



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA NAIROBI**

**CIVIL SUIT NO. 29 OF 2009 (O.S.)**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**AND**

**IN THE MATTER OF SECTION OF 17 OF THE MARRIED PROPERTY ACT (1882)**

**RACHEL MWIHAKI GATABAKI ..... APPLICANT**

**VERSUS**

**HON. NJEHU GATABAKI ..... RESPONDENT**

**SURAYA PROPERTY GROUP LTD. .... INTERESTED PARTY**

**R U L I N G**

The application before the Court is brought by a Notice of Motion dated 6<sup>th</sup> April, 2011 and taken out under the provisions of **Section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act; and Order 40 Rules 1 (a) and (b), (3), (4) (1) and (10) 1) (a) of the Civil Procedure Rules** and all other enabling provisions of the law. The Applicant thereby seeks the following orders –

1. *(Spent).*

2. *That Kenya Shillings Twenty Four Million and Fifty Thousand (Kshs.24,050,000/=) of the Kenya Shillings Thirty Four Million, Five Hundred Thousand (Kshs.34,500,000/=) to be deposited in a joint interest earning account in the names of Counsel for the Respondent – Ashfords & Co. Advocates and Counsel for Muga Developers Limited, Miller & Co. Advocates (hereinafter referred to as ‘the third party’), pursuant to a consent order issued on 30<sup>th</sup> March, 2011 in HCCC No. 719 of 2010 Muga Developers Limited v. Hon. Njehu Gatabaki & Rachel Gatabaki be preserved and held by the said account pending the hearing and determination of this application.*

3. *That eight (8) of the duly executed lease documents in the name of the Respondent in respect of 16 Lilac Villas situated on L.R. No.5980 (Now L.R. No.28223/2) to be deposited in the Milimani Commercial Court pursuant to the consent order recorded on 30<sup>th</sup> March, 2011, be preserved and held pending the determination of this application.*

4. *That the duly executed lease for the five (5) acre portion of land to be hived from L.R. No.5980*

*(Now L.R. No.28223/2) to be deposited in Court pursuant to the Consent Order recorded on 30<sup>th</sup> March, 2011 be preserved and held pending the hearing and determination of this application.*

*5. That Kenya Shillings Twenty Four Million and Fifty Thousand (Kshs.24,050,00/=) of the sum of the Kenya Shilling Thirty Four Million, Five Hundred Thousand (Kshs.34,500,000/=) to be deposited in a joint interest earning account in the names of Counsel for the Respondent, Ashfords & Co. Advocates, and Counsel for Muga Developers Limited, Miller & Company Advocate (hereinafter referred to as 'the third party') pursuant to a consent order issued on 30<sup>th</sup> March, 2011, in HCCC No.719 of 2010 Muga Developers Limited v. Hon. Njehu Gatabaki & Rachel Gatabaki be preserved and held in the said account pending the hearing and determination of this suit.*

*6. That eight (8) of the duly executed lease documents in the name of the Respondent in respect of 16 Lilac Villas situated on L.R. No. 5980 (Now L.R. No.28223/2) to be deposited in the Milimani Commercial Court pursuant to the consent order recorded on 30<sup>th</sup> March, 2011, be preserved and held pending the determination of this suit.*

*7. That the duly executed lease for the five (5) acre portion of land to be hived off from L.R. No.5980 (Now L.R. No.28223/2) to be deposited in Court pursuant to the consent order recorded on 30<sup>th</sup> March, 2011 be preserved and held pending the hearing and determination of this suit.*

*8. That this Honourable Court be pleased to make any order it deems appropriate in the circumstances and in the interests of justice.*

*9. That the costs of this application be provided for.*

The application is supported by the annexed affidavit of Rachel Mwiwaki

Gatabaki, the Applicant, sworn on 6<sup>th</sup> April, 2011 and is based on the following grounds –

*(a) That HCCC No. 719 of 2010 Muga Developers Limited v. Hon. Njehu Gatabaki & Rachel Gatabaki was filed in Milimani Commercial Courts in 2010.*

*(b) The Respondent in this matter filed a counterclaim and a Notice of Motion on 25<sup>th</sup> March, 2011 in HCCC No. 719 of 2010 Muga Dev Gatabak elopers Limited v. Hon. Njehu Gatabaki & Rachel.*

*(c) That a consent order was recorded on 30<sup>th</sup> March, 22011 where it was agreed that the consideration for the sale of L.R. No.28223/2 would be partly deposited with the Advocates for the Plaintiff and the 1<sup>st</sup> Defendant in that matter and also in Court.*

*(d) That the suit premises in this cause is the same subject matter as the suit premises in HCCC No. 719 of 2010 Muga Developers Limited v. Hon. Njehu Gatabaki & Rachel Gatabaki matter though the number has now been changed and rectified from 5980/3 to L.R. No.28223/2.*

