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

Civil Suit 504 of 2005

ROSE WAKUTHII MWANGI NJUNU

(Administrator of the Estate of the late

JULIUS W. MWANGI NJUNU) …………………………….......…...……… PLAINTIFF

VERSUS

EDWARD KITHINJI

HOUSING FINANCE COMPANY OF KENYA

ABDILLAHI WARSAME ALI t/a NADHIA AUCTIONEERS …..........… DEFENDANTS

R U L I N G

The plaintiff is the widow and Administratix of the Estate of the late Julius W. Mwangi Njunu who was granted a loan by the 2nd defendant, Housing Finance Company of Kenya. The late Njunu charged his property known as Nairobi/Block 99/244 to the 2nd defendant to secure the loan by the 2nd defendant. In due course, the late Njunu defaulted in his repayment of the said loan and the 2nd defendant threatened to exercise its statutory power of sale. Apparently, the said power was not exercised but with the 2nd defendant's consent, the said property was sold to the 1st defendant who was registered as proprietor of the said property. Somehow the 3rd defendant was instructed to evict the late Njunu.

The plaintiff is aggrieved by the above actions and has filed this suit to challenge the said sale and threatened eviction. She has done so on the grounds: that the 1st and 2nd defendants conspired to grab the said property fraudulently; the plaintiff alleges that the property was transferred to the 1st defendant without payment of any consideration to the late Njunu or the 2nd defendant; that the discharge of charge and the transfer documents were fraudulently done. that the interest charged was excessive, punitive and unconscionable. In the suit the plaintiff seeks ***inter alia*** a declaration that the sale and purported transfer are invalid; an Order of injunction restraining the defendants from trespassing, charging, evicting or in any manner interfering with peaceful possession of the suit property an order for the discharge and retransfer of the said property to the plaintiff and general damages. The Plaint was filed on 6.9.2005 and amended on 26.10.2005.

Simultaneously with the filing of the Plaint, the plaintiff lodged an application craving for interlocutory injunctive and prohibitory relief expressed to be under the provisions of Order XXXIX Rules 1 and 2 of the Civil Procedure Rules. The primary prayer in the application is:-

> "**That the defendants, by themselves, servants or agents be restrained by injunction from selling, transferring, renting, occupying, alienating, trespassing or in any manner evicting or interfering with peaceful possession or occupation of L.R. No. Nairobi/Block 99/244 till the hearing and disposal of this suit."**

The primary reasons for the application are that the 1st and 2nd defendants conspired to grab the suit property; that the 2nd defendant sold the suit property to the 1st defendant without serving a valid Statutory Notice of Sale; that the 2nd defendant caused the sickly late Njunu to transfer the suit property when the 1st defendant had paid nothing; that the 2nd defendant, despite being paid insurance sums that cleared the loan balance sold the suit property and is guilty of unjust enrichment.

On 16.9.2005, the plaintiff appeared **ex parte** before Ransley, J. and obtained interim orders as prayed. The application and orders were then served on the defendants. On 6.10.2005 the 1st and 2nd defendants filed replying affidavits. The 1st defendant also filed Grounds of Opposition on the same date. The 2nd defendant's affidavit is sworn by one Joseph Kania, the Manager, Legal Services of the 2nd defendant. The 1st defendant's affidavit is sworn by himself. In addition to the replying affidavits, the 1st and 2nd defendants have filed their defences which have been subsequently amended. The 1st defendant has raised a counter-claim against the plaintiff for sums deposited towards purchase price. He has also claimed against the 2nd defendant for sums deposited with his advocate as balance of purchase price. The plaintiff has replied to the defences and put up a defence to the 1st defendant's counter-claim.

The application was canvassed before me at length on 26.10.2005, 8.11.2005 and 17.11.2005 by Mr. Mugo, learned counsel for the plaintiff, Mr. Sharma and Mr. Issa, learned counsels for the 1st, 2nd and 3rd defendants respectively. The main and primary issues debated before me would appear to be:

(1) The validity of the ex parte order of temporary injunction given by Ransley, J. on 16/9/05.

