



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII

LAND CASE NO. 179 OF 2012

FLORENCE NYAMOITA ONGERA.....PLAINTIFF

VERSUS

NAHASHON ONGERA OMOTE.....1ST DEFENDANT

RUSARIA NYARINDA ONGERA.....2ND DEFENDANT

GLADYS NYANCHAMA ONGERA.....3RD DEFENDANT

RULING

1. The 1st defendant is a polygamist. He is married to three (3) wives, namely, the 2nd defendant, the plaintiff and the 3rd defendant who were married in that order between 1948 and 1964. The 1st defendant has owns several parcels of land some registered in his own name and others in the names of his wives jointly or singly. Some of these parcels of land for reasons which may not be known until the date of trial have been owned on a rotational basis between the 1st defendant, the Plaintiff, the Plaintiff and the 2nd defendant jointly, and the 2nd defendant and the 3rd defendant jointly. Some of the 1st defendant's parcels of land that have been held in this fashion are **LR No. West Mugirango/ Bosamaro East/ 260** and **LR No. West Mugirango/ Siamani/ 2173** (hereinafter referred to as "**the first suit property and the second suit property**") respectively where the context so admits). The Plaintiff who is the 1st defendant's 2nd wife and co-wife to the 2nd and 3rd defendants has brought this suit against his husband and co-wives claiming that sometimes in January, 1998, the 1st defendant inconsideration of love and affection, transferred to the Plaintiff and the 3rd defendant to own jointly the first suit property. The Plaintiff claims that the 1st defendant's decision to transfer the first suit property to the Plaintiff and the 3rd defendant was informed by the fact that amongst his parcels of land, the 1st defendant had apportioned the first suit property to the households of the Plaintiff and the 3rd defendant. The Plaintiff claims to have had exclusive occupation and use of her distinct portion of the first suit property from 1965 to date. The Plaintiff claims that sometimes in the year 1997 the 1st defendant fraudulently, unprocedurally and illegally caused the first suit property to be transferred back to the name of the 1st defendant from the names of the Plaintiff and the 3rd defendant. The Plaintiff claims that she was not involved in the said transfer and that the 1st defendant did not obtain the consent of the Land Control Board for the said transfer. The Plaintiff has accused the 1st defendant of fraudulently executing the land transfer forms and purporting the same to have been executed by the Plaintiff. The Plaintiff claims further that in a bid to further the said acts of fraud and to ensure that the first suit property is put beyond the reach of the Plaintiff, the 1st defendant sometimes in

the year 2009, purported to transfer the first suit property to the 2nd and 3rd defendants. The Plaintiff claims that the acts of the defendants aforesaid have deprived the Plaintiff of her interest in the first suit property.

