



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
HCC NO. 255 OF 2009**

LUCY MUTHONI NJIHIA PLAINTIFF

VERSUS

BARCLAYS BANK LIMITED1ST DEFENDANT

ANTIQUA AUCTIONEERS.....2ND DEFENDANT

CHARLES NJIHIA NG'ANG'A3RD DEFENDANT

OIL CROP COMPANY LIMITED4TH DEFENDANT

RULING

By an application described as an Amended Chamber Summons Dated 9th February 2010 the Plaintiff/Applicant sought an order of temporary injunction to restrain the 1st and 2nd Defendants/Respondents either alone or through their agents, servants or employees from selling, alienating disposing or transferring and/or otherwise dealing with L.R. No. Nakuru Municipality/Block 18/26 situate in Milimani, Nakuru (the suit premises) pending the hearing and determination of the application

The application was supported by the Applicant's affidavit sworn on 9th February 2010 and the grounds on the face thereof. It was opposed through Replying Affidavit of Nerah Okanga the Respondent's Legal Counsel sworn on 3rd November 2009, and was heard before me on 11th May 2010.

The applicant argued her own case while the 1st and 2nd Respondents were represented by Mr. Mogere, Advocate. The issue is whether the applicant established a **prima facie** case with a probability of success. That is the first test of the trilogy of the case of **GIELLA -vs- CASSMAN BROWN & COMPANY LTD [1973] E.A 358**.

The applicant's claim is summarized in paragraph 11 of her supporting Affidavit, that the suit property has always been a matrimonial property to whose purchase she contributed significantly and is jointly owned by her and the 3rd respondent and this obligated both the 1st and 3rd Respondents to seek her written consent prior to having the suit property being used as a guarantee to advance loan monies to the 4th Defendant in light of the provisions of Section 17 of the Married Women's Property Act 1882.

Section 17 of this Married Women Property Act 1882 as will be more particularly shown in the subsequent passages of this Ruling is merely a procedural provision for determination of the rights of a husband and wife upon a breakdown of a marriage and is not a basis for granting of an order of an injunction. It does not help the applicant's cause.

According to the factual situation, the applicant admits that she and the 3rd Defendant took out a house-improvement loan for improvement of the suit property on the basis that it was a matrimonial property jointly owned and occupied by the Applicant and the 3rd Defendant, and that the 1st Defendant had obtained her signature/authorization before granting the house-improvement loan of Kshs.300,000/- but did not involve her in the loan to the 4th defendant Oil Crop Limited.

The Applicant consequently contended that the 1st Respondent appears to have conspired and deliberately colluded with the 3rd Defendant to keep the Applicant in the dark regarding the loan to the 4th Defendant and the charge upon the suit property.

The Applicant also contended that 1st Defendant was at all times aware of the status of the property as a joint matrimonial property between the Applicant and the 3rd Defendant the property having been purchased from a Mr. Mukwana who was at the time a senior employee of the 1st Defendant.

The applicant further contended that she made direct contributions for the payment of the loan, through a joint account. In addition the Applicant contended that the property being physically divided into two portions with separate electric meters and each area occupied by the Applicant and the 3rd Defendant; and that the 1st Defendant would with due diligence have been aware of the said sub-division and ought to have sought the Applicant's consent before charging the suit property, that the plaintiff has been in possession of the property for over 24 years since 1986, and that she is entitled to a share of the suit property, that she should have been served with a Statutory Notice of the intended sale of the property, and that 1st defendant ought not to be allowed to deprive the Appellant of her lawful share of the property. The applicant dismissed the Ruling in Nakuru HCCC NO. 136 of 2008, as being not **Res Judicata** as the matter was still pending.

The above contentions were reiterated by the 3rd Defendant in his Replying affidavit on 22nd January 2010 and filed on 25th January 2010, that the Applicant contributed the initial deposit of Kshs.60,000/- and contributed towards the development of the suit property out of monies generated from her employment and agri-business. The 3rd Defendant however admits that he offered the suit property as security allegedly without the knowledge of the Applicant, while the 3rd defendant stood as guarantor for the 4th Defendant.

For all these reasons, the applicant contended that she had established a prima facie case, the sale of the suit property would cause her irreparable loss, and that the balance of convenience was also in her favour. The 1st Defendant did not share or agree with those submissions. The 1st Respondent disclosed and laid bare the relationship between the Applicant, the 3rd and 4th Defendants. The Applicant and the 3rd Defendant are husband and wife. They are neither separated nor divorced.

The 4th Defendant is, from its name a limited liability company whose shares may, again from the Supporting Affidavit of both the Applicant and the Replying affidavit of the 3rd Defendant, be inferred as beneficially owned by the 3rd Defendant and the Applicant, that is to say, husband and wife.

The offer for the house-improvement loan was made to the Applicant and the 3rd Defendant and both accepted and signed the offer letter dated 25th January 2001 and is attached to the Replying Affidavit of the 3rd Defendant. There was no question of clandestine charging of the suit property by the 3rd Defendant.