(2) Whether or not the plaintiff is guilty of material non-disclosure.

(3) Validity of the sale agreement between the 1st defendant and the late Njunu.

(4) Whether or not the plaintiff is entitled to the prayers sought in the application in the absence of such prayers in the Plaint.

(5) Validity of the Charge and Transfer documents.

(6) Whether or not the plaintiff has a legal right to protect.

(7) Generally, whether the orders sought could be issued as prayed.

I will consider this application in the light of the principles applicable to the grant of an interlocutory injunction which were laid down in the rule making case of **Giella vs. Cassman Brown & Co. Ltd. & Another [1973] E.A.358.** The principles are as follows: First the applicant must show a **prima facie** case with a probability of success at the trial but if the court is in doubt it should decide the application on a balance of convenience. Secondly, normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages.

On the validity of the ex parte temporary injunction, counsels for the defendants submitted that Ransley, J. granted the same without recording reasons for proceeding ex parte as required by the provisions of Order XXXIX Rule 3 (1) and the Order should for that reason alone, be set aside. For this proposition, reliance was placed upon the observations of the Court of Appeal in **Uhuru Highway Development Limited vs. Central Bank & 2 Others: C.A. No.126 of 1995 (UR)** where His Lordship Akiwumi, J.A. observed as follows at p.16 and 17:

"**It is clear from Order 39 Rule 3 (1) that in order that a Court may hear an application ex parte, it must satisfy itself and the reasons for doing so must be recorded …. the recording of reasons by the Learned Judge why he should hear the application ex parte are mandatory and the learned judge having failed to record his reasons as required by Order 39 R. 3 (1) could not and should not have gone on to hear the application ex – parte and grant the temporary injunction. This order was invalid, had no legal basis and is therefore of no legal effect"**

The Court of Appeal was considering an appeal against an ex parte injunction which appeal was allowed and the injunction set aside. I have perused the record of this matter and note that the Learned Judge did not record that he was satisfied that the object of granting the injunction would be defeated by delay. I have however no doubt in my mind that he was so satisfied. Subsequent events fortify this view because when the application came up before the same Judge on 22.9.2005 for inter partes hearing, the ex parte orders were extended by consent and have been so extended until the application was fully canvassed before me as stated earlier. I cannot sit an appeal against the order of my Learned Brother. It would have been a different matter all together if the defendants had applied to set aside the order immediately on being served with the ex parte order of injunction. In my view, it is rather late in the day to challenge the ex parte order on the grounds that no reasons were recorded especially as the application has now been fully debated before me. In my view, the challenge based on failure to record reasons for proceeding ex parte is now academic.

On the competence of the application, the defendants submitted that the order of temporary injunction sought is not available to the plaintiff as she did not seek a permanent injunction in the original Plaint. For this preposition reliance was placed upon the decision of Ringera, J. as he then was in **Kihara vs. Barclays Bank (K) Ltd. [2001] 2 E.A. 420**. With respect to the defendants, it appears to me that they have misapprehended that decision. Ringera, J. clearly distinguished applications under Order XXXIX Rule 1 and those made under Rule 2. It is only where the application is under Order XXXIX Rule 2 of the Civil Procedure Rules that the same must be predicated on a Plaint in which an injunction is sought. There is however, no such limitation under Order XXXIX Rule 1. The language of the rule in my view is clear that an Order of temporary injunction is available in any suit where conditions set in the rule are shown. The plaintiff in this case despite having quoted both rules 1 and 2 of the Order XXXIX of the Civil Procedure Rules has in reality argued the application under Rule 1. I cannot therefore strike out the application for incompetence.

The defendants further challenge the plaintiff's application on the basis of the decisions in the case of **Agip (K) Ltd. Vs. Vora [2000] 1 E.A.285 and Nairobi Mamba Village vs. National Bank of Kenya [2000] 1 E.A. 197** on the ground that the plaintiff does not have a proprietary interest in the suit property. This challenge in my view has not also been well taken as the plaintiff has brought the suit on her own behalf and as administratix on behalf of the estate of her deceased husband. If the suit had been brought

solely in her individual capacity, the plaintiff would be non suited. However, if her complaints are taken as her complaints made on behalf of the estate of the deceased, her right to bring this action is recognized in law. I cannot therefore strike out this application on the basis that the plaintiff has no proprietary interest in the subject property.

