



REPUBLIC OF KENYA

High Court at Nakuru

Civil Case 264 of 2011

**IN THE MATTER SECTION 17 OF MARRIED WOMEN PROPERTIES ACT (1882) AND ALL
OTHER ENABLING PROVISIONS OF LAW**

**IN THE MATTER OF AN APPLICATION FOR DECLARATION OF THE PROPERTY
RIGHTS**

BETWEEN

**LEAH THENYA KAMARA.....PLAINTIFF/APPLICANT
.....DEFENDANT/RESPONDENT
AND**

MICHAEL KAMAU MWAURA.....1ST INTERESTED PARTY/RESPONDENT

MUTUA TOREO KIBIRU.....2ND INTERESTED PARTY/RESPONDENT

JULIA WANGARI METHU.....3RD INTERESTED PARTY/RESPONDENT

RULING

The applicant has brought an originating summons against her husband, the 1st respondent and against three others described as interested parties/respondents to restrain them from selling, disposing of, wasting, alienating and/ or adversely dealing with the following parcels of land:

NYANDARUA/KAIMBAGA/1119,

NYANDARUA/KAIMBAGA/1120,

NYANDARUA/KAIMBAGA/1121,

NYANDARUA/KAIMBAGA/1122,

NYANDARUA/KAIMBAGA/1123,

NYANDARUA/KAIMBAGA/1125,

NYANDARUA/KAIMBAGA/1126, and

NYANDARUA/KAIMBAGA/1127.

She also seeks that the court declares that all the above parcels are owned jointly and in equal shares by herself and the 1st respondent, who was registered to hold them in trust for himself and the applicant; that the title deeds issued to the 1st and 2nd interested parties in respect of NYANDARUA/KAIMBAGA/1120 and 1119 respectively be cancelled to relent to the applicant and the 1st respondent as joint proprietors.

Finally, the applicant is asking the court to remove the restriction registered by the 3rd interested party against NYANDARUA/KAIMBAGA/1126 and 1127. Simultaneous with the originating summons, the applicant has filed a notice of motion for a temporary order of injunction to restrain the respondents from doing any of the acts listed in the originating summons with regard to the suit properties until the suit is determined.

The application is premised on the grounds that the 1st respondent and the applicant acquired the original parcel of land then known as plot No.135 KAIMBAGA SCHEME jointly in the early 1980s and thereafter occupied it in 1983; that over the years, the 1st respondent's attempts to dispose of the property were resisted by the applicant and her children. However, he was able to subdivide the said original plot No.135 KAIMBAGA SCHEME and to sell three resultant parcels to the 1st, 2nd and 3rd interested parties. The respondent and 1st interested party have not replied to these averments.

The 2nd interested party has filed grounds of opposition as well as a replying affidavit in which he has asserted that the application is incompetent, bad in law and is an abuse of the process of the court; that orders sought in the application are incapable of being granted as what is sought to be prevented has already taken place and finally that the applicant is non-suited against the 2nd interested party as she has no cause of action against him under the **Married Women Properties Act**, 1882. He has further deposed that he purchased 2½ acres from the respondent in 1997 to be carved from plot No.135 KAIMBAGA SETTLEMENT SCHEME; that the portion was transferred and title deed issued to him; and that the applicant was aware of the transaction but did not protest.

Years later, the applicant and her sons interfered with the boundary of the parcel purchased by the 2nd interested party. As a result, the latter filed Nyahururu PMCC No.67 of 2007 against the applicant. That suit is pending determination hence the 2nd interested party's opinion that this suit is intended to obstruct the course of justice in Nyahururu PMCC No.67 of 2007.

The 3rd respondent on her part has submitted that her late husband purchased four (4) acres of the original parcel No.135 from the respondent but the latter refused to transfer the same prompting the 3rd respondent's late husband to file Nyahururu PMCC No.243 of 1987. In that suit the 3rd respondent's late husband and the respondent recorded a consent on 6th September, 1988 to the effect that the latter would transfer to the former the four (4) acres in question or in the alternative refund the purchase price of Kshs.50,000/= by 27th October, 1988. When the respondent failed to comply with the consent order the court ordered further that he executes the transfer within 30 days and default the Executive Officer of the court was directed to sign transfer documents to facilitate the Land control Board consent.

Once more the respondent failed to comply and the Executive Officer executed the requisite documents and thereafter the consent of the Land Control Board was obtained. The respondent remained defiant and declined to discharge the Settlement Fund Trustee Charge on the property. At the time the 3rd respondent's husband was dying in December, 1993 the respondent had not discharge the charge.

Instead, he went head and subdivided the original parcel into nine (9) portions. The 3rd respondent has moved and registered restrictions on Nos. 1126 and 1127 which make up two acres and seeks two additional acres to add up to 4 acres. The 3rd interested party sees in this application a collusion between the respondent and the applicant to deprive the 3rd interested party and the estate of her deceased husband the four acres purchased from the respondent.

