



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**  
**CIVIL CASE 299 OF 2008**

1. ACHAL SUKHBINDER SINGH  
2. KAVITA ACHAL  
3. NILAN SHAH  
4. NILAM AKTAR ZAFAR  
5. RAZIA BEGUN DEEN .....PLAINTIFFS/APPLICANTS  
VERSUS  
1. BANK OF BARODA LIMITED  
2. CHANDRAKANT NATWARLAL GOR.....,DEFENDANTS/RESPONDENTS

**RULING**

Application dated 5<sup>th</sup> June 2008 is brought by the Applicants/Plaintiffs seeking orders:-

1. That an interlocutory injunction do issue to restrain the Defendants from selling, parting with possession, transferring or leasing out or in any way dealing with Plot No. LR 209/4877/2 to the detriment of the Plaintiffs pending the hearing and determination of this suit.
2. That the First Defendant be restrained from releasing the title of suit property LR 209/4877/2 to the Second Defendant pending the hearing and determination of this suit and that the said title be deposited in the High Court pending the court until hearing and determination of this suit and that further court orders be made to preserve the suit property pending the hearing and determination of this suit property.

It is common that the provisions of Section 52 of the Indian Transfer of Property Act as applied in this country the law prohibits dealings with immovable property while a suit in connection with the same is pending in a court.

Furthermore there is a judgment and decree in Milimani High Court No. 7 of 2003 in which the Second Defendant herein being First Defendant therein together with one Bhupinder Singh Chana were decreed to transfer one fourth of undivided share of subdivision a of property No 209/4877/2 Flat No. 4 to First Plaintiff and Second Plaintiff herein. The decree was dated on 30<sup>th</sup> October 2006. The supporting affidavit shows that the

suit property was purchased by the Plaintiffs together with the Second Defendant and one Bhupinder Singh Chana in accordance with an agreement dated 4<sup>th</sup> February 1994 (exhibited). The plot was demarcated into parts shown and described as “**A**” and “**B**”.

The Plaintiffs have at all times occupied their portion known as “**A**” while the Second Defendant and that other person Bhupinder Singh Chana have been in occupation of part known as “**B**”. The plot No LR 209/4877/2 was by agreement agreed to be subdivided. In the meantime pending subdivision, the second Defendant and the Bhupinder Singh Chana would hold the Plaintiffs’ share in trust.

Upon the subdivision of the suit property the first Defendant failed to comply with agreement as to the subdivision and a suit was filed being HCC No. 7 of 2003 by 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs against 2<sup>nd</sup> Defendant for specific performance. The judgment made on 30<sup>th</sup> October 2006 against the Second Defendant a copy of judgment is exhibited as “**AS**” and decree “**AS3**”. The 2<sup>nd</sup> Defendant failed to carry out the orders of the court.

On or about July 2007 the Second Defendant proceeded to take a loan from the first Defendant giving as security the whole property LR 209/4877/2 to the First Defendant. The Second Defendant did not disclose to the Plaintiffs of his action. He kept the Plaintiffs in darkness. In his replying affidavit the Second Defendant says he is one of the registered proprietor with Bhupinder Singh Chana. He admits that the property was approved for sub-division but that it was later that sub-division was invalidated by the Council. He admits that as legal owner he has right to charge the property. He admits that he was sued and a decree was made against him on 30<sup>th</sup> October 2006 but he has appealed against that judgment and that he has applied for stay against execution and the application is still in court pending. He swears that he has not failed to pay the loan and he will not fail to pay.

The issues disclosed is that the Plaintiff has an interest in the land which arises out of decree of court. It is therefore not true that they have no interest and that it is only Second Defendant who holds an interest.

If the Second Defendant has made an application for stay of execution in the High Court why does he not wait for the outcome? The Second Defendant’s action shows he does not respect the law (judgment of High Court) and that he is ready to commit fraud to by-pass the law and the rights of others. The judgment of Hon. Justice Ojwang in the case of Peter Karanja Mungai vs. Daniel Njoroge Kamau and 2 others is relevant. The statement that the judgment in HCC No. 7/2003 was wrongly decided by the Defendant is not for him to make. He should await the opinion of the Court of Appeal.

Regarding the submission of First Defendant it has to be said that a chargee has no right of possession to the charged property.

The issue is that the property in dispute is subject to civil proceedings. The First Defendant ought to have awaited the Court of Appeal’s decision before purporting to take such property as security at all.

The Second Defendant has also filed submissions alleging that the Applicants have no prima facie case. This is not true. The Plaintiffs first and second hold a decree of part of their share of land.

Upon perusing and consideration of the arguments advanced by the parties it is my considered view that the Plaintiffs are entitled to orders sought in Chamber Summons dated 5<sup>th</sup> June 2008 namely that pending hearing and determination of this suit the Defendants are hereby restrained from selling parting with possession transferring, leasing out, or in any other way dealing with suit property LR 209/4877/2 to the detriment of the Plaintiffs. And that pending hearing and determination of this suit the First Defendant is hereby restrained from releasing the title of the said suit property to the First Defendant. The said Title Deed shall be deposited in court. The reasons on which I support my view is that I find the Plaintiffs have demonstrated a prima facie case and the court in HCC No 7 of 2003 did not find that damages would be adequate remedy, (Kasanga J) and furthermore balance of convenience tilts in favour of the Plaintiffs who are in possession. The application is allowed accordingly. Costs to the Plaintiff.

Dated and delivered at Nairobi this 8th day of June 2009.

**J. N. KHAMINWA**  
**JUDGE**