The cases relied upon by the defendants are not relevant. In **Agip (K) Ltd. Vs. Vora** (Supra), the Court of Appeal held that a temporary injunction under Order XXXIX Rule (1) could only be granted where the applicant had an interest in the land or on the basis that the respondent threatened to dispose of the property in circumstances that could delay execution of any decree that would be passed against it. The Court declined to grant an injunction where a licence had been effectively terminated and the applicant had not claimed any proprietary interest in the land.

And in **Nairobi Mamba Village vs. National Bank of Kenya** (Supra), Ringera, J. as he then was, held that a party seeking to prevent alienation, wastage or damage to the property in dispute under Order XXXIX of the Civil Procedure Rules had to establish that it had legal rights in such property. In that case the plaintiff was neither a chargor nor borrower. He was not a party to the charge and could not restrain the chargee from selling the charged property pursuant to the exercise of the contractual and statutory power of sale. It is obvious from the above that these decisions are not helpful and dealt with different factual situations.

On the issue of non-disclosure, the defendants argued that the plaintiff had not been candid. The plaintiff has predicated her application on the grounds ***inter alia*** that the 1st and 2nd defendants conspired to grab the suit property; that the 2nd defendant sold the suit property to the 1st defendant without serving a valid statutory notice and that the 2nd defendant caused the sickly late Njunu to transfer the suit property when the 1st defendant had paid nothing. The 1st and 2nd defendants have responded to the plaintiff's complaints as follows: that the late Njunu, after being granted a loan facility by the 2nd defendant defaulted on his repayments and the 2nd defendant served a Statutory Notice. The 2nd defendant has exhibited a copy of the said notice as "**JM6"** dated 26.5.2004. Also exhibited is correspondence exchanged between the 2nd defendant and the late Njunu marked as "**JM3"**. The correspondence clearly indicates that the late Njunu clearly admitted his indebtedness to the 2nd defendant and in exhibit "**JM7"** the late Njunu proposed to sale the suit property with the consent of the 2nd defendant. Indeed, the plaintiff has exhibited the resultant agreement in respect of the sale of the suit property by private treaty to the 1st defendant. When confronted with this response, the plaintiff in a supplementary affidavit avers that she has no comment on the admission by her late husband of his indebtedness to the 2nd defendant. As regards service of a Statutory Notice, the plaintiff now changes her position and claims that the notice was defective, invalid and of no effect. I have perused the said notice. I am unable to agree with the plaintiff that the same is defective and invalid. Service of the notice is not denied. With respect to the deceased's proposal to sell the suit property, by private treaty the plaintiff in her supplementary affidavit feigns ignorance and then avers that if indeed there was such a sale then the same was a nullity for lack of consideration. Yet the plaintiff does not deny executing the agreement she has exhibited at page 20 of her supporting affidavit. I have perused this agreement. It acknowledges that the suit property had been sold by the late Njunu and the date for giving vacant possession had been agreed which date was varied by this latter agreement. The agreement further provided for payment of balance of monies due. The plaintiff's reaction to this agreement is that at the time of the agreement she had no capacity to enter into any agreement binding the deceased's estate. She does not allege that she did not comprehend the agreement. She does not allege mistake, undue influence, duress or any condition that would negate consent.

The plaintiff further expressly states with respect to the agreement of sale between the 1st defendant and her late husband that the latter was unwell and was forced to transfer the suit property. Evidence of coercion is said to be the 2nd defendant's letter dated 27.11.2004. This letter is exhibited by the defendant as "**JM7"**. I have perused the impugned letter. It cannot support the plaintiff's allegation of force. The plaintiff has also not exhibited evidence of the allegation that at the time her late husband entered into the said agreement of sale he was incapable of understanding the agreement by reason of his mental sickness. The upshot of my above consideration is that the plaintiff was not candid at the time she

obtained the ex parte interlocutory injunction. She did not disclose that a Statutory Notice was served. She did not disclose that the suit property was sold by private treaty by her late husband and not by the 2nd defendant in exercise of its Statutory Power of Sale. She did not disclose that she had in fact acknowledged the said sale and had agreed to give up possession and receive balance of purchase price. She was not candid about her husband's sickness and deliberately suggested that her late husband was mentally unstable.

