



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 259 of 2010

STEPHEN MWANGI KIMANI.....PLAINTIFF

VERSUS

1. HANNAH WAMBUI NJIHIA
2. JOSEPH MUTURI MUCHIRI.....DEFENDANTS

R U L I N G

Before me is an application dated 6th December 2010 brought by way of **Chamber Summons** by the plaintiff. It was brought under **Order XXXIX Rules 1, 2 and 3** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act (Cap 21)**. It has eight (8) prayers, two of which have been spent as follows:-

1. **(Spent).**
2. **(Spent)**
3. **That an order do issue restraining the defendant by herself or by her servants or agents from selling, transferring, charging, leasing, developing or howsoever disposing off or alienating Title No. Ngong/Ngong/24712 within Kajiado District Area pending hearing and determination of this suit.**
4. **That an order do issue restraining the 1st defendant by herself her servants or agents from receiving or anyhow so ever demanding collecting, keeping or using rent from tenants on premises on property title No. Ngong/Ngong/24712 pending hearing and determination of this suit.**
5. **That rent receivable from tenants on premises on property title number Ngong/Ngong/24712 be paid into a joint interest earning account operated jointly by the plaintiff and the 1st defendant pending determination of this suit.**
6. **That in the meantime and pending determination of this suit rent received and or receivable from tenants of property title number Ngong/Ngong/24712 be utilized to service the 1st defendant's liability on the existing mortgage with Equity Bank Ltd for which the title aforesaid is held as security.**
7. **The honourable court be pleased to make any other orders deemed necessary for the ends of justice.**
8. **Costs be provided for.**

The application has one ground on the face of the Chamber Summons. The ground is that the defendants fraudulently obtained transfer of title to the subject parcel of land from the plaintiff and unless injunction was granted, the plaintiff would suffer irreparable loss and damage.

The application was filed with an affidavit sworn by the plaintiff on 6th December 2010. It was deponed, *inter alia*, that following the plaintiff's acceptance of the 2nd defendant's offer to purchase his title to commercial plot **title No. Ngong/Ngong/24712** which was then undeveloped, an agreement was executed dated 19th July 2000 for the purchase of the plot in the joint names of the plaintiff and the 1st defendant; that the transaction was subject to the provisions of the **Land Control Act**; that it was agreed that the 2nd defendant would as soon as possible obtain **Kajiado Land Control Board's** approval for the transfer; that on the insistence of the 1st defendant the plaintiff paid the balance of the purchase price to the 2nd defendant but the 2nd defendant did not avail to the plaintiff the application for consent of the **Land Control Board** for signature; that though the plaintiff raised his fears, the 2nd defendant continued assuring him that all was well; that the 1st defendant whom the plaintiff was cohabiting with suddenly and inexplicably deserted the plaintiff in August 2008 carrying with her movable household effects into the commercial property which the plaintiff had constructed on the property; that on requesting **F.N. Wamalwa & Company Advocates** to do a search on the title, it was unearthed from the District Land Registry that a consent was purportedly obtained from the **Land Control Board** through a document signed before **P.G. Mburu Advocate** and that the property was to be transferred to the 1st defendant as sole proprietor; that the plaintiff had not only paid the entire purchase price but also spent colossal sums of money developing commercial premises on the land; that a search revealed that the 1st defendant had charged the title to secure a loan of Kshs.800,000/= with Equity Bank Ltd; that the 1st defendant conducted her business at the suit premises and also collected rent exclusively from tenants; that the plaintiff was apprehensive that if no restraining order was granted the 1st defendant was likely to sell or charge further the title which would be prejudicial to the plaintiff.

The application is opposed. A replying affidavit sworn on 9th February 2011 by **Hannah Wambui Njihia**, the 1st defendant, was filed. It was deponed, *inter alia*, that the plaintiff and the 1st defendant were husband and wife; that during their cohabitation they moved from **Ongata Rongai** to **Kiserian** and lived there from 1999; that at **Kiserian** the 1st defendant identified the suit premises for purchase from the 2nd defendant; that the 1st defendant introduced the 2nd defendant to the plaintiff and the two entered into a sale agreement at an agreed purchase price of Kshs.670,000/= and that the plaintiff paid kshs.500,000/= on signing the agreement and the balance of Kshs.170,000/= was to be paid on transfer to the names of the plaintiff and the 1st defendant; that the 1st defendant did not know when consent of the **Land Control Board** was obtained, however a family friend by the name **Peter Shompole** approached the 1st defendant and informed her that the plaintiff wanted to have the property registered in the sole name of the 1st defendant; that the said **Peter Shompole** showed the 1st defendant a letter from the plaintiff requesting the **Land Registrar Kajiado** to register the land in the name of the 1st defendant; that the said **Shompole** and a neighbour **Mr Gachoigua** brought the 1st defendant the transfer forms from **F.M. Wamalwa Advocate** and consequently the piece of land was registered in the name of the 1st defendant; that it was not true that the 1st defendant persuaded the plaintiff to pay the balance of the purchase price; that the 1st defendant built a kiosk on the plot since 2001 and title deed was issued to her in 2002 with the knowledge of the plaintiff; that in 2008, because of disagreements, the 1st defendant left the matrimonial home; that some documents used in these proceedings by the plaintiff were not genuine documents from the Lands office; that it was the 1st defendant, as a business woman, who developed the premises single handedly except for Kshs.210,000/= which the plaintiff took over and repaid to Kenya Women Empowerment Finance; that the 1st defendant leased the premises and had been collecting rent exclusively; that the plaintiff had not shown a *prima facie* case with probability of success.

