



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

Civil Suit 423 of 2009

CMKW.....PLAINITFF

VERSUS

J M K.....1ST DEFENDANT

M J.....2ND DEFENDANT

J M.....3RD DEFENDANT

INVESTMENT & MORTGAGE BANK LTD.....4TH DEFENDANT

RULING

The plaintiff filed an application pursuant to provisions of Section 3A of the Civil Procedure Act and Order XXXIX Rules 1(a), 2 & 9 of Civil Procedure Rules seeking orders of the court to restrain, by means of a temporary injunction the 1st, 3rd and 4th defendants, by themselves or through their agents from transferring, leasing, charging, subdividing, disposing or in any manner whatsoever interfering with the plaintiff’s property being LR. No. Nairobi [particulars withheld], Nyari, inclusive of all developments thereon (*hereinafter referred to as the suit property*) pending the hearing and finalization of the suit. The plaintiff prayed for a further order restraining the 1st, 3rd and 4th defendants, by means of a temporary injunction, from trespassing or breaking into the suit property or removing therefrom any property or intimidating, harassing or threatening to evict the plaintiff from the suit property pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The 1st defendant, JM K, the 2nd defendant, MJ, the 3rd defendant, J M and PKN, the head of the legal department of the 4th defendant swore replying affidavits in opposition to the application. The 1st defendant filed notice of preliminary objection to the application and also filed skeleton submissions prior to the oral hearing of the application.

At the hearing of the application, I heard rival submissions made by Mrs. Muriu for the plaintiff, Mr. Havi for the 1st and 2nd defendants, Mr. Gatheru Gathemia for the 3rd defendant and Mr. Munyu for the 4th defendant. I have carefully considered the said arguments. I have also considered the pleadings filed by the parties in support of their respective opposing positions. I have had the benefit of perusing through the authorities cited by counsel for the parties to this application. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (E.A. Industries v. Trufoods, [1972] E.A. 420).”

In the present application, certain facts are more or less not in dispute. The plaintiff was the husband of the 2nd defendant. The two divorced in 1996. During the subsistence of their marriage, the couple was blessed with two children. After her divorce, the 2nd defendant was remarried by one KRJ a citizen of the United States of America. The 2nd defendant was remarried on 27th September 1996 at Santa Ana, California, United States of America. Upon her remarriage, the 2nd defendant relocated to the United States of America. According to the plaintiff, he purchased the suit property and transferred the same to the 2nd defendant as his nominee. The 2nd defendant was duly registered as the owner of the suit property and certificate of lease issued in her name on 19th July 2005.

It was the plaintiff’s case that the 2nd defendant had been so registered as his trustee. He deponed that the said registration of the 2nd defendant was not supposed to confer any proprietary rights on the 2nd defendant. He stated that he commenced construction of a residential house on the suit property after he had procured from the 2nd defendant a Power of Attorney nominating Anne Njeri Kimani, the advocate for the plaintiff, as her attorney in relation to any transaction in respect of the suit property. The plaintiff explained that he had requested the 2nd defendant to donate the said Power of Attorney, as at the material time, he intended to borrow money from a bank to finance the completion of the residential house in the suit property.

In her response to the allegations made by the plaintiff in his supporting affidavit, the 2nd defendant stated that the plaintiff purchased the suit property and transferred the same to her voluntarily as a gift in appreciation of the fact that the 2nd defendant gave birth to two children, who were sired by the plaintiff, and who are named after the plaintiff’s mother and father respectively. According to the 2nd defendant, the plaintiff was elated that the 2nd defendant had decided to name the said children after his parents and that is why he unconditionally and on his own volition decided to purchase the suit property for the 2nd defendant. The 2nd defendant denied that she was registered as the owner of the suit property as a trustee of the plaintiff. She further denied that she had donated Power of Attorney to the advocate of the plaintiff in recognition of the plaintiff’s ownership rights over the suit property. She denied that the plaintiff had any interest in the suit property. She deponed that, being the registered owner of the suit property, she had the legal right to sell it and transfer it to any person she desired. According to the plaintiff, the 2nd defendant did not have authority to transfer the suit property. The plaintiff contends that the transfer was made fraudulently and in breach of trust.

I have evaluated the conflicting affidavit evidence by the plaintiff and the 2nd defendant in regard to the circumstances under which the suit property was registered in the name of the 2nd defendant. It is common ground that at the time the 2nd defendant was registered as the owner of the suit property, she had been divorced from the plaintiff. In fact, she is already remarried. The plaintiff cannot therefore rely on the decision of Mutiso vs Mutiso [1988] KLR 846, where the Court of Appeal held that in certain circumstances the court may hold that a resulting trust has arisen when a husband transfers a property to a wife. In that case, the Court of Appeal observed that a presumption of advancement may apply where a husband transfers a property to his wife. The court further observed that the strength of the presumption of advancement may be diminished in modern times and the presumptions to be drawn in Kenya must similarly accord with the social conditions which prevail in Kenya so as to conform to the most likely intentions of couples in Kenya. The plaintiff and the 2nd defendant, at the time the suit property was transferred, other than being parents of the two children, did not have any relationship recognized in law. The 2nd defendant was someone else’s wife.