From the above findings, I cannot escape the conclusion that the plaintiff is guilty of material non-disclosure. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Ltd. [1989] KLR 1** the Court of Appeal held ***inter alia*** that:-

> "**It is axiomatic that there should be full and frank disclosure to the Court of facts known to the applicant.**
>
> **Failure to make disclosure may result in the discharge of any Order made upon the ex parte application, even though the facts were such that with full disclosure an Order would have been justified."**

The leading judgment in that case was read by Nyarangi, J.A., who at page 18 said:

> "**The necessity for full and frank disclosure is even greater in an ex parte application."**

Kwach, J.A. in that case quoted from **R. vs. Kensington Income Tax Commissioner E.P. Princess Edmond De Polignack [1917] 1 KB 486** as follows:-

> "**It is perfectly well settled that a person who makes an ex parte application to the Court, that is to say, in the absence of the person who will be affected by that which the Court is asked to do, is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge and if he does not make that fullest possible disclosure then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires**

no authority to justify it."

As regards the validity of the sale agreement between the deceased Njunu and that 1st defendant, the plaintiff argues that the same is null and void for lack of consideration and is tainted by fraud. The impugned agreement was drawn by M/S Kamotho Maiyo & Mbatia Advocates who at Clause 12 state that they acted for both the late Njunu and the 1st defendant. The late Njunu therefore, had the benefit of legal advise during the transaction. The agreement provided for the mode of payment of purchase price to wit. A sum of Kshs.10,500,000/= was to be paid to the 2nd defendant in full satisfaction of the debt owed by the late Njunu to the 2nd defendant and Kshs.1,500,000/= was to be paid to the late Njunu upon registration of transfer in favour of the 1st defendant. This sum was expressed to be paid to the said firm of Kamotho Maiyo and Mbatia, Advocates as stakeholders pending completion and upon completion was to be paid to the late Njunu. Under Clause 9 of the said agreement, the property was sold in vacant possession to be given on the completion date upon payment of the full purchase price. The plaintiff has exhibited a further agreement executed between the late Njunu and the 2nd defendant on 23.6.2005 by which agreement he acknowledged that he was the immediate past owner of the suit property which he had sold to the 1st defendant vide the agreement dated 8.2.2004. The late Njunu further acknowledged that the sale had been completed save for the delivery of possession. By Clause 4 (f) of the latter agreement, the parties agreed that the balance of the monies due to the vendor would be payable once he vacates the property.

The 1st defendant swears that he has duly complied with the terms of the agreement of sale between him and the late Njunu. There is no allegation that balance of purchase price would not be available if the possession is delivered up. The plaintiff is still in possession. Hence the condition precedent before payment of balance of purchase price has not been complied with.

In the premises, the argument that the sale agreement between the late Njunu is void for lack of consideration appears to be without merit. As regards the submission that the sale agreement is a nullity on the grounds that it is tainted with fraud, I am afraid, I have not been persuaded that that is so. The allegation that the late Njunu was too sick to enter into the contract of sale of the suit property with the 1st defendant has not been supported by the material on record. The plaintiff appears to base this argument on the fact that soon after the said sale agreement, the late Njunu passed away. The only document exhibited by the plaintiff with respect to the death of the said Njunu is the Certificate of Death. There is otherwise no medical evidence to show that at the time of the said sale agreement, the late Njunu's medical condition was such that he could not enter into the said contract of sale of the suit property. It is illustrative that the particulars of fraud given in the Plaint do not contain a complaint based on the sickness of the late Njunu. Save for the bare allegation of fraud, none of the particulars given in my view, show fraud. Indeed, some of the particulars regarding fraud are directly contradicted by the plaintiff's own documents. For instance, there is the allegation that the 2nd defendant fraudulently entered into a 2nd sale agreement with the deceased. No such agreement is exhibited. Then the plaintiff boldly alleges that the 2nd defendant as mortgagor could not illegally allow sale of the said property to itself. In support of this averment, the plaintiff has annexed "**RWM4"** which is the agreement by which the late Njunu obtained enlargement of time to give vacant possession. A plain reading of this agreement leaves no doubt that it was not a 2nd sale agreement. Indeed, it makes reference to the earlier sale agreement and acknowledges that the sale was complete. The complaint against inconsistency in the dates of the agreement in my view, has not been well taken as the same is clearly a typographical error that would not invalidate the agreement of sale. In the premises, on a **prima facie** basis, I have not been persuaded that the sale agreement between the 1st defendant and the late Njunu is invalid.

