



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 89 OF 2010

MARY NJERI KANYORO.....
.....**PLAINTIFF**

VERSUS

EDWARD MUGANE NJONJO.....
.....**1ST DEFENDANT**

DAVID KAHORA NGUGI.....
.....**2ND DEFENDANT**

CLASSIC RIFT VALLEY AGENCIES.....
.....**3RD DEFENDANT**

RULING

By an application brought by way of a Notice of Motion dated 6th April 2010 and filed on 7th April 2010, the Plaintiff Applicant sought an interim order of injunction against the Defendants, their agents, and servants from trespassing, transferring, alienating, disposing, evicting, leasing or in any way interfering with the Plaintiff's land known as BAHATI/BAHATI/BLOCK 1/3075 pending the hearing and determination first of the application and of the suit.

Interim orders were granted *ex parte* on 16th April 2010 restraining the defendants as aforesaid. When the matter came up for hearing *inter partes* on 23rd June 2010, Counsel for the respective parties opted to file written submissions on their respective claims.

The Plaintiff/Applicant's case is that the Applicant in consideration of a friendly loan of Kshs 50,000/= from the 2nd defendant deposited her title deed with the 2nd defendant together duly executed Transfer Forms. The Applicant was to repay the total loan and interest at Shs 75,000/=. She failed to pay the said sum in its entirety and borrowed from another Shs 50,000/= from the 1st defendant which the applicant used to pay the 2nd defendant but by the time she obtained this amount the interest had escalated the loan, and by the time of these proceedings the Applicant had paid the 2nd Defendant a total of Kshs 230,000/=.

The Applicant claims that despite such payment, the 2nd Defendant held on to her title and illegally transferred the land to himself (*by using the transfer forms*) and purported to sell and transfer the land to the 1st Defendant. The Applicant contends that such transfer was fraudulent and should ultimately be set aside.

On their part the Defendants through submissions by their counsel, Mr. Chebii, contend that the Applicant is a stranger to the suit land. The notice by the 3rd defendant is to one Esther Njoki, a squatter on the land, who has no connection with the Applicant. The Defendants also deny allegations of fraud, and contend that if there was any such fraud, there is no report to the law enforcement agencies, the Police. The Defendants also deny that title to the land was deposited with the 2nd defendant, or any one of them, as none of them is a "**bank**" who would "**charge**" the property. The Defendants' counsel also note that the "**alleged caution**" placed by the Applicant against the title was not attached to the Applicants Supporting Affidavit or further affidavit in reply to the Defendants' Replying Affidavits.

The Defendants' counsel contends that the suit and application herein is an abuse of the process of court. The Defendants' actions were above board. The application ought not to be granted and be dismissed with costs.

Those were the respective arguments by the rival counsel.

The principles upon which a court will grant an injunction are well established. Firstly, it is a

discretionary remedy, and like every discretion it must be exercised judicially. Secondly as it was laid down in the often quoted case of **GIELLA vs. CASSMAN BROWN & CO. LTD [1973] E.A. 358**, a court will grant an injunction where -

- (a) ***an applicant shows there is a prima facie case with a probability of success;***
- (b) ***the applicant might suffer irreparable injury or loss unless the injunction is granted; and***
- (c) ***if the court is in doubt it will decide the application on the balance of convenience.***

It is the Applicant's case that she borrowed some Kshs 50,000/= from the 2nd Defendant/Respondent, and was required to pay back a sum of Kshs 75,000/=. She failed to do so. She then borrowed another Kshs 50,000/= from the 1st Defendant to pay the 2nd Defendant. She had in consideration of the borrowing from 2nd Defendant signed over to him the Transfer Forms and also given him the title deed.

The Applicant claims that she has paid the 2nd Defendant over Kshs 230,000/= with the help of her daughter. The 2nd Defendant has not denied this contention. The Applicant also contends that although she signed over the Transfer Forms and handed over the title deed to the 2nd Defendant, at no time was she given notice or invited to the relevant Land Control Board to obtain consent for the transfer of land. The Applicant also contends that there was collusion between the Defendants to sell her land. Fraud vitiates most transactions.

In the circumstances the applicant has established a prima facie case with a probability of success. The applicant would suffer irreparable injury and loss unless interim orders of injunction is issued. The balance of convenience would also favour the Applicant.

I would therefore allow the applicant's application dated 6th April 2010 and filed on 7th April 2010 in terms of paragraph 3 thereof.

I direct that the costs of this application abide the determination of the suit herein.
There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 12th day of November 2010

M. J. ANYARA EMUKULE
JUDGE