REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI COMMERCIAL COURTS

Civil Suit 316 of 2006

VINETTE DAPHINE OKOLA…………..……………………PLAINTIFF

VERSUS

AKICH OKOLA……………………………..………1ST DEFENDANT

EQUITORIAL COMMERCIAL BANK LIMITED…...2ND DEFENDANT

SAM THENYA………………………………...……...3RD DEFENDANT

DOROTHY THENYA…….....................................…………………………….4TH DEFENDANT

R U L I N G

The Plaintiff has sued four defendants the 1st Defendant is her husband. It is not denied that the 1dt Defendant is the registered owner of property No. LR 330/642 situated along Kunde Drive in Lavington within the City of Nairobi. The 1st Defendant charged his property to the 2nd Defendant who in exercise of the statutory power of sale sold it to the 3rd and 4th Defendants. That sale provoked the Plaintiff's application by chamber summons dated 3rd may, 2006. The application is brought under Order XXXIX Rule 1, 2, 3 and 9 of the Civil Procedure Rules. The said application seeks the following prayers:-

· **The Defendant's jointly and severally by themselves or servants or agents or nominees or through any person claiming a right through or under them, be restrained by an order of injunction from selling, charging, transferring, or in any way alienating or dealing with all that property known as Nairobi LR No. 330/642 pending the hearing and determination of this suit.**

· **The Defendants jointly and severally by themselves or servants or agents or nominees or through any person claiming a right through them be restrained by an order of injunction from evicting the Plaintiff from the property known as Nairobi LR No. 330/642 or in any way interfering with her quiet possession of the said property pending the hearing and determination of this suit.**

· **The court be pleased in exercise of its inherent jurisdiction, to make such further orders as may be just and expedient to make in the circumstances of this suit.**

· **Costs of this application abide by the outcome of the suit.**

In support of that application the plaintiff swore an affidavit and in brief deponed that sometimes in 1995 the 1st Defendant her husband was a civil servant in the Government of Kenya. That during that time he was allocated the suit property. That the reason for this allocation of the said property was by reason of being a civil servant and accordingly the title was registered in his sole name. That at the time of allocation the said property did not have any development but an old condemned house. That she and the 1st Defendant agreed to demolish the condemned house and build their matrimonial home. That the 1st Defendant commissioned some architectures to design the proposed house and thereafter on representation of the 1st Defendant the Plaintiff began to source funds for the development. That they proceeded to liquidate money in the joint savings which were held in overseas accounts to further assist in the development of the proposed matrimonial home. The Plaintiff further deponed that her husband was fully occupied both in Kenya and various overseas assignments in the cause of his duties as Deputy Solicitor General of the Republic of Kenya. The Plaintiff consequently took upon herself the onerous task of liasing with various projects consultants in the construction of the proposed property. The Plaintiff stated that she participated full time in the project in supervising the project contractor and casual labourers. In 1997 both she and her family moved into the completed matrimonial home. She deponed that she was unaware that the 1st Defendant had charged the property to the 2nd Defendant. That she came to learn later from a newspaper advertisement which advertisement was for an auction of their matrimonial home. That when she confronted the 1st Defendant he assured her that he was sorting out the matter. That it was until 24th April, 2006 that she came to learn that their matrimonial home had been sold by auction to the 3rd and 4th Defendants. That as a consequence of that she decided to investigate this matter further and she found that the 1st Defendant held an account with the 2nd Defendant that that account had been operational on or before August, 2001 and it was in credit until the 29th August, 2001 when the 2nd Defendant allowed the 1st Defendant to overdraw from his account. She said that the said account has remained overdrawn. She also found out that the 1st Defendant also had a loan account with the 2nd Defendant which was opened on 31st October, 2003 by a disbursement of Kshs.11 million. That the said loan was purportedly advanced by transferring the said loan sum from the loan account to the 1st Defendant's personal account which at that time had disbursements overdrawn at Kshs.12,927,839.00. This sum was unsecured. She averred that this disbursement was not an actual loan but was by way of a book entry purported to advance the loan based on a credit facility letter dated 8th October, 2003. Under the offer contained therein the 2nd Defendant required a collateral security. Under the loan facility the 2nd Defendant required a security that is a legal charge over the suit property. She deponed that the 1st Defendant without her knowledge executed a charge dated 24th February, 2004. That charge was registered on 29th March, 2005. On her enquiry from the 1st Defendant why he took so long for the legal charge to be raised over the suit property the 1st Defendant advised her that the 2nd Defendant had at first declined the said property as a security for reasons that it was one of the properties that was likely to be repossessed by the Government of Kenya The Plaintiff deponed that she has been advised by her counsel that the said charge was not supported by consideration to entitle the 2nd Defendant to create a charge over the suit property. That she is further advised by the reason of the lack of the said consideration the 2nd Defendant was not entitled to exercise his statutory power of sale. The 2nd defendant having purportedly exercised that power of sale the Plaintiff was apprehensive that a transfer would be effected in favour of the 3rd and 4th Defendants. She finally deponed that she is a nationalized Kenyan of Jamaican extraction with no where to call home other than the suit property and should she be evicted from that property she together with her children would be rendered destitute. That when she left her country of origin she had expended all her savings which she used on the development of the matrimonial property. She therefore concluded that she will suffer irreparable damage which cannot be compensated by damages. Her counsel in submission repeated the averments in the affidavit in support and stated that the charge upon which the 2nd Defendant exercised the right of sale was fatally defective and had been created without consideration. The counsel then proceeded to give information of the outcome of the Plaintiff's investigation regarding the 1st Defendant's account at the 2nd Defendant's bank. Counsel stated that at the trial of this suit it ought to be investigated how the 2nd Defendant could have allowed the 1st Defendant to overdraw the overdraft which from the documents supplied to the Plaintiff showed that it was unsecured. He said that at the trial the Plaintiff will demonstrate that the loan account was to cover

the unsecured facility granted to the 1st Defendant. He posed questions that the court needs to consider. He asked what was the purpose of the loan? He stated that the genesis of the loan was in a letter dated 2nd July, 2003 by the 1st Defendant to the 2nd Defendant. This letter sought for a mortgage over the suit property. That letter was responded to by the 2nd Defendant where a credit facility was granted to the 1st Defendant. He stated that this shows how the 2nd Defendant used the amount to create a loan account. He submitted that the Plaintiff had an interest in their charged property which interest was created by an agreement with the 1st Defendant and as a consequence of that agreement the Plaintiff put in her resources into the development of the matrimonial home and she did so in anticipation that the property would be registered in both their names. He highlighted the 2nd Defendant's stand in refusing to accept the matrimonial home as security and he stated that it was not clear at what stage the 2nd Defendant changed its mind and added that this can only be investigated at full trial. He said that the plaintiff was raising not flimsy but very serious issues that is the issues of a wife interest to the matrimonial property. That she was also raising issue of fraud in that she was saying that the 2nd Defendant was not faithful to the letter of facility/offer. He said that ought to be investigated at the trial. He again posed the question how an individual such the 1st Defendant could be allowed to overdraw an account for over Kshs.12 million which was unsecured? He then asked again was this a proper charge or was it to cover issues relating to lending in regard to enquiry by the Central Bank of Kenya? In regards to the response to the Plaintiff's application by the 3rd and 4th Defendants where they say that they personally did not buy the suit property but that it was purchased by a company. Plaintiff's counsel accepted that there is a distinction between an individual and a company. But then he invited the court to look at the annextures to the replying affidavit. He stated that the annextures showed that the 3rd and 4th Defendants were purchasing the property for Sadoka Company Ltd. He said that a company does not need a human person to contract. He therefore stated that the memorandum of sale ought to have stated that the suit property was being sold to Sadoka company Limited. He also drew the court's attention to the receipts of the sale process which similarly indicated that the payment was made by the 3rd and 4th Defendants on behalf of Sadoka Company Limited. Plaintiffs counsel referred to 2nd Defendants replying affidavit which had referred to a previous suit filed by the 1st Defendant in the High Court Central Registry, Nairobi which suit was against the 2nd Defendant only. Plaintiff's counsel said that a man and his wife are two different adult persons who can take their different positions. He said that the matters alluded to by the 2nd Defendant's replying affidavit were based on a suit which the Plaintiff was unaware of. In support of the Plaintiff's case Plaintiff counsel relied on the case of **Samuel Onyango Okelo and 2 others vs Citibank N.A. Civil Suit No. 86 of 2005, Mombasa**. He stated that Justice Maraga was of the view that when a court is faced with an injunction application the court should attempt to preserve the status quo pending the final hearing of the suit. He also relied on a portion of the said ruling where Justice Maraga followed the case of **Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Limited, Mombasa HCCC No. 74 of 2000** (unreported) this case held as follows:-

"……***.where, going by the material placed before it at an inter-parte hearing of an application for injunction, it appears to the court that the plaintiff has a strong case, like where it is clear that the defendants act complained of is or may very well be unlawful, the issue of whether or not damages can be adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it."***

Plaintiff's counsel said that the issues raised by the Plaintiff particularly the issue of fraud could not be wished away and it was necessary for it to be investigated at trial. He asked the court to consider the children, the niece and the Plaintiff with the prospect of being thrown out of what amounted to a fraudulent transaction. In this regard he relied on the case of **Ze Yu Yang vs Nova Industrial Products Ltd. HCCC No. 9 of 2003.** He said that this case found that under Section 69B ITPA once the hammer falls at the auction the only remedy available to an applicant is one in damages. But he said that this case found that where fraud was found it was sufficient to nullify a sale. He therefore sought orders as prayed in the application.

The 1st Defendant did not oppose the application for interim orders as sought by the Plaintiff.

The 2nd Defendant opposed the application and he drew the court's attention to the plaint which he said was the substratum to the Plaintiff's claim. He said that the Plaintiff's allegations were really against the 2nd Defendant. He said that paragraph 50 that the Plaintiff averred that no loan was ever advanced to the 1st Defendant which loan was the subject of the charge. That the Plaintiff's claim against the 3rd and 4th Defendant was on the basis that the 2nd Defendant does not have statutory power of sale. He agreed with the Plaintiff's counsel that the plaintiff and the 1st Defendant were separate beings and therefore separate entities. He however said that it was upon the Plaintiff to prove her case. He said the law of injunction is now well established in the case **of Giella and Cassman Brown & Company Limited (1973) E.A. 358**. He said that the Plaintiff would need to show that damages would not be adequate remedy. He drew the court's attention to the 2nd defendant's replying affidavit which he said showed that the Plaintiff did not deserve the orders sought. That replying affidavit had annexed an affidavit sworn by the 1st Defendant in HCCC No. 654 of 2005 where the 1st Defendant had pleaded that there was no charge created over the suit property and in response to that allegation the 2nd Defendant had obtained an affidavit of the advocate who prepared and registered the charge and who confirmed that indeed a charge was executed and registered. That subsequently in that same suit the 1st Defendant departed from his previous pleadings and he now claimed that the property had been undersold. In his amended claim the 1st Defendant attacked the sale and not the charge. That in the previous suit by the 1st Defendant has pleaded that the property belongs to him. The 2nd Defendant however stated that it is not disputed that the property was registered under RTA Cap 281 and that there was no dispute that it was registered in the name of 1st Defendant. He said that the plaintiff's claim is solely based on the fact that she is a wife. He therefore stated that the Plaintiff does not have any business to claim ownership over the suit property because RTA does not recognize interest of a wife. He said that there was no legal basis to attack the charge. That the charge is a contract between the 1st and 2nd Defendants. That the wife that is the Plaintiff is a third party to the contract and she was not entitled to attack it. The 2nd Defendant's counsel further stated that the Plaintiff in her affidavit in support had deponed that she was unaware of the charge over the property or even the sale and yet the 1st Defendant her husband in this suit had stated that a bank official had called both her and him and threatened to sell the suit property. He stated that the averments in the affidavit of the Plaintiff could not prove that she had used her money to construct the matrimonial home. He therefore submitted that the plaintiff's arguments are not maintainable and that her whole case should fail. He added that the property has been sold and that the substantive law which is RTA Section 23 and Section 69B ITPA state that once a property has been sold any claim that can be brought would be a claim in damages. He therefore concluded that the Plaintiff's claim can only be in damages and she cannot anyway have case against the 3rd and 4th Defendants. He then stated that when the ***ex parte*** order was served on the 2nd defendant the same did not comply with Order XXXIX Rule 3 (3) of the Civil Procedure Rules. 2nd Defendant relied on the case of **Captain Patrick Kanyagia & Another and Damaris Wangechi & others Nairobi Civil Appeal No. 150 of 1993** (unreported) where he said that the Court of Appeal allowed an appeal in favour of a purchaser at an auction. He also relied on the case of **Caesar Njagi Kunguru and Kenya Commercial Bank Limited Nairobi HCCC No. 1543 of 2000 (Milimani)** (unreported). This case the court declined to rewrite the parties contract stating that that was not the business of the court. In the case of **John Mirung'u Kariuki and Equity Building Society & Others Nairobi HCCC No. 145 of 2005** (milimani) (unreported) and in the case of **Orchid Pharmacy Limited and Southern Credit Banking Corp. Limited Nairobi HCCC No. 561 of 2001 (Milimani)** (unreported). He said that in both all those cases it was held that once a sale has taken place the only remedy was in damages. That where it was shown that the plaintiff has unclean hands an injunction order would not be granted. The 2nd Defendant also relied in a **Court of Appeal No. 59 of 2001 Jacinta Wanjiku Kamau vs Isaac Kamau Mungai and Another (2006) eKLR**. In this case the wife was claiming that the husband in whose name the property was registered in held her interest in the said land in trust. When the case went to the Court of Appeal the Court of Appeal found as follows:-

"***No fraud or illegality was pleaded and hence the 2nd respondent ought not to have been dragged into this domestic dispute between a husband (1st respondent) and his wife (appellant). The learned judge***

considered all that was placed before him and came to the conclusion that the appellant's claim was for dismissal. We have considered that evidence, re-evaluated it and have come to the conclusion as did the learned Judge that the appellant's claim was indeed baseless."

Advocate for the 3rd and 4th Defendant opposed the application and in so doing relied on their replying affidavit. The main thrust of the replying affidavit was that the Plaintiff had sued the wrong entity since the property had been purchased by Sadoka Company Limited. In opposition counsel submitted that the Plaintiff had not discharged the onus on her for she had failed to demonstrate that the 3rd and 4th Defendants were the purchasers of the suit property. He stated that the certificate of sale clearly shows that the property had been purchased by Sadoka Company Limited. He further submitted that the Plaintiff had no cause of action against the 3rd and 4th Defendant that there was no allegation against them of fraud. He said that from the pleadings there was nothing to warrant the plaintiff getting the orders that she sought. He supported the authority relied on by the 2nd Defendant that is the case of **Court of Appeal, Civil Appeal No. 59 of 2001 Jacinta Wanjiku Kamau and Isaac Kamau Mungai & Another (2006) eKLR** and stated that whether or not there was an allegation of fraud or illegality a party should not be trapped by domestic dispute. He therefore said that this case cannot succeed. He called the Plaintiff a busybody in this matter. That her interest in this suit is doubtful. That she had no interest which was supported by statute and to succeed she would need to show that the 1st Defendant held the suit property in trust for her. In this regard counsel relied on the case of **Kitale vs Kitale (2001) 1EA 90** (HCK). He said that this case established that a party should establish beneficial interest in a property. This is either the plaintiff had not done. He quoted the portion of the aforesaid case as follows:-

"***It is trite law as has been expounded in Bromley's Family Law Edition at page 585, that where a spouse buys property intended for common use with the other, it cannot per se give the later any proprietary interest. However if either seeks to establish a beneficial interest in the property, the legal title which is vested in the other, she/he can do so only by establishing that the legal owner holds the property in trust for the claimant."***

He further submitted that once a sale has been done the right of a plaintiff to redeem is extinguished. That the purpose of injunction application being to maintain status quo the status quo in respect of the suit property was that it was sold to the 3rd and 4th Defendant and the court cannot therefore restrain what has already occurred. In this regard he relied on the case **Civil Appeal No. 42 of 1951 Noormohamed Janmohamed vs Kassamali Virji**. He stated that the court cannot give an injunction in vain.

In brief response the Plaintiff's counsel stated that it would be at the trial of the Plaintiff will prove fraud. He said that the case of 3rd and 4th Defendant was consequential on the 2nd Defendant's case. He said that although the Plaintiff had an onus to prove her case at this stage all she needed to do was establish a prima facie case. He submitted that the plaintiff had done so. He faulted the submission of the defendants by saying that they had failed to refer to the letter of offer which letter set out the purpose. With regard to the Defendants' submissions the Plaintiff's claim in damages he submitted that the section relied upon were not absolute where fraud is alleged. He said that in the Plaintiff's prayer of the application the Plaintiff had sought injunction against servants and agents of the Defendant and accordingly if an injunction is granted it would not be in vain for it would cover those other persons. In a surprise move Plaintiff's counsel concluded that the court should bear in mind Section 52 of the ITPA.

2nd Defendant's counsel in brief response to the latter submission stated that the doctrine of ***lis pendens*** only related to a situation where the subject matter is the property in dispute. He relied on the case of **Mawji vs U.S. International University and Another (1976) KLR page 199**.

As I began to consider the case before me I find that I have to remind myself the provisions of the case of **Mbuthia vs Jimba Credit Finance Corporation & Another (1988) KLR 1**, which is in the following terms:-

"***The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weigh up the relevant strength of each side's proposition. The lower***

court judge in this case had gone far beyond his proper duties and made final findings of fact on disputed affidavits.”

I will begin by considering the last point that was raised by the Plaintiff’s counsel relating to Section 52 under the ITPA. I am of the considered view that that section does not apply in a case such as this before the court. This case would fall under Section 69B of ITPA when a dispute arises as it has done in this case relating to sale of the mortgaged property. I therefore reject the Plaintiff’s submissions in that regard. The Plaintiff’s claim essentially relates to an alleged promise that was made to her by the 1st Defendant that she would be registered as a co-owner of the suit property. She stated that in reliance to that representation she gave financial and physical contribution to the building of the matrimonial home. The book of **Hanbury and Martin Modern Equity 16th Edition** has the following to say on this issue:-

“***If the title is unregistered, the question whether the transferee, typically a morgagee, is bound by the equitable interests depends on whether the mortgagee had notice, actual or constructive, of the interest of the beneficiary.”***

The question I ask myself as I consider this ruling is whether the 2nd Defendant had notice of the Plaintiff’s interest in the suit property. The Plaintiff ought to have brought it to the attention of any person wishing to deal with the suit property by perhaps registering a caveat as provided by Section 57 of RTA. It was not enough for the Plaintiff to have said that she believed the 1st Defendant had registered her as the co-owner. Having found so, I am of the view that the Plaintiff fails to prove a prima facie case with probability of success in regard to the promise she alleges was made to her by the 1st Defendant or in regard to her both financial and physical contribution. I also find that perhaps this suit is brought with some collusion between the Plaintiff and the 1st Defendant for it was submitted to me that the 1st Defendant’s application to nullify the sale property in the High Court Central Registry had been dismissed for non attendance. There is every likelihood that the Plaintiff’s case was to take care of that dismissal. The Plaintiff dealt in great detail with the relationship between the 1st Defendant and the 2nd Defendant. She did not state that she was a joint account holder at the 2nd Defendant’s bank. She also did not state that she was in anyway involved in the charge that was raised by the 1st Defendant. That being the case the Plaintiff fails to clearly state under what circumstance she would fault the transactions between the 1st Defendant and the 2nd Defendant. She fails to prove privity in the said transaction. I again find on this ground the Plaintiff has failed to prove a prima facie case with a probability of success. The 1st Defendant who is the registered owner would the one to show the court that he will suffer irreparable loss. I do not find sympathy in the argument raised by the Plaintiff and that failure to give her an injunction would render her and her children a destitute. This is because as I have found she failed to prove interest in the charged property. It may well be that when oral evidence is submitted at the trial the trial judge may reach a different decision that on the evidence presented before me the Plaintiff has failed. I find solace in the case of **Gusii Mwalimu Investment Company Limited and Another vs Mwalimu Hotel Kisii Limited** (unreported) where JA Tonui stated as follows:-

“***Although discretion is wide it is exercised only on settled principles and not according to private opinion or sympathy or benevolent or capriciously. This he said was a quote from the case M. Cetha vs Singh (1931) 13 KLR.”***

In regard to the 3rd and 4th Defendants in their submissions that the Plaintiff had sued the wrong party I have looked at the memorandum of sale and the receipts and have noticed that it is not clear that the property was being purchased by Sadoka Company Limited.

The Plaintiff’s case and submissions would indeed invoke sympathy but this court cannot be guided by sympathy alone. The law is clear that on an auction of a property the plaintiffs remedy lay only damages. The Plaintiff has failed to prove therefore that she is entitled to the orders of injunction that she seeks from this court. The Plaintiff’s application will therefore fail and the orders of the court are as follows:-

· **That the Plaintiff's application dated 3rd May, 2006 is hereby dismissed with costs to the Defendants.**

MARY KASANGO

JUDGE

Dated and delivered this 3rd day of October 2006.

F AZANGALALA

JUDGE