I turn now to the challenge made against the Charge and Transfer documents. As regards the Charge, the plaintiff complains that the same was executed in breach of Section 110 of the Registered Land Act. Cap 300, Laws of Kenya as the instrument does not indicate how the late Njunu was identified. The transfer is challenged on the basis that it is in breach of Section 3 of Cap.23 of the Laws of Kenya – regarding

attestation. The Charge is exhibited by the 2nd defendant as "**JK3"**. It shows the late Njunu was identified at the time of attestation by his identity card. The plaintiff contends that identification by an identity card was not sufficient. This challenge in my view is not serious. The challenge is being made 8 years after the execution of the charge by the late Njunu. Njunu himself does not appear to have raised any such challenge. Indeed a Court of Equity would frown upon such challenge made long after benefit had been enjoyed under the charge.

As regards the transfer instrument between late Njunu and the 1st defendant I note that the same was executed before an Advocate known as Kamotho Waiganjo. The transfer is exhibited as part of "**EK2".** It shows that it was executed on 7.4.2005. Late Njunu died on 5.7.2005. There is no evidence that before his demise he had complained about the impugned transfer. Indeed the document was prepared by Late Njunu's advocates M/S Kamotho Maiyo and Mbatia Advocates. In the premises, the challenge made by the plaintiff against the said transfer is in my view a red herring.

The defendants further challenge the plaintiff's application on the ground that neither the plaintiff nor her late husband, have done equity to entitle them to an equitable remedy. The defendant submitted that the late Njunu took a loan of Kshs.6,000,000/= but never serviced the loan. The plaintiff on her part agreed to vacate the premises by 30.8.2005 and instead of giving up possession she filed this suit to perpetuate her possession of the suit premises. As regards failure to regularly service the loan the late Njunu himself freely admitted his indebtedness to the 2nd defendant. In his admission he did not blame his failure on his sickness. He entered into the sale transaction with the 1st defendant with open eyes. The plaintiff on her part blames sickness for her husband's financial problems. As discussed above she has not made full disclosure. She challenges contracts executed by her late husband, which contracts the late husband did not challenge. In my view the plaintiff's conduct does not meet the approval of a Court of Equity. It is not the case that all plaintiffs who may have acted with impropriety will not be entertained by a Court of Equity. Each case is determined in the light of its own special circumstances. In the present case, the plaintiff may not be entitled to an injunction which would not be available to her late husband. In the light of the deceased's clear admission of his indebtedness to the 2nd defendant and his own agreement to sell the suit premises, it is unlikely that the equitable remedy of injunction would have been available to him. The plaintiff is in no better position.

In **Maithya vs. Housing Finance Co. of Kenya [2003] 1 E.A. 133,** Nyamu, J. held ***inter alia*** that:

> "**Failure to service the loan or to pay the lender**
>
> **or pay into court what had been admitted took**
>
> **the applicant outside the realm of exercise of the court's**
>
> **jurisdiction."**

In the case at hand, the plaintiff makes no proposal on how she can settle the loan balance in the event that she succeeds in this application. Yet her husband's indebtedness was admitted by himself before his demise. The plaintiff is not prepared to do equity. She has put herself outside the realm of exercise of the court's discretion.