*(e) That it has become evident that the sale of the suit premises may not be reversed and that the Applicant should therefore be entitled to her 50% share of the consideration.*

*(f) That if the suit in Milimani is compromised, the consideration held will be disbursed to the Respondent and this suit will be rendered nugatory.*

*(g) That we seek that the portion of the consideration equivalent to the Applicant's claim in this case be held and preserved pending the determination of the suit.*

*(h) That the Applicant seeks to preserve Kenya Shillings Twenty Four Million and Fifty Thousand (Kshs.24,050,000/= as the Respondent has already received a deposit on the consideration amounting to Kenya Shillings Fourteen Million (Kshs.14,000,000).*

- (i) *The Applicant has a beneficial interest in the suit property which interest needs to be secured pending the hearing and determination of this suit.*
- (j) *The Applicant herein will be prejudiced if they do not secure their interests in HCCC No.719 of 2010 Muga Developers Limited v. Hon. Njehu Gatabaki & Rachel Gatabaki pending the hearing and determination of this suit.*
- (k) *If the orders sought are not granted, any orders given by this Court will be rendered nugatory.*

The Defendant/Respondent filed a statement of Grounds of

Opposition under **Order 51 Rule 14 (1) (c)** of the **Civil Procedure Rules**. These grounds were that –

- (i) *The application is an abuse of the court process.*
- (ii) *The application is incompetent, as it seeks to vary, appeal and/or challenge the orders of Hon. Justice L. Njagi which orders were issued by consent of all parties, including the Applicant herein.*
- (iii) *That this Honourable Court cannot sit on appeal and/or otherwise interfere with the decision of the sister High Court sitting at Milimani Commercial Courts.*
- (iv) *The orders sought are, in any event conflicting with the consent orders issued on 30<sup>th</sup> March, 2011 and are likely to embarrass this Honourable Court.*
- (v) *That the Applicant is not a Defendant in the counterclaim filed by the 1<sup>st</sup> Defendant herein, in HCC No. 719 of 2010, hence, has no locus standi or capacity to sue in respect thereof.*
- (vi) *The application seeks final orders that are incapable of being granted as the Originating Summons herein has not been heard, and/ or determined.*
- (vii) *That the application and the entire suit is bad in law and fatally defective as Section 17 of the Married Women's Property Act (1882) cannot defeat the rights of the proprietor registered and protected by law.*
- (viii) *That the application and the entire suit is bad in law as the Applicant and/or the Respondent are not the registered owners of the suit property and the Applicant is not entitled to claim any right, legal or equitable rights arising from the said property under any law and/or purportedly under the Married Women's Act (1882).*
- (ix) *That the Applicant is a complete stranger to the Sale Agreement and/or not contract between the parties and hence has no claim legal and/or equitable arising from the said subject property.*
- (x) *That the suit is bad in law and irredeemably defective as the Applicant had no locus standi to bring this action before this Honourable Court.*
- (xi) *That the suit is a futile action and unsustainable against the Respondent as the substantive orders sought by the Applicant for a declaration of joint ownership of the property cannot be issued as against the Respondent as the suit property is registered in a third party's names who have not been enjoined and/or served with the suit papers and not parties to the suit.*
- (xii) *That the suit is bad in law and fatally defective and premature as there are no divorce and/or separation proceedings out of which a claim under Section 17 of the Married Women's Property Act (1882) can be founded.*

**(xiii) That the entire application and the suit is bad in law and fatally defective and unsustainable action as no application under Section (17) of the Married Women's Property Act (1882) may be brought during the subsistence of marriage.**

**(xiv) That the Court cannot act in vain as the relief sought in the application are unavailable and unenforceable as against the Respondent since the suit and application is in respect of the property known as L.R. No.5980/3 registered in the names of the third parties while HCCC No. 719 of 2009 is in respect of L.R. No. 28223/2 also registered in the names of the third parties.**

As early as 21<sup>st</sup> July, 2011, when the matter came for hearing before

Karanja, J., as she then was, Ms. Thongori appeared for the Applicant; Mr. Muriuki for the Respondent; and Mr. Miller for the interested party and the 3<sup>rd</sup> party. Ms. Thongori told the Court that she had a matter before a 3-Judge bench and would not be able to proceed with the application. She therefore requested leave to put in written submissions and highlight the same.

On his part, Mr. Muriuki said that he had requested the Deputy Registrar to avail "the other Court file" as he intended to raise a Preliminary Objection because the present application had been taken care of in a consent order in another matter. For the interested party, Mr. Miller said that his client had complied with everything that had been asked of them and requested that the suit be set down for hearing.

