



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**Environment and Land Case 11 of 2012**

**EMILY CHONGE**

**WANYAMA.....PLAINTIFF/APPLICANT**

**~VRS~**

**K-REP BANK OF KENYA.....1<sup>ST</sup>  
DEFENDANT/RESPONDENT**

**PATRICK MANG'ENI YUSTO.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**RULING**

There is no dispute that the 2<sup>nd</sup> Defendant was the registered proprietor of land parcel no. Ndivisi/Khalumuli/648. On 5/2/2002 he agreed to sell 50ft x 100ft of it to the Plaintiff for ksh.70,000/=. He subdivided the parcel into three titles: Ndivisi/Khalumuli/2735, 2736 and 2737 and left all of them in his name. He set aside 2737 for the Plaintiff who went into occupation and developed a home thereon. He did not transfer the plot to the Plaintiff. Instead, in 2008 he went to the 1<sup>st</sup> Defendant for a loan of Ksh.500,000/= and used the title (2737) as security. A legal charge was registered against the title. He did not service the loan which now stands at Ksh.829,497/14. The 1<sup>st</sup> Defendant decided to exercise its statutory power of sale and instructed Garam Investments, auctioneers, who have advertised to sell the property by public auction on 3/8/12.

On 11/6/2012 the Plaintiff filed this suit seeking to permanently restrain the Defendants, their agents, servants and assignees from selling the suit land by public auction or by private treaty. The Plaintiff alleged fraud against the Defendants. Filed along with the suit was the present motion which sought a temporary injunction to restrain the Defendants, and all those acting under them, from selling the suit land until the matter has been heard and determined. She claimed that when the 2<sup>nd</sup> Defendant sold the suit land to her his title to it became extinguished and he could not, therefore, use it to secure the loan. She has proposed to the bank to transfer the charge to another piece of land which the 2<sup>nd</sup> Defendant owns.

The 2<sup>nd</sup> Defendant (who was present during the hearing of this application) informed the court that he was not going to file any papers in response. The 1<sup>st</sup> Defendant swore a replying affidavit through its Bungoma branch manager Jared Omanyo to say that the Plaintiff is a stranger to its dealings with the 2<sup>nd</sup> Defendant who failed to meet his obligations under the loan agreement. The Plaintiff swore a supplementary affidavit to say that the 1<sup>st</sup> Defendant failed in its duty to investigate and find out who the owner of the developments on the suit land was.

Mr. Situma for the Plaintiff and Mr. Khakula Jr for the 1<sup>st</sup> Defendant addressed me on the application. I have considered what they had to say and all the facts that the application revealed.

The 2<sup>nd</sup> Defendant will at the end of the day have to account to the Plaintiff for breach of contract. He sold to her a 50ft by 100ft plot and was paid in full but has failed to transfer the title to her. From the evidence so far disclosed, the 1<sup>st</sup> Defendant was not privy to that agreement. The title to the disputed land remained in the name of the 2<sup>nd</sup> Defendant. The Plaintiff did not register her claim against the title. She did not seek to caution the title. If there were developments made by the Plaintiff on the land it was only

the 2<sup>nd</sup> Defendant who knew about it. He had the responsibility to disclose this to the 1<sup>st</sup> Defendant. From his conduct, he did not. At this stage, therefore, one cannot say that the Plaintiff can challenge the charge on account of fraud, or at all. It follows that she cannot question the 1<sup>st</sup> Defendant's right to exercise its power of sale as a chargee. The result is that the Plaintiff does not have a *prima facie* case with a probability of success in terms of **Giella v. Cassman Brown [1973] EA 358** as against the 1<sup>st</sup> Defendant to whom the application is substantially directed.

It should also be noted that the 1<sup>st</sup> Defendant is a bank. In the event that the property is sold and the suit is ultimately decided in favour of the Plaintiff the bank should be able to pay its full value. It cannot therefore be argued that unless the application is granted the Plaintiff will suffer such loss that damages would not appropriately compensate.

In conclusion, the application has no merit and is dismissed. Given the facts as outlined, I ask that costs be borne by the 2<sup>nd</sup> Defendant who is a fraud.

Dated, signed and delivered at Bungoma this 31<sup>st</sup> day of July 2012.

**A. O. MUCHELULE**  
**JUDGE**