I.C.F. Spry in Principles of Equitable Remedies Specific Performance Injunctions Rectifications and Equitable Remedies (15th Ed.) 1997 at page 410 opines:

> "**An injunction is ordinarily refused when it is**
>
> **sought in furtherance of a deception, … where the**
>
> **right sought to be enforced has been obtained in**

circumstances which involve fraud; … where the

plaintiff has acted unlawfully; or had not

done equity."

I turn now to the final issue as to whether or not the plaintiff is otherwise generally entitled to the orders sought. The plaintiff has argued that the 2nd defendant was paid Kshs.5.8 million under the insurance policy that covered the loan on the demise of the late Njunu. According to the plaintiff that payment settled the mortgage debt to save the suit property. Yet the 2nd defendant had sold the same property. In the plaintiff's view the 2nd defendant has unjustly enriched itself. The 2nd defendant's response to this is that the insurance policy was taken out by the 2nd defendant and the proceeds thereof were applied to the mortgage account. This explanation was apparently accepted by the plaintiff because in her supplementary affidavit sworn on 17.10.2005, she was only concerned with how the 2nd defendant could insure the suit property for only 5,819,625/= when it was valued at Kshs.12 million. It is obvious therefore, that the complaint based on the payment of insurance proceeds cannot be a ground for the issuance of a temporary injunction.

The plaintiff has also made heavy weather of a document titled "**Authority"** apparently made under Act no.5 of 1996 and Section 9A-C of the Auctioneers Rules 1997. The document appears to authorize the 3rd defendant to obtain vacant possession of the suit property. The document bears Stamps of the Chief Magistrate and the signature of a Senior Resident Magistrate. The 1st defendant denies instructing the 3rd defendant to evict the plaintiff and further denies obtaining an eviction order. He has indeed instituted HCCC No. 610 of 2005 claiming possession of the suit property. The 2nd defendant on its part has responded that the plaintiff by agreement covenanted to vacate the suit premises on or before 30.8.2005 in default of which the 2nd defendant would be at liberty to use the services of a Court Bailiff to secure vacant possession of the suit premises. The 2nd defendant's position is that the authority given to the 3rd defendant by the Senior Resident Magistrate's court on 6.9.2005 was in accord with the Agreement between the plaintiff and the 2nd defendant. The 3rd defendant has filed neither grounds of opposition nor a replying affidavit. To my mind, the agreement between the plaintiff and the 2nd defendant which contained a time table for the assumption of vacant possession by the 2nd defendant did not oust the jurisdiction of the Court in the event of non-compliance by the plaintiff. The manner in which the Authority exhibited by the plaintiff as "**RWM"** was obtained has not been explained. There is no evidence that the plaintiff was informed of the proceedings if any before the Senior Resident Magistrate. If any order was made by the Senior Resident Magistrate, it must have been made in contravention of the Rules of Natural Justice. A Court of Equity would not countenance such a process. As the 3rd defendant would appear to have acted irregularly and has offered no explanation for the apparent irregular action, I am of the view that the plaintiff has shown a **prima facie** case that the 3rd defendant may use unorthodox means to evict her. The plaintiff in my view has succeeded against the 3rd defendant to the said limited extent. With regard to the other prayers sought in her application I am unpersuaded that the plaintiff has a **prima facie** case with a probability of success at the trial. This finding is sufficient to dispose of this application **viz a viz** the 1st and the 2nd defendants. It is not necessary to consider the second condition for the grant of interlocutory injunction. This application is for dismissal as against the 1st and 2nd defendants. It is so dismissed.

As against the 3rd defendant, the plaintiff is entitled to the due process of law even if she may at the end of the day be evicted. I accordingly, order that an interlocutory injunction should issue restraining the 3rd defendant, his servants or agents from trespassing or in any manner evicting or interfering with the plaintiff's peaceful possession or occupation of **L.R. Nairobi/Block 99/244** till the hearing and disposal of this suit or until further orders of this Court or a Court of competent jurisdiction. The plaintiff should file a written undertaking as to damages within 7 days of today. Costs of the application shall be in the Cause.

DATED and **DELIVERED** at **NAIROBI** this 6th day of February 2006.

F. AZANGALALA

JUDGE