAL BANK OF KENYA .....2ND DEFENDANT/RESPONDENT**

**RULING**

1. By a Notice of Motion dated 20<sup>th</sup> November 2013 and brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules, the Applicant seeks for orders of temporary injunction restraining the Defendants from selling off, interfering, wasting or disposing of L.R. NO. [particulars withheld] pending hearing and determination of this suit.
2. The Motion is supported by the grounds on the face of it and an affidavit sworn by the Applicant. One of the grounds raised by the Applicant is that she contributed money for the purchase of the plot. The plot was developed under her care and they moved into the plot in 2003. She depones that she now lives in fear as the 1<sup>st</sup> Defendant has threatened to dispose of this plot which is her matrimonial home.
3. The application is opposed by both Respondents. The 1<sup>st</sup> Respondent through his replying affidavit said that she divorced the Applicant in 2007 and annexed a divorced certificate. He also depones that the children of their marriage are adults, two working, two putting up with him and one living with the Applicant. That the Applicant has no locus to warrant the injunction orders sought.
4. The 2<sup>nd</sup> Respondent in opposing the application states that 1<sup>st</sup> Respondent defaulted in repaying the loan over the charged property and the arrears stand at Kshs. 1,963,2581/85. When the loan was offered as security, the 1<sup>st</sup> Respondent was the sole proprietor. The property has been advertised for sale by public auction and the 1<sup>st</sup> Respondent has not contested nor liquidated the outstanding loan. The 2<sup>nd</sup> Respondent urged the court to decline the orders sought.
5. I have perused the pleadings together with the submissions filed. From the pleadings, it is not in dispute the Applicant and the 1<sup>st</sup> Respondent lived on this plot. It is also not in dispute that the Applicant still lives on this plot although they are now divorced with the 1<sup>st</sup> Respondent. There is also no dispute of the outstanding loan owing to the 2<sup>nd</sup> Respondent.
6. The 1<sup>st</sup> Respondent has no objection to the suit property being sold to settle the loan. His argument being he used the money for school fees, their children are all adults and they are divorced with the Applicant. The Applicant however contests the sale for two reasons; first she contributed money to purchase the plot and secondly because this is her matrimonial home.
7. I am alive to the principles to be considered in granting of injunctions as enunciated in the case of **Giella vs. Cassman Brown**. I am also aware of the settled principle on stopping chargees from realizing security that once a property is charged, it becomes a commodity for sale and loses its sentimental value attached to it by the parties. See **Augustine Kibet vs. Savings and Loan (K) Ltd.**
8. Taken all matters in consideration it seems the Applicant may lack locus to warrant the injunction as

pleaded by the 1<sup>st</sup> Respondent. However she raised the issue of rights over matrimonial property. That she contributed money to purchase the suit property – a fact not denied by the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Defendant charged the property in 2010 after their divorce yet she was living on the property. This in my view gives her a slim chance that she has shown a prima facie case. It would be fair to give her a hearing to establish whether she was entitled to a share of the suit property.

9. The 1<sup>st</sup> Respondent in his grounds states the property was acquired after he divorced the Applicant. The search certificate shows the contrary that the suit property was acquired in the year 2000.

10. I am therefore satisfied the application for injunction is merited for the reason given in paragraph 8 supra. The same is allowed granting the Applicant temporary orders of injunction restraining the Defendants from selling off, wasting away or in any other manner interfering with the suit parcel **[particulars withheld]** pending the hearing and determination of this suit. Costs shall be in the cause.

**DATED, SIGNED and DELIVERED** this 31st day of March 2014.

**A. OMOLLO**

**JUDGE.**