2. The Plaintiff has claimed further that sometimes in the year 2006, the 1st defendant fraudulently caused the second suit property which was hitherto registered in the name of the Plaintiff to be transferred to the 1st defendant. The Plaintiff claims that she never executed the document of transfer of the second suit property to the 1st defendant. The Plaintiff claims further that no Land Control Board consent was procured for the transaction. The Plaintiff claims that she had not known of the said fraudulent activities of the 1st defendant until the year 2012 when the defendants jointly and severally started to interfere with her occupation and use of the two properties. In her Plaint dated 24th May, 2012, the Plaintiff seeks; a declaration that the transfer of the first suit property from her name to the 1st defendant and subsequently to the 2nd and 3rd defendants was null and void, a declaration that the transfer of the second suit property from her name to the 1st defendant was null and void. The Plaintiff also seeks a permanent injunction to restrain all the defendants from interfering with the Plaintiff's rights and/or interest on the first suit property.
3. Together with the plaint, the Plaintiff filed an application by way of Notice of Motion dated 25th May, 2012 seeking a temporary injunction to restrain the defendants from interfering with the Plaintiff's quiet possession and/or in any way or manner interfering with the user and/or any properties of the Plaintiff standing on the first suit property pending the hearing and determination of this suit. The Plaintiff's application was supported with a short affidavit sworn on 25th May, 2012 in which she stated that she has all along been in exclusive use of and occupation of a clearly distinct portion of the first suit property. The Plaintiff stated further that she has her homestead on the said portion of the first suit property and that she has planted tea on a portion of it. The Plaintiff claimed that on 23rd May, 2012, the 2nd defendant descended on her said portion of the suit property in the company of a gang of 15 people and started pruning her tea bushes and in the process caused great damage to the same and to the young trees that the Plaintiff had planted. The Plaintiff is apprehensive that unless the defendants are restrained from repeating the aforesaid acts, they will most likely proceed to evict the Plaintiff from the first suit property. It is due to the foregoing that the temporary injunction was sought by the Plaintiff. The Plaintiff annexed to her affidavit in support of the application, a copy of an extract of the register for the first suit property. This extract shows that the first suit property was first registered in the name of the 1st defendant on 6th September, 1985. On 15th January, 2008, the same was transferred to the Plaintiff and the 3rd defendant. The property was transferred back to the 1st defendant on 7th June, 2007 and ultimately to the 2nd and 3rd defendants on 4th December, 2009. It is the last two transfers which are challenged in this suit. There is a caution registered against the title of the property on 16th March, 2012 in favour of the Plaintiff claiming "beneficiary interest". The Plaintiff also annexed copies of Pay Slips issued to her by KTDA for the tea she delivered in January, 2012 and September, 2011.
4. The Plaintiff's application was opposed by the defendants who swore separate affidavits on 15th June, 2012 in response thereto. In summary, the 1st defendant denied all the allegations contained in the Plaint and the Plaintiff's affidavit in support of the injunction application. The 1st defendant contended that he acquired the first suit property before he married the Plaintiff and that for the sake of harmonious co-existence of his three wives and their children, the family business and family properties including the first suit property could change ownership from time to time as may be necessary for the good or benefit of his larger family of three wives and children. The Plaintiff contended that the first suit property was acquired by him and the 2nd defendant in 1950 and that the same was registered in his name on 16th November, 1985. The 1st defendant contended further that on 15th January, 1998, he caused the first suit property to be transferred to

the Plaintiff and the 3rd defendant to hold in trust for him. The purpose of this transfer according to the 1st defendant was not in consideration of love and affection as claimed by the Plaintiff but to reduce the 1st defendant's exposure to risks that was emanating from his businesses. The 1st defendant contended that it was not his intention to confer exclusive ownership of this property to the Plaintiff and the 3rd defendant. The 1st defendant contended further that once his risk exposure had stabilized the Plaintiff and the 3rd defendant willingly transferred the first suit property back to him. The 1st defendant claimed that in the process of rationalizing the distribution and user of his properties he decided to confer the proprietorship of the first suit to the 2nd and 3rd defendant. This is what culminated in the transfer of this property to the 2nd and 3rd defendants on 4th December, 2009. The 1st defendant contended that the Plaintiff has other properties which are registered in her name and the names of her children. The Plaintiff also occupies and uses other properties which are in the names of the 1st defendant. The 1st defendant contended that the 2nd and 3rd defendants' title to the first suit property is indefeasible and that they are not trespassers on the suit property as alleged by the Plaintiff. The 1st defendant contended that this suit has not been brought in good faith but in pursuit of the Plaintiff's selfish and personal interest. On the issue of tea bushes, the 1st defendant contended that, all tea picked from the first suit property should have been sold through his KTDA account No. 63 and that the pay slips annexed to the Plaintiff's affidavit shows that the Plaintiff and her children have opened clandestine accounts with KTDA through which they have been diverting the family resources as they are being paid through these accounts for tea plucked from the first suit property which should be sold through the 1st defendant's account aforesaid. The 1st defendant claimed that he has more tea bushes on the suit property than the Plaintiff and her sons combined and that, the Plaintiff and her sons have duplicated the tea bushes and are in the process plucking tea from the bushes that belong to the 1st defendant and the 2nd defendant. The 1st defendant maintained that all the legal procedures pertaining to the transfer of the first suit property to the 1st defendant and subsequently to the 2nd and 3rd defendants were followed and that the Plaintiff raised no objection whatsoever during the process. The 1st defendant contended that the issue of tea is being raised by the Plaintiff to cover up the secret tea buying accounts that she and her sons hold. The 1st defendant contended that the Plaintiff has not met the principles for granting interlocutory injunction. The 1st defendant annexed to his affidavit copies of his pay slips for tea delivered to KTDA in the months on May, 2003, December, 2004 and October, 2007 under his account No. 63. The 1st defendant also annexed copies of titles deeds for properties which he claims to be owned by the Plaintiff and which are in her use. In her affidavit, the 2nd defendant stated that the first suit property was purchased jointly by the 1st defendant and herself and that the same was registered in the name of the 1st defendant through mutual arrangement between the 1st defendant and herself. She reiterated the contents of the 1st defendant's affidavit that the first suit property was registered in the names of the Plaintiff and the 3rd defendant merely to reduce the 1st defendant's risk exposure and that the first suit property was transferred back to the 1st defendant by the Plaintiff and the 3rd defendant willingly as the two had been holding the property in trust for the 1st defendant. The 2nd defendant maintained that she had the right to own the first suit property. In her affidavit in reply, the 3rd defendant reiterated the contents of the 1st and 2nd defendants' affidavits that I have referred to herein above and termed the Plaintiff's claim against her as "unfair and a display of personal overbearing interest at the expense of the directions of the 1st defendant in matters pertaining to the proper management, sharing and use of the family assets". The 3rd defendant maintained that her ownership of the first suit property cannot be impeached.

