



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 423 of 2009**

**CMKA..... PLAINTIFF**

**VERSUS**

**JMK..... 1<sup>ST</sup> DEFENDANT**

**M J ..... 2<sup>ND</sup> DEFENDANT**

**JM..... 3<sup>RD</sup> DEFENDANT**

**INVESTIMNET & MORTGAGE BANK LTD ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> defendant filed the chambers summons dated 10<sup>th</sup> September 2009 seeking for orders inter alia that the caution lodged by the plaintiff on LR NO. [...]on 26<sup>th</sup> April 2009 be withdrawn. Secondly, the discharge of charge between the 1<sup>st</sup> defendant and the 4<sup>th</sup> defendant be registered over LR NO.[...]. He also sought for an order restraining the plaintiff from interfering with the peacefully occupation and possession of the suit premises. The application is supported by the grounds stipulated on the body thereto and the supporting affidavit sworn by the applicant on 10<sup>th</sup> September 2009.

2. The brief summary of the matters deposed to, are that the 1<sup>st</sup> defendant purchased the suit premises from the 2<sup>nd</sup> defendant. The property was charged to the 4<sup>th</sup> defendant. The 1<sup>st</sup> defendant subsequently sold the suit property to the 3<sup>rd</sup> defendant and part of the purchase price was paid. The transfer was

executed and the 4<sup>th</sup> defendant secured the balance of the purchase price through a charge. The 3<sup>rd</sup> defendant paid the stamp duty and lodged the title documents for transfer with the Commissioner of Lands on 11<sup>th</sup> August 2009. However the plaintiff lodged a caution over the suit premises and the Registrar of Titles has declined to proceed with registration until the caution is removed by an order of the court.

3. At the same time, the plaintiff in the company of police officers raided the suit premises and took possession. Thus the 1<sup>st</sup> defendant continues to incur losses on the interest on the purchase price and the 3<sup>rd</sup> defendant who is the purchaser cannot take possession of the suit premises and is threatening to rescind the agreement for sale in view of the interferences. He has annexed the copy of the sale agreement with the third defendant, the transfer which was executed and other documents.

4. This application was supported by the 3<sup>rd</sup> and the 4<sup>th</sup> defendants. It was further submitted that the plaintiff's application for interim order of injunction was dismissed by **Kimaru J** on 24<sup>th</sup> July 2009. The 1<sup>st</sup> defendant bought this property in 2004 by that time the plaintiff was not married to the 2<sup>nd</sup> defendant therefore the issue of implied trust is without basis. The plaintiff has no registrable claim on the property. The caution was lodged simultaneously with the application for injunction whereas the application for injunction was dismissed, the caution still persists.

5. It is not in dispute that the suit property was sold to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant in 2004. The 1<sup>st</sup> defendant is now at an advanced stage of completing a sale with the 3<sup>rd</sup> defendant at a consideration of 25 million. Some of the purchase price is being advanced by the 4<sup>th</sup> defendant. The documents of transfer were lodged for registration at the lands office; however the Chief Land Registrar declined to register the documents because of a caution that was lodged by the plaintiff. Moreover there is

no allegation against the 3<sup>rd</sup> defendant who is an innocent purchaser for value.

6. On the part of the plaintiff this application was opposed counsel relied on the replying affidavit sworn on 25<sup>th</sup> September 2009. The plaintiff maintained that he purchased the property in the name of the 2<sup>nd</sup> defendant as his nominee. The plaintiff kept the original title in his custody and the 2<sup>nd</sup> defendant donated a power of Attorney to Miss Ann Kimani who was acting for both parties. The plaintiff commenced the construction of residential house and used colossal sums of money which he used to send through the firm of Nyambura Muciimi and Company. As at February 2009, the plaintiff was still building when somebody purported to have transferred the property using a power of attorney.

7. The plaintiff contends that the power of attorney is a forgery, thus the transfer to the 1<sup>st</sup> defendant is a nullity. The lawyer who is said to have drawn the instruments of transfer has disassociated himself. These were the documents which were relied on to transfer the property to the 1<sup>st</sup> defendant. The issue of fraud is being investigated by the police and that is why the Commissioner of lands refused to transfer the property. Counsel submitted that as at the time **Kimaru J.** ruled on the matter, the issue of fraud had not been known. The 3<sup>rd</sup> defendant is not an innocent purchaser for value because he had been warned by a letter dated 23<sup>rd</sup> April 2009 that the property was being sold in fraudulent circumstances.