In its wisdom, the Court directed that the parties file submissions within 14 days in respect of the application dated 6<sup>th</sup> April, 2011, and Mr. Muriuki to raise his Preliminary Objection within the said submissions. The learned Judge fixed the matter for highlighting the skeleton submissions on 6<sup>th</sup> October, 2011. On that date, Ms. Thongori appeared for the Applicant while Mr. Gatumuta held brief for Mr. Miller for the interested party. The Respondent was not represented. The Court then directed that the matter be mentioned on 13<sup>th</sup> October, 2011 for highlighting the written submissions.

When the matter before this Court on that date, Ms. Thongori appeared for the Applicant while Mr. Kosgey held brief for Mr. Muriuki and Ms. Oisare held brief for Mr. Miller. Ms. Thongori told the Court that she filed her written submissions on 26<sup>th</sup> July, 2011 but the other parties had not filed theirs. She said that she was ready to proceed by adopting the written submissions. On the other hand, Mr. Kosgey told the Court that Mr. Muriuki was not ready to proceed and that he had written to the parties to that effect. Ms. Oisare for Mr. Miller said that he had not filed any submissions and they were ready to proceed in any direction the Court proposed.

The Court observed that this matter had been pending for the filing of written submissions and that only Counsel for the Applicant had filed hers while the others had not. In the circumstances, the Court could only proceed on the basis of what was on record, and unless the other parties were ready to make oral submissions on that day, the Court would proceed on the basis of the pleadings and the Applicant's submissions. Mr. Kosgey then prayed that the Respondent's grounds of opposition be argued first. The Court's response was that those grounds ought to have been argued in the written submissions. Since the Respondent had not filed his submissions, it was not possible at that moment in time to have those grounds argued otherwise than in the context of submissions. For what it was worth, the Court granted one more adjournment in order to accommodate the Respondent who was granted 7 days from that day to file and serve his written submissions. By consent, the matter was stood over for further mention on 27<sup>th</sup> October, 2011 to confirm compliance and highlight the written submissions.

The matter next came up on 24<sup>th</sup> November, as the Judge was on a short leave on 27<sup>th</sup> October, 2011. Mr. Nyaga holding brief for Mr. Muriuki requested the Court to place the file aside for half an hour as Mr. Muriuki was held up in the traffic. Ms. Thongori vehemently opposed that application stating that she was the only one who had filed submissions while the other Counsel had not. She urged the Court to adopt her submissions. Mr. Miller for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties told the Court that they were not opposed to the application and that was why they had not filed any submissions. For his part, Mr. Muriuki, who had come by then, said he was not able to proceed because he had not filed his submissions

or an affidavit. The Court took the position as the Counsel for the Respondent had not filed any submissions in spite of having been given ample time by the Court to do so, and Counsel for the Applicant did not wish to add anything to the written submissions, the Court would proceed to write its ruling.

I have taken the liberty to summarise the history of the proceedings to-date in order to demonstrate that the Respondent was given a chance to file its submissions but did not do so. By failing to do so, he lost the opportunity to expound on the Grounds of Opposition. Looking at those grounds, they certainly required some elaboration as they don't carry much weight when they are left as mere statements. For instance, how is the application an abuse of the Court process? How is the Court likely to sit on appeal and/or otherwise interfere with the decision of the sister High Court sitting at Milimani Commercial Courts? How the orders do sought conflict with the consent orders issued on 30<sup>th</sup> March, 2011? What is the nexus between the counter-claim by the 1<sup>st</sup> Defendant in **HCCC No. 719 of 2010** and this application? One may ask oneself similar questions in respect of most of the other Grounds of Opposition.

Those grounds are argumentative, and in the absence of some exposition by the Respondent, the Applicant would be at a loss in any attempt to respond. I also note that grounds (x) (xi) and (xii) relate exclusively to the suit and do not mention the application anywhere. If only the Respondent had been kind enough to expound on those Grounds of Opposition, it would probably have assisted the Court to do substantive justice to this matter in more ways than one. But keeping away from such an exposition is not of any use to anyone and certainly does not help to promote the Respondent's cause. In the circumstances, I find that no explanation has been offered to prop up those Grounds of Opposition and since the 1<sup>st</sup> and 2<sup>nd</sup> interested parties are not opposed to the application. For these reasons, I find that the Applicant is entitled to the orders sought. Prayers 5, 6 and 7 of the application by Notice of Motion dated 6<sup>th</sup> April, 2011 are accordingly granted as prayed.

Costs in the Cause. Parties be at liberty to apply.

It is so ordered.

**DATED and DELIVERED at NAIROBI this 31<sup>st</sup> day of January, 2012.**

**L. NJAGI**

**JUDGE**