5. On 24th January, 2013, the advocates for the parties herein agreed to argue the application herein by way of written submissions. The Plaintiff filed her written submissions on 25th February, 2013 while the defendants filed their submissions in reply on 23rd April, 2013. In their submissions, the Plaintiffs' advocates submitted that the Plaintiff has established a prima facie case with a probability of success against the defendants and that the Plaintiff has also shown that unless the

orders sought are granted the Plaintiff will suffer irreparable harm. The said advocates submitted further that even if the application was considered on a balance of convenience, the same would tilt in favour of granting the injunction sought. The Plaintiff's advocates submitted that the Plaintiff has satisfied the principles for granting interlocutory injunction that were pronounced in the case of, **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, and as such the Plaintiff is entitled to the injunction sought. In response to these submissions, the defendants' advocates submitted that the Plaintiff had not at all met the conditions set out in the said case of, **Giella vs. Cassman Brown** (supra) and as such the Plaintiff is not entitled to the injunction sought against the defendants. The defendants' advocates submitted that the Plaintiff's suit is bad for non-joinder of the Land Registrar to the suit. The defendants' advocates also accused the Plaintiff of non-disclosure of material facts. The defendants' advocates submitted further that the tea bushes on the first suit property belong to the registered proprietors of the said property and not to the Plaintiff who owns and occupies other properties. The defendants' advocates submitted that the Plaintiff has not furnished any evidence of the alleged fraud on the part of the defendants and as such the sanctity of the 2nd and 3rd defendants' title to the first suit property cannot be brought to question. The defendants' advocates submitted that the Plaintiff had failed to establish a prima facie case against the defendants and also to demonstrate that she stands to suffer irreparable harm unless the orders sought are granted. The defendants' advocates cited several authorities to buttress the foregoing submissions.

6. I have considered the Plaintiff's application together with the submissions and authorities cited in support thereof. I have also considered the affidavits filed by the defendants in opposition to the application, the submissions made by the defendants' advocates and the cases cited by them in support of those submissions. As correctly pointed out by the advocates for both parties, the principles for granting interlocutory injunctions are well settled. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. (supra)**, that was cited by the advocates for both parties, an applicant for interlocutory injunction must demonstrate a prima facie case with a probability of success against the respondent and also show that unless the order is granted he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. The plaintiff's case against the defendants as concerns the first suit property which is the subject of this application as stated above is that, the 1st defendant had inconsideration of love and affection, transferred to the Plaintiff and the 3rd defendant the first suit property. The Plaintiff's complaint is that without the Plaintiff's knowledge or involvement, the 1st defendant fraudulently caused the first suit property to be transferred back to the 1st defendant and in further perpetuation of the said fraud, proceeded to transfer the first suit property again from his name to the 2nd and 3rd defendants. The particulars of fraud pleaded against the 1st defendant is that he forged the Plaintiff's signature in the transfer form of the property back to himself and also failed to secure the consent of the Land Control Board for the transaction. The Plaintiff claims that the 1st defendant's said acts of fraud have denied the Plaintiff her proprietary interest in the first suit property. The Plaintiff's further complaint is that the 2nd defendant in assertion of her acquired interest in the first suit property invaded the same in the company of the a group of people and started pruning the tea bushes grown thereon which the Plaintiff claims to belong to her. The Plaintiff claimed that the 2nd defendant and the said group of people that accompanied her damaged some tea bushes and also cut down some young trees that the Plaintiff had planted on her portion of the first suit property. The first question that I need to answer is whether on the material placed before the court, the Plaintiff has demonstrated that she has a prima facie case against the defendants with a probability of success. In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, it was held as follows;