This affidavit annexed a copy of a marriage certificate issued under the **Marriage Act (Cap 150)** on 31/07/2001 and an affidavit sworn on 9th February 2011 by **Peter Shompole** supporting the 1st defendant's contention that the plaintiff wrote a letter authorizing the Land Registrar to register the plot in

the sole name of 1st defendant, though all other documents indicated that the purchase was purchased in the joint names of the plaintiff and the 1st defendant.

Also filed is a replying affidavit sworn on 4th March 2011 by **Joseph Muturi Muchiri** the 2nd defendant. In the said affidavit, it was admitted that the 1st defendant was the seller of the said plot; that the plaintiff had taken from him all the signed documents for the transaction including the transfer and **Land Control Board** consent form documents; that it was not true that he colluded with the 1st defendant as alleged by the plaintiff; that the plaintiff would not have paid the balance of the purchase price if he was not given the said documents.

The plaintiff through counsel **F.N. Wamalwa & Company** filed written submissions on 12/01/2012. It was stated that this was a case of forgery done by the 1st defendant, who could therefore not be entitled to equitable relief. Such a person cannot get equitable relief. Reliance was placed on **Mutiso –vs- Mutiso (1988) KLR 846**. It was also argued that the jurisprudence on gifts to wives had been diminishing – See **Pettit –vs- Pettit (1970) AC 777**. It was emphasized that in the present case, there was an illegality committed on the part of the 1st defendant and the court should not enforce an illegal contract. Reliance was placed on the case of **Maps Investment (K) Ltd –vs- Kenya Railways Corporation (2005) KLR 410**.

It was argued that the plaintiff had established the parameters for grant of an interlocutory injunction.

The 1st defendant through counsel **JKM Gichachi** filed written submissions on 30th March 2012. It was denied that the plaintiff put up the building. It was contended that, though the purchase price for the plot was paid for by the plaintiff, the plot was developed by the 1st defendant. The 1st defendant had also been in possession of the premises since 2001. It was contended that the 1st defendant had stated the truth that she did not execute any documents. The plaintiff, on the other hand, was the one who authorized the plot to be registered in the sole name of the 1st defendant. It was submitted that the plaintiff had not proved his allegations. It was lastly argued that since the 1st defendant has been the registered owner of the plot, the plaintiff had not shown a *prima facie* case with probability of success.

On the hearing date, **Mr Wanjue** who appeared for the plaintiff and **Mr Musyoki** for the 1st defendant, relied on written submissions.

I have considered the application, documents filed and written submissions. This is an application for an interlocutory injunction. The parameters for consideration by the court in such an application are settled. In **Giella –vs- Cassman Brown Ltd (1973) EA 358** the Court of Appeal for East Africa stated that there are three parameters. Firstly, an applicant has to show a *prima facie* case with probability of success. Secondly, an injunction will not normally be granted unless an applicant will otherwise suffer an irreparable loss not capable of being adequately compensated in damages. Thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

Does the plaintiff have a *prima facie* case? It is not contested that the plaintiff and the 1st defendant have been husband and wife. That the plaintiff paid all the purchase price for the plot. That the documents of purchase and transfer were in the names of the plaintiff and the 1st defendant. However, the plot was registered in the name of the 1st defendant alone, who has now moved to stay on the plot and is doing business there and collecting all rent from tenants. There are allegations that the 1st defendant obtained sole registration by fraud. The District Land Registry file is said to be missing. The plaintiff claims to have developed the plot. The defendant claims to have developed the plot except for a Kshs.210,000/= loan amount from **Kenya Women Empowerment Trust** which was taken over and repaid by the plaintiff.

Having considered all the facts placed before me, I am of the view that the plaintiff has a *prima facie* case with probability of success. A *prima facie* case is not a case that must succeed, but one which might

succeed. It is an arguable case. The issue of whether he gave consent for registration of the plot into the sole name of the 1st defendant will be determined at the main hearing. I must state, at this stage, that the burden of proving that the plaintiff gave such consent, from the facts so far given, is on the 1st defendant.

Will the plaintiff suffer irreparable loss if the injunction is not granted? In my view he will. The lost opportunity on the use and access to land and its income cannot be possibly adequately compensated in damages. I find that the plaintiff will suffer irreparable loss if interlocutory injunction is not granted. However, the injunction to be granted has to be a balancing act between the two parties, who still appear to be husband and wife.

As I have found in favour of the plaintiff on the first two parameters for the grant of an injunction, I do not consider it necessary to delve into the balance of convenience, as I have no doubt in my mind that injunctive orders should issue.

I appreciate that an interlocutory injunction was issued pending the hearing of the application. Considering the peculiar facts of the case, I allow the application and issue an injunction in the following terms:-

1. An order be and is hereby issued restraining the 1st defendant by herself or by her servants or agents from selling, transferring, charging or disposing of or alienating Title No.

Ngong/Ngong/24712 within Kajiado District area pending hearing and determination of this suit.

2. That rent receivable from tenants on the premises on the property title number **Ngong/Ngong /24712** be paid into a joint interest earning account operated by the plaintiff and the 1st defendant pending determination of this suit, and in the meantime same will be utilized to service the 1st defendant's liability on the existing mortgage with Equity Bank Ltd for which the title aforesaid is held as security.

3. Costs of the application be in the cause.

The other prayers are not grantable, in my view.

Dated and delivered this **22nd** day of **November** 2012.

George Dulu

Judge

In the presence of:

N/A for the parties
Nyalo – Court clerk