I have considered the averments outlined in the preceding paragraphs, the submissions and decided cases relied on by both sides.

Being an application for an interlocutory injunction, it is the duty of the court to determine whether the applicant has demonstrated that she has a *prima facie* case with a probability of success at the trial; that she will suffer loss that cannot be compensated by an award of damages. However, should the court be in doubt, it will decide the matter on a balance of convenience. **Giella V. Cassman Brown and Company Limited** (1973) EA 358.

It is not in doubt that the applicant is the wife of the respondent. It is equally true that the subdivisions of plot Nos.1119 to 1127 (excluding Nos.1120 and 1124) are registered in the name of the respondent.

No. 1120 was purchased by the 2nd interested party and registered in his name. It is also not controverted that the 3rd interested party's late husband entered into a written agreement for the purchase of four (4) acres from the original suit property. The two purchasers, namely, the 2nd interested party and the 3rd interested party's late husband brought suits against the respondent and against the applicant and her sons, respectively.

Nyahururu PMCC No.67 of 2007 filed by the 2nd interested party against the applicant and her sons to restrain them from interfering with No.1120, is pending determination. The applicant and her sons have counter-claimed in that action against the 2nd interested party that the sale leading to the transfer and subsequent registration of No.1120 was fraudulent hence null and void. The determination of that question, as I have observed, is still pending.

Nyahururu PMCC No.243 of 1987 was instituted by the 3rd interested party's late husband against the respondent to enforce the sale agreement. A consent order was recorded in which the respondent undertook to transfer the purchased portion to the 3rd interested party's late husband.

It is worth noting at this stage that, when the 3rd interested party's husband died, a grant of representation was issued in Nyahururu SRM's Succ. Cause No.42 of 1994 to the 3rd interested party's co-wife, Frida Wangui Metho (Frida). In the cause, the certificate of confirmation indicates that the original parcel, No.135 was to be shared equally between the 3rd interested party and Frida. This has been conceded to be an error as only 4 acres from the original parcel (No.135) was due to their late husband.

It is therefore apparent from the foregoing analysis that, first, as against the 2nd interested party there is a title deed in his favour and a subsisting suit challenging that title. This suit therefore offended **Section 6** of the **Civil Procedure Act**.

Secondly, as regards the 3rd interested party, first and foremost, she is not the administrator of the estate of her late husband. The grant of representation was issued to her co-wife, who ought to be the party in this action in terms of **Sections 79 and 82** of the **Law of Succession Act**. Again the court in Nyahururu SRMCC 243 of 1987 found as a matter of fact that there was a valid sale agreement.

The respondent wilfully entered into a consent, which became an order of the court, to transfer the four acres in question. The process of transfer is complete save for the discharge of charge. Neither the respondent nor the applicant has challenged these matters, which matters are therefore conclusive. This action is *res judicata* Nyahururu SRMCC NO. 243/1987, as it is contrary to **Section 7** of the **Civil Procedure Act**. See **Ngugi V. Kinyanjui & 3 others**, (1989) K L R 148

While still on the dispute between the applicant and the 2nd and 3rd interested parties, it must be borne in mind that their dispute cannot be resolved in an originating summons which is intended to achieve speedy resolution of the issues. Similarly, a suit filed under **Section 17** of the **Married Women's Property Act**, 1882 is for expeditious determination as to the share, if any, of a wife in the matrimonial property. Bringing in third parties (interested parties) will defeat this objective. See **Housing Finance Company of**

Kenya Limited V. Kimeriah and another (1996) LLR 471 (CAK).

For the foregoing reasons, I find that the applicant has failed to establish a *prima facie* case against the 2nd and 3rd interested parties. It is not controverted that the 2nd interested party has a title to No.1120, while the court has found that the 3rd interested party's late husband was entitled to 4 acres of the original property. It has also been averred without being challenged that the applicant is not in occupation of the two portions in controversy. She has therefore not demonstrated any loss that she may suffer if restraining orders sought herein are not issued.

The balance of convenience is in favour of the 2nd and 3rd interested parties. The application is dismissed with costs to the 2nd and 3rd interested parties. But as regards the respondent, the applicant has established that she is married to him and contends that she contributed to the payment of the loan towards the acquisition of the suit property.

As these arguments are not rebutted, I find that the applicant has established a *prima facie* case to warrant the issuance of a temporary injunction in terms of paragraph 3 of the notice of motion dated 29th September, 2011 against the respondent in respect of all the listed parcels, except Nos.1120, 1126 and 1127, until this suit is heard and determined.

Dated and Signed at Nakuru this 11th day of February, 2013.

**W. OUKO
JUDGE**

Dated, Signed and Delivered at Nakuru this 21st day of February, 2013 by Hon. Justice M. J. Anyara Emukule.

JUDGE