



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**E.L.C CASE NO. 69 OF 2012**

ROSE NJOKI KAMAU .....PLAINTIFF

VERSUS

ARCHIBALD WAMBURU KAHORA .....1<sup>ST</sup> DEFENDANT

TITUS KINYUA KARANJA ..... 2<sup>ND</sup> DEFENDANT

**RULING**

This is in respect to the plaintiff/applicant's Notice of Motion dated 4<sup>th</sup> December 2012 and filed herein on 14<sup>th</sup> December 2012 and seeking that this Court do restrain any dealings with reference to land parcel No.

LOC 2/KANGARI/2970 till the determination of this suit. The same is brought under **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules, Section 28 (c)** and **93 (1) and (2) of the Land Registration Act** and **Article 68 (iv) of the Constitution**.

Apart from **Order 40 Rule 1, 2 and 3 of the Civil Procedure Rules**, I must confess I do not see the relevance of the other provisions cited in this application. Indeed there is no **Article 68 (iv) in the Constitution of Kenya 2010!** The pleadings themselves leave a lot to be desired but I will nonetheless invoke **Article 159 (2) (d) of the Constitution of Kenya 2010** and consider the application on merits. I must however caution counsels to exercise diligence in their pleadings. It would appear that much of this is left to clerks.

The application itself is supported by the plaintiff/applicant's affidavit in which she depones, inter alia, that the 1<sup>st</sup> respondent is her husband and that the property LOC 2/KANGARI/2970 (hereinafter referred to as the suit property) was purchased jointly by the plaintiff/applicant's father and the 1<sup>st</sup> respondent who contributed Ksh. 300,000/= and Ksh. 220,000/= respectively and it was agreed that the suit property be registered in the 1<sup>st</sup> defendant/respondent's names. In her plaint filed on the same day, the plaintiff/applicant avers that the 1<sup>st</sup> defendant/respondent was registered as owner of the suit property in trust for the plaintiff/applicant and her father one Samuel Kamau Mwangi. The plaintiff/applicant adds that with the help of her father, she planted tea on the suit property yet the 1<sup>st</sup> defendant/respondent has now transferred the suit property to the 2<sup>nd</sup> defendant/respondent without her consent and the 2<sup>nd</sup> defendant/respondent is now committing acts of waste on it including picking her tea and depositing building materials thereon.

Although both defendants/respondents entered memorandum of appearance, only the 2<sup>nd</sup> defendant/respondent filed a reply to the application in which he stated that he is a purchaser for value of the suit property and was not aware of the plaintiff/applicant's interest. All he knew was that the 1<sup>st</sup> defendant/respondent was the registered owner of the suit property and consent was given by the 1<sup>st</sup> defendant/respondent's wife namely Elizabeth Njambi whose marriage certificate he annexed to his replying affidavit.

I have considered the application and the reply thereto.

It is the contention of the plaintiff/applicant that the 1<sup>st</sup> defendant/respondent is her husband and the suit property is matrimonial property and therefore her consent was necessary before its transfer to the 2<sup>nd</sup> defendant/respondent. The allegation that plaintiff/applicant is wife to the 1<sup>st</sup> defendant/respondent is not controverted by the 1<sup>st</sup> defendant/respondent who would be the person best placed to do so.

Instead the 2<sup>nd</sup> defendant/respondent has annexed a marriage certificate between the 1<sup>st</sup> defendant/respondent and one Elizabeth Njambi. But while that certificate is evidence of a marriage between the 1<sup>st</sup> defendant/respondent and the plaintiff, it is not in itself evidence that the plaintiff/applicant is not the wife of the 1<sup>st</sup> defendant/respondent. That will be an issue for trial.

The plaintiff/applicant's supporting affidavit also states that the suit property was purchased jointly through funds contributed by her father and also the 1<sup>st</sup> defendant/respondent. Again this is not controverted because the 1<sup>st</sup> defendant/respondent filed no reply to the application. In that case, the plaintiff/applicant's claim that the suit property is matrimonial property is well founded and under **Section 28 and 93 of the Land Registration Act**, such spousal rights are subject to protection as overriding interests and under **Section 94 of the Land Registration Act**, one spouse cannot dispose of such property without the consent of the other. On the face of it, that would appear to be the situation in this case and on the principles set out in **GIELLA VS CASSMAN BROWN & CO. LTD, E.A. 358**, I am satisfied that the plaintiff/applicant has established a prima facie case with a probability of success.

On the second principle set out in the **GIELLA** case (supra), the evidence available to me suggests that spousal property may have been sold without the consent of one spouse. That would be a violation of the **Land Registration Act** and therefore a transgression against the law and as was held by Justice Waki (as he then was) in **MOHAMMED VS COMMISSIONER OF LANDS & 4 OTHERS K.L.R (E & L) 1 Page 217**, in such circumstances, it would be no answer to a prayer for injunction, that the applicant may be compensated in damages. I would take the same view.

Ultimately therefore, upon considering all the evidence before me, I allow the plaintiff/applicant's Notice of Motion dated 4<sup>th</sup> December 2012 and grant prayer (c) thereof.

Costs shall be in the cause.

B.N. OLAO

JUDGE

15<sup>TH</sup> JULY 2013

15/7/2013

Before B.N. OLAO – JUDGE

CC - Muriithi

Plaintiff – absent

2<sup>nd</sup> Defendant – present

1<sup>st</sup> Defendant – absent

COURT: Ruling delivered this 15<sup>th</sup> day of July 2013 in open Court.

B.N. OLAO

JUDGE

15<sup>TH</sup> JULY 2013