8. Even when the transfer to the 1<sup>st</sup> defendant is purported to have been effected, the plaintiff was still constructing a residential house in the suit premises. The plaintiff divorced the 2<sup>nd</sup> defendant in 1996 that is when she married somebody by the name James in a fake marriage so as to get resident status in the US. However in the year 2000 the plaintiff and the defendant had a child and they continued to live together even the time he is purported to have signed the power of attorney in Kenya she was in US. Counsel urged the court not to remove the caution for reasons that there are serious issues of fraud

involved in the suit premises.

9. Secondly the plaintiff has pleaded resultant trust and there is an application before the court of appeal under the provisions of order 5 rules 2(b) of the Court of Appeal Rules. Lastly although there is a specific prayer against the Commissioner of Lands, the Government is not a party to these proceedings and prayers cannot be issued against a party who is a stranger to the proceedings. The applicant should have filed a prerogative writ seeking for mandamus.

10. This court reserved the ruling to await the outcome of the decision of the Court of Appeal which sought for an interim order of injunction pending the hearing of the appeal. It was my view that there are many cross cutting issues raised in this application as well as the application before the Court of Appeal.

11. This court was informed that the Court of Appeal declined to grant the interim conservatory orders. Meanwhile it was brought to the attention of this court that the plaintiff has filed proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> defendants before the Superior court of the state of California in the County of San Diego in which he has made allegations of fraud, defamation and conversion. This suit was filed in November 2009 when the present suit is still ongoing.

12. I find the issues raised and the allegations made in this suit by the plaintiff against the 2<sup>nd</sup> defendant regarding their relationship, the issues of divorce, remarriage and co-habitation between the plaintiff and the 2<sup>nd</sup> defendant intriguing. May that as it may, what concerns me now are the orders sought in this application. Principally whether the caution lodged by the plaintiff over the suit premises should be lifted. It is trite law that a title deed over a land is prima facie evidence of ownership of land. It is not disputed that the property belonged to the 2<sup>nd</sup> defendant who has deposed that she sold it to the 1<sup>st</sup> defendant. There are allegations of fraud and breach of trust which were also considered **by Kimaru J** in his ruling on whether to grant an interim order of injunction. I will therefore not dwell on those issues.

13. Under section 133 (1) of the Registered Lands Act it is provided that:-

***“A caution may be withdrawn by the cautioner or removed by order of the court or, subject to subsection (2), by order of the Registrar.”***

It is not in dispute that the 1<sup>st</sup> defendant is the registered owner of the suit premises and the property was charged to the 4<sup>th</sup> defendant. The 1<sup>st</sup> defendant has annexed a copy of the sale agreement between him and the 3<sup>rd</sup> defendant and a transfer of lease which was lodged for registration together with the discharge and charge on 11<sup>th</sup> August 2009. However these documents could not be registered because of the caution.

14. The 1<sup>st</sup> defendant has established that he is the registered proprietor of the suit premises and as an absolute owner; he is entitled to deal with the premises. In this regard, nothing stops him from transferring and charging the property as he deems fit. For the aforesaid reasons, I will grant an order lifting the caution registered by the plaintiff on the suit premises on condition that there will be no further transfer for a period of one year within which time the plaintiff should prosecute this suit so that the issues raised in the suit can be determined. Since the 1<sup>st</sup> defendant is the prima face legal owner of the suit premises he is entitled to exclusive possession without any interference by the plaintiff.

15. Accordingly I grant the order to lift the caution registered over the suit premises and an order restraining the plaintiff from interfering with the 1<sup>st</sup> defendant's possession of the suit premises until the determination of this suit. Costs of this application shall be in the cause.

RULING READ AND SIGNED ON 29<sup>TH</sup> JANUARY 2010 AT NAIROBI.

**M.K. KOOME**

**JUDGE**