The Replying Affidavit of Nereah Okanga also refers to and attaches the Ruling of Hon. Mr. Justice Maraga the Presiding Judge of this court in which a similar application was made by the 3rd Defendant, and similar prayers - for an interlocutory or temporary injunction were sought by the 3rd Defendant in Nakuru HCC No. 136 of 2008. That application was dismissed by Hon Mr. Justice Maraga on 5th March 2009. Although the grounds in that application were different from the grounds agitated in this application, namely, alleged violations of the various provisions of the Registered Land Act; (Cap 300, Laws of Kenya) and Section 44 of the Banking Act (Cap 488, Laws of Kenya), the fundamental issue raised in that suit, and in this suit and in the Application the subject of this Ruling remain the same namely whether the Applicant, the wife of the 3rd Defendant, is in law entitled to the order of interlocutory injunction on the principal ground that her rights under the Married Women Property Act 1882 (of England), have been or could be violated if the orders she seeks are not granted.

Section 17 of the Married Women Property Act 1882 provides:-

"In any question between husband and wife as to the title to or possession of property, either party or any such bank, corporation, company, public body or society as aforesaid, in whose books any stocks, funds, or shares of either party are standing may apply by summons or otherwise in a summary way to any judge of the High Court .. and the judge may make such order with respect to the application"

In the case of **OBUYA -vs- OBUYA [1986] KLR 391, Shields J** held -

(1) *Section 17 of the Married Women's Property Act 1882 is procedural section and by virtue of Section 3 of the Judicature Act (Cap 8, Laws of Kenya), it was applicable in this court as part of the procedure and practice observed in the courts of justice in England at 12th August 1897.*

(2) ...

(3) *The jurisdiction was to be exercised in accordance with the principle that disputes between husband and wife as to ownership of property which at the time they had been using in common are disputes*

which may very well be dealt with under the rule that orders should be made which appear to be fair and just in the special circumstances of the case."

In the earlier case of NJOROGE -vs- NGARI [1985] K.L.R 480, Buttler-Sloss J, held inter alia that - Section 17 of the Married Women Property Act 1882 does not defeat the rights of a proprietor protected by the Registered Land Act but merely promotes a summary procedure way by which property rights between a husband and wife can be decided.

The learned judge also held that *"if the property is in the name of one person, even if that property is registered in the name of one person, then both persons have property interest in that property. If legal ownership of such person is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and that other person."*

The learned judge also held that the purpose of the Married Women's Act 1882 Section 17 is not to defeat rights but to provide a machinery for ascertaining and defining rights and once ascertained, then the register is to be changed to take account of them. The system of registration is meant to serve proprietorship and, proprietorship is not designed to serve, the system of registration.

In this case the Applicant supported by the 3rd Respondent, the husband contended that she initially contributed seed money to purchase the suit property and continued to contribute towards the repayments of the loan from her salary and her agri-business.

Whereas all that may be so, the issue in this suit and in this application in particular is not the contribution by the Applicant towards the purchase of the suit property or indeed who is the rightful owner or what her proportion of ownership should be. All of those questions are irrelevant. In an application for an injunction against a third party whose interest as a lender is secured loan, the dispute ceases to be between the husband and wife but between the registered proprietor of the land or suit property and the third party, the lender whose security is being assailed.

For such an assault to succeed, the assailant must bring herself within the principles for granting an interlocutory injunction. These principles have already been alluded to in the course of the passages of this Ruling. The assailant, that is, the Applicant must establish a prima facie case with a probability of success.

A case with a probability of success will show that the applicant has not breached any of the covenants in the instrument securing the loan. The Ruling in the HCCC 136 of 2008 showed that the 3rd Defendant who is the husband of the applicant was indebted to the 1st Defendant in the sum of Khs.18,579,384.50 as of 7th March 2008. That sum will, with interest, be much higher now. The applicant or the 3rd and 4th Defendants have made no effort to pay the said sum or any part thereof.

I will repeat here what I said recently in the case of **DR. CHRISTOPHER WAITHAKA -vs- BARCLAYS BANK OF KENYA LTD. (NAKURU HCCC NO. 239 of 2007) page 13 -**

"It has been said that a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. I think it is also a truism to say that a chargor's or mortgagor's equity of redemption is only good as long as the mortgagor is prepared to pay the amount in default within the period of the statutory notice. Beyond that period, the property becomes a mere commodity for sale, whatever sentimental value the owner or chargor may attach to it."

Likewise, as in this case, the mortgagee or chargee will not be restrained because of a contrived dispute between a wife and husband. I say "**contrived**" because the applicant does not seek any orders against either the 3rd Respondent (the husband) or the 4th Respondent (the Company beneficially controlled by the 3rd Respondent and applicant).

This state of affairs renders the entire suit, and not merely, the application, a complete abuse of the process of court, particularly because the same issue of injunction has been agitated and dismissed in a previous application in the case of **CHARLES NJIHIA NGANGA -vs- BARCLAYS BANK OF KENYA LTD.** and **ROBERT WAWERU MAINA (NAKURU HCC NO. 136 OF 2008)**

For those reasons the applicant's application dated 1st September 2009 is dismissed with costs to the 1st and 2nd Respondents.

There shall be orders accordingly.

Ruling dated and signed this 2nd day of July 2010

M. J. ANYARA EMUKULE
JUDGE