The plaintiff may however get comfort in the same decision where the said court held that even where a gift is presumed, it may still be the case that a beneficial ownership was intended to remain with the person making the gift. In a recent decision of the Court of Appeal, The Registered Trustees Anglican Church of Kenya Mbeere Diocese vs David Waweru Njoroge [2007] eKLR, the court held at page 7 of its judgment as follows:

“Generally speaking, the moment in time when a gift takes effects is dependent on the nature of the gift; the statutory provisions governing the type of the gift and the steps taken by the donor to effectuate the gift. There are leading English cases dealing with the gift of shares and the applicable law such as In Re Fry deceased [1946] Ch 312; In Re Rose: Midland Bank Executor and Trustee Co. Ltd vs Rose [1946] Ch 78 and In re Rose ; Rose v Inland Revenue Commissioners [1952] Ch 499. Most of relevant decisions were considered in the recent English case of Pennington vs Waine [2002] 1 WLR 2075. However, we can only find very few cases dealing with the gift of registered land.”

After summarizing the said English decisions, the Court of Appeal in the above case concluded that a gift of registered land becomes effective upon execution and delivery of the transfer and cannot be recalled thereafter even though the donee has not yet been registered as a proprietor.

In the present application, it was evident that, although the plaintiff claims that he had transferred the suit property to the 2nd defendant to hold the same in his trust, there is no evidence on record to suggest that that was the intention of the plaintiff when he transferred the suit property to the 2nd defendant. The Power of Attorney donated by the 2nd defendant to the advocate of the plaintiff does not prove or establish the assertion by the plaintiff that the 2nd defendant intended to retransfer the suit property back to him. The fact that the plaintiff donated the Power of Attorney to the plaintiff’s advocate was not a bar for the 2nd defendant to revoke the same power of attorney and donate another power of attorney to a person of her choice. My evaluation of the facts of this application leads me to the conclusion that the plaintiff transferred the suit property to the 2nd defendant as a gift. I was not persuaded by the thrust of the plaintiff’s case that a trust was created when the said transfer was made. In my considered opinion, and in light of the Court of Appeal decision in The Registered Trustees Anglican Church of Kenya Mbeere Diocese (Supra), the gift of the suit property by the plaintiff to the 2nd defendant became complete and effective the moment the 2nd defendant was registered as the owner of the suit property. The 2nd defendant therefore had the legal right and power to deal with the property in any manner that she deemed fit, including selling and transferring the same to third parties.

From the evidence on record, it was apparent that the 2nd defendant appointed one Michael Njugi Mwangi as her attorney for the purposes of the sale and transfer of the suit property to the 1st defendant. Although the plaintiff lamented that the 2nd defendant had sold the suit property at a price that was grossly undervalued (*and therefore constituting evidence of fraud perpetrated against him*), I was unable to find merit with such complaint. A registered proprietor of a parcel of land is at liberty to sell such property at a price that he or she deems fit in the circumstances. I refuse to read much in the purchase price of the suit property other than observe that it was a price that was agreed between a willing seller and a willing buyer. After the transfer of the suit property to the 1st defendant, the same was charged to the 4th defendant to secure a loan for the sum of Kshs.18 million. The suit property was so charged to secure an amount that was advanced to a company known as B Investments Ltd. Subsequently thereafter, the 1st defendant sold the suit property to the 3rd defendant. According to the 3rd defendant, he has already taken possession of the suit property and was in occupation of the suit property until the month of May 2009, when the plaintiff attempted to forcefully evict him from the same. Although the transfer documents was lodged at the Land Registry, the transfer of the suit property to the 3rd defendant was stopped when the plaintiff obtained orders from this court temporarily prohibiting the said transfer pending the hearing and determination of this application. A complaint was made to the police. It appears that the investigation is still ongoing.

Having evaluated the facts of this application, it is evident that, even if the plaintiff has a case in regard to

whether the 2nd defendant was holding the suit property in trust for him, the suit property is no longer the property of the 2nd defendant. The plaintiff may have had a case for a grant of temporary orders of injunction if the suit property was still registered in the name of the 2nd defendant. That is not the case here. The position on the ground is that the 1st defendant is a registered owner of the property; the 4th defendant has a legal charge over the suit property; and the 1st defendant has already sold the suit property to the 3rd defendant. The transfer of the suit property to the 3rd defendant is awaiting registration. The 4th defendant is waiting to have its charge registered over the suit property to secure a loan that it has advanced to the 3rd defendant to purchase the suit property.

It is clear that the plaintiff has an uphill task to establish a prima facie case in respect of a property that has passed hands several times. In the case of the plaintiff, the horse has already bolted out of the stable. The closing of the doors of the stable may not be of much help to the plaintiff. Other persons have acquired legal rights to the suit property pursuant to the subsequent transfers that are, prima facie, superior to that of the plaintiff. The plaintiff's remedy, in my view, lies in damages. He can pursue the same in his main suit. In fact the plaintiff, *inter alia*, pleaded to be awarded general and special damages consequent to the said sale and transfer of the suit property by the 2nd defendant. The balance of convenience tilts in favour of the 3rd defendant who has paid valuable consideration for the suit property. He is an innocent purchaser without notice of the events that transpired before he purchased the suit property from the 1st defendant.

For the above reasons, I am unable to grant the application sought by the plaintiff. His application for interlocutory orders of injunction is hereby dismissed with costs to the defendants.

DATED AT NAIROBI THIS 24TH DAY OF JULY 2009

L. KIMARU

JUDG