“a prima facie case in a civil application includes but is not confined to “a genuine and arguable case”. It is a case which on the material presented to 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”.

7. I am satisfied on the material placed before the court that the Plaintiff has demonstrated that her proprietary right over the first suit property has been infringed by the 1st and 2nd defendants. There is no dispute that the 1st defendant did transfer the first suit property to the Plaintiff and the 3rd defendant on 15th January, 1998. The Plaintiff claims that the transfer was in consideration of love and affection and that the transfer was made with the intention on conferring exclusive ownership of the first suit property upon the Plaintiff and the 3rd defendant. On his part, the 1st defendant claims that the transfer of the first suit property to the Plaintiff and the 3rd defendant was done without any consideration and that the Plaintiff and the 3rd defendants were supposed to hold the property in trust for him. This court would not be able to determine at this stage whether the first suit property was transferred to the Plaintiff and the 3rd defendant to hold in trust for the 1st defendant or in consideration of love and affection for them to own exclusively. These are issues that would require evidence to determine. The 1st defendant has furnished evidence of his modus operandi in dealing with this property over the years whereby the property has been registered in the names of various members of the family at various times. The explanation for this mode of dealing with the property is however not satisfactory. The motive at one time has been given as the desire to minimize the 1st defendant's exposure to risks which means in other words, hiding some of his properties from his creditors an act which a court of law cannot lend a hand to. The other reason which has been given by the 1st defendant for this rotational ownership of the first suit property is to achieve mutual and internal discipline in his polygamous family. Whatever the case, once the property was transferred to the Plaintiff and the 3rd defendant, the same became for all intents and purposes the property of the Plaintiff and the 3rd defendant and as such could only be transferred back to the 1st defendant by the two for valuable consideration or otherwise through the normal procedure of conveying land. The 1st defendant has gone to great length in his replying affidavit to show that the Plaintiff and the 3rd defendant were to hold the first suit property for him in trust. In my view, if the intention of the 1st defendant was to have the first suit property held by the Plaintiff and the 3rd defendant in trust for him, nothing would have been easier for him than to indicate as much in the instrument of transfer through which the property was transferred to the Plaintiff and the 3rd defendant. If he had indicated the existence of such trust relationship, then the Plaintiff and the 3rd defendant would have been registered as holding the first suit property as trustees pursuant to the provisions of section 126 (1) of the Registered Land Act, Cap. 300 Laws of Kenya (now repealed). If that was done, it would not have been necessary for the 1st defendant to invite the court as he is now doing to infer the existence of a trust relationship between him, the Plaintiff and the 3rd defendant. It is this inference that the court finds difficult to do at this stage without a trial. In any event, whether the Plaintiff and the 3rd defendant held the first suit property as trustees for the 1st defendant as alleged or not, the 1st defendant had to follow the due process in having the first suit property transferred back to him. The 1st defendant had to have the form of transfer executed in his favour by the Plaintiff and the 3rd defendant with respect to the first suit property. The 1st defendant had also to secure the consent of the Land Control Board for the transaction. The Plaintiff claims that none of these were done. The 1st defendant has claimed that all due process was followed in having the first suit property transferred to him. As the party in whose favour the property was allegedly transferred, nothing would have been easier to the 1st defendant than to exhibit a copy of the transfer that was allegedly executed in his favour by the Plaintiff and the 3rd defendant. I appreciate that the onus of proof lies with the Plaintiff. However, in this case, the Plaintiff has denied ever executing any instrument of transfer of the first suit property in favour of the 1st defendant. The Plaintiff is therefore expected not to have the said transfer. The onus then shifts to the 1st defendant who alleges execution of the said instrument of transfer to furnish the court with the said transfer and prove the execution thereof by the Plaintiff. The 1st defendant has not done this. The 1st defendant has also not furnished the court with a copy of the Land Control Board Consent obtained for the transaction. In the circumstances, the Plaintiff has established a case which the 1st defendant should be called upon to answer at the trial of this suit. If it turns out that the 1st defendant had the

first suit property transferred to him illegally, the conveyance of the said property by 1st defendant to the 2nd and 3rd defendants would be equally illegal, null and void.

