



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 450 OF 2009

IN THE MATTER OF: - THE SALE OF A MORGAGED PROPERTY, L.R. NO. KITISURI - 1010/C101

AND

IN THE MATTER OF: - THE SHARING OF THE PROCEEDS OF THE SALE OF L.R NO. KITISURU – 101/C101 ALSO KNOWN AS KITISURU 101/101

BETWEEN

JANE W. GAKUNGU APPLICANT

VERSUS

MICHAEL M. GAKUNGU RESPONDENT

RULING

Before me is a Notice of Motion dated 22nd September 2009 brought under Section, 3,3A, 63(c) of the Civil Procedure Act, and Order XXXIX rules 2(1), (2), (3), (4) 3 and 8 of the Civil Procedure Rules; the prayers sought are that;

(a) Pending the hearing and determination of the Notice of Motion/Originating Summons a temporary injunction do issue, restraining the Respondent by his Advocates from releasing any sum to the Respondent or his agents save to remit the redemption sum properly due to the NSSF Board of Trustees in redemption of L.R. KITISURU 101/101 also identified as KITISURU 101/C101 less the said Advocates reasonable legal fees consequent upon the sale only, until further court orders.

(b) Pending the hearing and determination of the originating summons filed, a mandatory injunction do issue compelling the Respondent to provide the Applicant within 7 days of making of the Order with a comprehensive schedule of all sums of money in the sale of L.R KITUSURU 101/101 also identified as KITISURU 101/C101.

(c) Pending the hearing and determination of the Notice of Motion/Originating Summons filed, a mandatory injunction do issue compelling the Respondent by himself, his servant, agents, Advocates, or howsoever the funds are held to forthwith deposit in court and further to the direction of the court all funds available and released to his credit, whether now held by him or by his agent advocates' from purchaser of L.R. KITISURU 101/101 also identified as KITISURU 101/C101

(d) Costs of this application

The application is supported by the Affidavit sworn by the Applicant, Jane W. Gakungu, on 22nd September 2009.

I note that prior to this application, the Applicant had filed a Notice of Motion dated 9th September 2009 which she withdrew.

The Respondent has filed the Preliminary Objection and a Replying Affidavit both dated 2nd October 2009.

A brief background of this application is that the applicant and the respondent herein are joint beneficial owner of the property known as L.R KITUSURU 101/101 also identified as KITISURU 101/C101 herein after referred to as the suit premises. The applicant states that she cohabited with the respondent as husband and wife from 1995 up to the time that the differences arose when the Defendant left the matrimonial home. That during their cohabitation they jointly purchased the suit premises from NSSF and were issued with Tenant Purchase Agreement. That the respondent without the consent and authority of the applicant has proceeded to dispose off his interest in the said property. According to the applicant this is illegal and the respondent has demonstrated that he has no intention of respecting her share of the property. She further states that she will suffer irreparable loss which cannot be adequately compensated by way of damages as she is in danger of losing her lawful share profits of his suit property.

The preliminary objection raised by the respondents is as follows.

0. The application is fatally defective, by amongst other reasons, the reason that the procedure by way of a Notice of Motion, Muddled up with an originating summons and the reliefs sought are unavailable to the applicant.
1. The reliance on the affidavit supporting the Originating Summons to support the Notice of Motion in addition to the aforesaid, makes the application fatally defective, in that it offends the provisions of order XXXX1X and order XXXVI, before directions have been taken or prematurely procedural.
2. The Notice of motion dated 22nd September, 2009, and the Originating Summons dated 9th September, 2009, both erroneously invoke the provisions of the Civil Procedure Act and Order XXXIX of the Civil Procedure Rules.
3. The applicant is not entitled to be heard on merit on the application for interlocutory injunctive reliefs she seeks, on the basis that she is guilty of material non-disclosure and/or deliberately suppressed material information and facts that she considers could adversely affect the Court in the exercise of its discretion when she twice took out the Ex-parte proceedings hereof.
4. There is no sufficient basis for the reliefs sought, either in the Notice of Motion and/or in the Originating Summons.
5. Further the applicant failed to make a full or any disclosure at all that she is currently undergoing a criminal trial where she has been charged with criminal offences that concern her involvement in a conspiracy to murder the Respondent a material fact that would have better informed the court/Judge in the exercise of his discretion.
6. There is no valid marriage relationship between the Applicant and the Respondent, as alleged.
7. In the alternative and without prejudice to the above the applicant made no single worthy material or financial contribution in the purchase and payment towards the acquisition/purchase of the property whose sale proceeds are the subject matter of these proceedings, and hence these present summons are vexatious, and an abuse of the court process and only intended to delay the Respondent from receiving the sale proceed/income to meet and satisfy the indebtedness concerning the subject property and their party claims thereof.

I have considered the application, the affidavits filed by the parties preliminary objections raised and written skeleton submissions filed and I find as follows;

The preliminary objection raised by Mr. Kihara on the application being defective, that the applicant's current Notice of Motion is not supported by any affidavit are valid. However, in light of the provision of article 159 (2) (b) of the Constitution which states that courts shall administer justice without due regard

to procedural technicalities and section 1A (1) and 1B of the Civil procedure Act, I will not strike out the Notice of Motion.

On the merits of the application the applicant is seeking injunctive orders against the respondent. The applicant has to proof that she has met the principles stated in the case of Geilla Vs. Cassman Brown EA.1973 which are;

0. The applicant has to show she has a prima facie case with a probability of success.
1. The Applicant has shown that she would suffer irreparable injury, which would not be adequately compensated by an award of damages if injunction is not granted.
2. If the court is in doubt, it shall decide the application on the balance of convenience.

The Applicant states that she is a joint beneficiary owner to the suit premises; to support this she has annexed Tenant Purchase Agreement between the National Social Security Fund Board of Trustees and Michael M. Gakungu (the Respondent & Jane W. Gakungu “JWGI”. Prime facie she has shown that she is a joint owner of the said property. She has therefore fulfilled the 1st principle. On the second principle she claims to have contributed to the purchase of the suit premises, an issue the respondent disputes. The issue of contribution cannot be decided at interlocutory stage but only at a full hearing. Indeed, if the property has been sold there is an issue of what she is entitled to from the proceeds of sale, this issue I find again can only be determined at the trial. I find that the parties have filed lengthy affidavits which explain their relationship and the role each played. These are matters of evidence.

I do agree with Mr. Kihara’s submission that the applicant is seeking relieves against persons who were not named as parties these being Mr. Benard Ngaira who bought the suit property and counsel for the firm of Walker Kontos Advocates. I therefore decline to grant any order in the Notice of Motion that would affect these parties. Prayer 4 of the application is a mandatory order which I will not grant at this stage. The evidence being sought can be adduced at the hearing. However, considering the relationship of the parties and the suit property has been sold I order that the funds that are being held as a result of the sale of suit property shall be either deposited in court or in interest earning account in the names of the counsels to the parties in this suit. All other reliefs sought shall be dealt at the hearing of this suit. Each party shall bear their own costs. Parties are at liberty to apply in case of any dispute.

Dated and delivered this 9th Day of February 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk