



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 1268 OF 2014

SUSAN ANNA KARANJA.....PLAINTIFF

-VERSUS-

LENANA TOWERS LIMITED.....DEFENDANT

RULING

1. The Plaintiff commenced this suit on 29th September, 2014. She claimed that her spouse Ezekiel Karanja Ndune had disposed of their matrimonial property known as Land Reference Number 209/1797 Nairobi, Milimani without her consent. She stated that following a search at the Lands Registry, the records thereat revealed that the suit property had been transferred to the Defendant for the amount of KShs.100,000,000/=. The Plaintiff sought to have a declaration that the transfer of the suit property to the Defendant was null and void. The Plaintiff also sought an order for the immediate surrender and hand over to the Plaintiff of the original title documents for the suit property.
2. Alongside the Plaint, the Plaintiff also filed a Notice of Motion which motion sought to restrain the Defendant from transferring, charging, leasing, trespassing, constructing and or erecting any structures on or in any way alienating or interfering with the suit property until determination of the suit. The said Application was pegged on the grounds that the suit property was matrimonial property and that the Defendant had fraudulently transferred the property to its name without the Plaintiff's consent and or approval. The Plaintiff further contended in her Affidavit sworn in support of the application that the consideration stated of KShs.100,000,000/= was simply "unrealistic" for an acre of land in Nairobi's Milimani Area.
3. The Application ultimately came up for hearing on 8th December, 2014 when only Counsel for the Plaintiff Mr. Mungai appeared. He urged the Court to grant the interlocutory injunction stating that not only was the application unopposed but even then the Plaintiff had proved that she had a prima facie case with chances of success. In the Plaintiff's view having been in possession since 1976 meant too that damages would not suffice.

4. I have read the Application as well as the Supporting Affidavit. I have also considered Counsel's Submissions. Even though the Defendant never filed any documents in opposition to the Application and therefore the factual aspect of the case thus far remains uncontroverted, it must be noted that it was still incumbent upon the Plaintiff to satisfy the Court that the Plaintiff had a prima facie case and that in the absence of an injunction the Plaintiff stood to suffer irreparably: see **Giella -v- Cassman Brown & Co. Ltd. [1973] E. A. 358, Mrao -v- First American Bank of Kenya Limited & Others [2003]KLR 125 and American Cyanamid -v- Ethicon[1975] AC 396.**
5. The Plaintiff's main contention is that the Defendant transferred or caused the suit property to be transferred to the Defendant without the Plaintiff's consent. The Plaintiff pegs the requirement of her consent on the fact that the registered proprietor Ezekiel Karanja Ndune is the Plaintiff's spouse and that under Section 93(3) of the Land Registration Act a spousal consent was necessary before transfer of the suit property.
6. The suit property was purchased and registered in the said Ezekiel Karanja Ndune's name in October, 1977. That was over one quarter of a century before the Plaintiff and Ezekiel Karanja Ndune were united in holy matrimony. Effectively, and as there is no indication that the Plaintiff and the said Ezekiel Karanja Ndune reside in or within the suit property, the suit property would not qualify as matrimonial property under the Matrimonial Property Act, No. 49 of 2013 for a specific spousal consent to be required prior to disposition thereof under Section 12(1) of the said Act.
7. Section 93(3) of the Land Registration Act , No. 3 of 2012 however provides for a general spousal consent where one spouse seeks to dispose of property held in his or her individual name. The said Section puts an acquirer of interest under a duty to ensure that the general spousal consent has been issued to the spouse disposing of interest in the property, which need not be matrimonial property as defined under Section 6 of the Matrimonial Property Act. Section 93 (3) of the Land Registration Act runs as follows:-

(3) *Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house:-*

(a) *the lender shall, if that disposition is a Charge, be under a duty to inquire of the borrower on whether the spouse has or spouse have, as the case may be, have consented to that Charge; or*

(b) *the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to the assignment.*

(4) *If the spouse undertaking the disposition deliberately misleads the Lender or, the assignee or transferee by the answers to the inquiries made in accordance with Subsection 3(a) or 3(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.*

8. A casual reading of the above sections would appear to reveal that the purchaser or transferee has a heavier duty to ensure the success of the transaction. It is not enough that the transferee undertakes a due diligence process and is assured that the spousal consent is available. The transferee must actually ensure that the consent has actually been given, not simply obtained, otherwise the transaction will be void for lack of a consent on the prompting by any of the spouses whose consent was required. The transferee must therefore not only be absolutely certain as to the existence of the spouse(s) but also the consent to the transaction by such spouse.
9. The Plaintiff herein has proven that she is a spouse to the transferor of the suit property. The Plaintiff has alleged that her consent was not obtained prior to the transfer of the suit property.

That allegation has not been controverted. On the face of the documents before the Court as supported by the Plaintiff's affidavit, a statutory right conferred upon the Plaintiff has apparently been transgressed.

10. The Plaintiff has the right to know when her spouse is disposing of real property and to consent to such disposition. She has shown that no such consent was apparently obtained from her and it is upto the Defendant to explain to the Court whether an attempt was made to obtain such consent and whether indeed one was obtained. In my view, the Plaintiff has established a prima facie case with a probability of success.
11. In his submissions, Counsel for the Plaintiff submitted that the Plaintiff stands to suffer irreparably if an injunction is not granted. I have stated previously in the unreported case of **Samuel Chege Gitau –vs- Joseph Gicheru, NBI ELC 1245/2014** that land has an intrinsic value not comparable to ordinary chattels found in any commercial street notwithstanding the fact that it can actually be valued. Where therefore there is a dispute involving its transaction, it would be important for the court to ensure its preservation especially at an interlocutory stage.
12. In the instant case the Defendant has failed to reply to the allegations before the Court, it is unclear whether the consideration was actually paid. No suggestion too has been made that the Defendant is in a position to compensate the Plaintiff monetarily. I hold the view that in view of the express provisions of Section 93(3) and (4) of the Land Registration Act, if there ultimately be a finding by the trial Court that no consent was obtained then the transaction has to be declared void.
13. It cannot be said that transgression of statutory provisions can be remedied through damages. I hasten to add too that the social policy behind Section 93 of the Land Registration Act which was to buttress the constitutional provisions intended to protect any property where a spouse may have an interest should never be defeated simply because of one party's economic ability to pay damages.
14. I am therefore inclined to grant an injunction as prayed. I do however also deem it right to express the view that in such cases the Plaintiff should always give serious consideration to the course of joining the allegedly errant spouse to the proceedings before the Court. In my view, such a spouse is not only a necessary party but also a proper party to the proceedings, one against whom reparatory orders may also be made in favour of the third party transferee who may have been misled.
15. In consequence, I allow the Application dated 26th September, 2014 in terms of prayer number 3 thereof. I also order that the said Ezekiel Karanja Ndune be joined to these proceedings as a Defendant. He is both a necessary and proper party to these proceedings. Such joinder is to be effected by the Plaintiff within the next thirty (30) days.
16. The Plaintiff will have costs of the Application as well.
17. Orders accordingly

Dated, signed and delivered at Nairobi this 19th day of December, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the Defendant