8. The Plaintiff has contended that she has been in occupation of a distinct portion of the first suit property since 1965 and that in addition to her homestead that is situated in that portion of the suit property, she has also planted tea thereon which she has been selling to KTDA over the years. The Plaintiff has furnished the court with the evidence of her tea sales to KTDA.

The Plaintiff has claimed that the 2nd defendant invaded her portion of the first suit property on 23rd May, 2012 with a gang of 15 men and started pruning her tea bushes. The 2nd defendant's response to this allegation is that the tea bushes on the suit property belong to her and the 1st defendant and that she has every right to pick the same. The 2nd defendant has denied ever threatening or harassing the Plaintiff in the process of such pruning or picking tea from the suit property which she normally does with the help of her children and a few hired women. On his part, the 1st defendant admitted that the Plaintiff and her sons have some tea bushes on a portion of the first suit property. The 1st defendant claimed however that he has more tea bushes on the suit property than the Plaintiff and her sons. He claimed that the Plaintiff has mixed up tea bushes and is picking tea leaves from his tea bushes and selling the same using her own account which she has opened clandestinely with KTDA. The 1st defendant who claimed to be selling his tea to KTDA while the Plaintiff and her children sell their tea to "SOKO UHURU" buyers annexed a number of pay slips issued by KTDA with respect to his deliveries. The position taken by the 1st defendant is inconsistent with that of the 2nd defendant who is accused of invading the Plaintiffs tea bushes. The 2nd defendant while claiming ownership of the tea bushes on the first suit property and declaring that the Plaintiff has no tea bushes thereon placed no material before the court in support of her ownership of the said tea bushes. The 1st defendant while acknowledging the fact that the Plaintiff and her children have some tea bushes on the first suit property claimed that some of the tea bushes being picked by the Plaintiff belong to him. There is no evidence of the alleged "duplicated tea bushes". I have also noted that whereas the Plaintiff placed evidence before the court of her sale of tea from the first suit property to KTDA as at January, 2012 which was a few months before the filing of this suit, the 1st defendant's pay slips are for the tea sold in the years 2003, 2004 and 2007(I cannot make out the date of the Plaintiff's first Pay Slip). I am satisfied from the foregoing that the Plaintiff has an interest on some tea bushes grown on a portion of the suit property the ownership which cannot be determined at this stage. That interest deserves protection by this court pending the hearing and determination of this suit. Due to the foregoing, I am persuaded that the Plaintiff has established a prima facie case with a probability of success against the defendants.

9. On the issue as to whether or not the Plaintiff will suffer irreparable loss unless the orders sought are granted, I am convinced that this condition has also been met. The Plaintiff has demonstrated that she has an interest in the first suit property which requires protection from this court. The Plaintiff has a homestead on the suit property and has also tea bushes. I am satisfied that the Plaintiff would suffer irreparable loss if the 2nd and 3rd defendants who now claim ownership of the suit property proceeds to evict her from the suit property or prevent her from picking her tea grown on the suit property.

10. The upshot of the foregoing is that the plaintiff has established a case for granting of the orders sought. The plaintiff's Notice of Motion application dated 25th May, 2012 is granted in terms of prayer (c) thereof. For the avoidance of doubt, this order shall not entitle the Plaintiff to exclusive occupation and use of the first suit property. The order is limited to the portion of the first suit property in her actual possession and use. The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 30th day of August, 2013

S.

OKONG'O,

JUDGE.

In the presence of:-

Mr. Soire for the Plaintiff

Mr. Bigogo holding brief for Mose for the Defendants

Bibu Court Clerk.

S. OKONG'O,

JUDGE.

E&LCC.NO.179 OF 2012