REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE 99 OF 2003

NG'OLWA MWAINE ……………………………………………….. PLAINTIFF

AND

ALEXANDER KIMATHI M'ITHILI …………..…………….. 1ST DEFENDANT

BETHA GACHERI ……………………………………………. 2ND DEFENDANT

<u>RULING OF THE COURT</u>

On 31.3.2004, the applicant filed a Notice of Motion dated 30.3.2004. The application was made under sections 3, 3A and 80 of the Civil Procedure Act, Chapter 21 and Order 44 Rules 1, 2 and 3 and Order 1 Rule 3 of the Civil Procedure Rules. The application prays for orders:-

1. That the honourable court do join the applicant as an interested party and/or claimant in the matter herein.

2. That the court do stay executions of decree herein until further orders of the court.

3. That the consent judgment herein and/or decree be reviewed and/or set aside and the applicant be allowed to be heard. 4. That costs be provided for.

The application was premised on seven grounds numbered a-g on the face thereof, basically showing that the suit herein was filed without consent of the Land Adjudication Officer and that infact the suit was filed in an attempt to circumvent the applicant's objection to the sale and transfer of the land by the defendant to the plaintiff. That the sale was done in breach of the trust since the land in dispute was matrimonial property and that the real reason behind the sale was a conspiracy to deprive the applicant and her nine children of the land.

The applicant also filed an affidavit in support of the application. The affidavit made and sworn by Betha Gacheri was dated 30.3.2004 in which she deponed at paragraph 3 thereof that during the subsistence of the marriage with the defendant, the two jointly acquired various properties namely Kangeta Adjudication No. 3919, 4324, 2798, 5579, 3903 and 2341 all of which properties had been sold secretly without her knowledge. She also deponed that the suit herein was filed without the consent of the Land Adjudication Officer and further that after sale of the land the defendant abandoned her and went away to squander the sale proceeds, and finally that the decree herein was a nullity.

The applicant also filed a further replying affidavit on 19.5.2004, details of which are not necessary at this point of my ruling. The plaintiff and defendant also filed the replying affidavits to the applicant's

application. The defendant denied that the property sold to the plaintiff was matrimonial property and that all the other properties allegedly sold secretly by him were sold in the course of his business and for the purpose of earning a living. Further that the applicant was fully aware of when the defendant was selling the properties to which the applicant had made no contribution. On 3.5.2004, the respondent/plaintiff filed a Notice of Preliminary Objection on a point of law to the applicant's application dated 30.4.2004 on the following grounds:- 1. That the same is a sham, vexatious, frivolous and an abuse of the court process.

2. That the decree sought to be stayed herein has already been executed and therefore the prayers sought are not available to the applicant. 3. That the suit herein is concluded and the court is therefore rendered functus officio.

4. That this application is therefore incompetent.

It was that Preliminary Objection that was canvassed before me on 16.2.2004. Mr. Mwanzia for the respondent submitted that by the time of filing of the application, the decree had already been executed and the land in question had already changed hands. That it is therefore too late in the day for the applicant to seek to be enjoined in a suit that has already expired as it were.

Finally, that if applicant was dissatisfied with the decree, she should have filed a separate substantive suit challenging the outcome of what the defendant had done. The Preliminary Objection was opposed. Mr. Charles Kariuki for the applicant argued that the same was misconceived and lacked merit. Mr. Kariuki contended that the application not only seeks stay of decree but also seeks a review of the judgment of the court. Mr. Kariuki took issue with the speed with which the case was concluded and that the said case was filed solely because the applicant had objected to the transfer of the land to the plaintiff. It was also contended for the applicant that lack of consent by the Land Adjudication Officer to the filing of the suit was such a crucial point that the applicant ought to be allowed to be enjoined in the suit in order to canvass that point which if proved would render the entire proceedings in the lower court a nullity. Mr. Kariuki urged the court to allow the applicant to canvass her application on merit and to reject the respondent's notice of preliminary objection. Mr. Kariuki cited the following authorities to the court:-

(a) Mark Mugenya Dimbo V Anjelina Achola Ogogo – Civil Appeal No. 92 of 1997 – Kisumu.

(b) M'Kirugua M'Itiane V M'Ichengi Baikanatha – Civil Appeal No. 117 of 1992 – Meru.

(c) Republic V Kigera (1988) KLR 819.

The issue for determination by the court is whether at this point in time the court should allow the applicant to be enjoined in the suit that is already concluded, or whether indeed the applicant's application is a sham and should deservedly be struck out at this stage.

I have carefully considered the submissions by counsel for both parties. I have also considered the pleadings and in particular the pleadings in the lower court. The plaintiff/respondent filed suit on 5.8.2003 praying for judgment against the defendant for a declaration that the plaintiff is the sole proprietor of plot No. 3919 KANGETA LAND ADJUDCIATION SECTION measuring 0.12 acres or thereabouts inclusive of all the developments thereon, the Land Adjudication Officer Meru North Land Adjudication do cause land parcel No. 3919 Kangeta to be transferred to the plaintiff herein and the defendant to sign all requisite documents, instruments to cause the said transfer and in default, the Honourable Court to authorize the Executive Officer to sign the same. The plaintiff also prayed for costs of the suit and interest thereon. The plaintiff refers to an agreement of sale between himself and the defendant in respect of the parcel of land No. 3919 for the sum of Kshs. 800,000/= out of which the sum of Kshs. 600,000/= had already been paid to the defendant by the time of filing suit. At paragraph 6 of the plaint the plaintiff averred thus:-

"6. The defendant's wife who was not a party to the said agreement has cautioned the said plot thus making the transfer of the same impossible." And at paragraph 7 of the plaint the plaintiff averred thus:-
"7. That the defendant is the sole registered proprietor of Plot No. 3919 KANGETA LAND

ADJUDICATION SECTION measuring 0.12 acres or thereabouts."

The defendant filed his defence on 27.8.2004 by way of admission. The defendant admitted paragraph 1 through 7 of the plaint. At paragraph 2 of the defence, the defendant averred as follows:- "2. In reply to paragraph 8 of the plaint, the defendant states that he has been ready and willing to transfer the suit land to the plaintiff and has gone severally

to the Land Adjudication Office Kangeta and it is defendant's wife, one Beth Gacheri who has brought complications by unreasonably lodging objections." Then on 28.8.2003, a consent judgment was drawn by the plaintiff's counsel and same was filed on 2.9.2003, entering judgment in favour of the plaintiff in terms of paragraph 12(a) of the plaint. Each party was to bear its own costs. After carefully considering the pleadings as stated above and the authorities cited to the court by counsel for the applicant, I am convinced that the preliminary objection lacks merit. Firstly, Mr. Mwanzia's submissions were mere words, devoid of any legal backing. Mr. Mwanzia chose not to refer the court to any authorities despite being given the opportunity to do so. The issue of whether or not the suit was properly before court is an issue in dispute. It is not disputed that the suit land is situated in a land adjudication section. The plaintiff purported annexed to his replying affidavit as annexture "NMS" a letter dated 6.1.2004 from the Department of Land Adjudication and Settlement confirming that the parcel of land No. 3919 situated within Kangeta Adjudication section is demarcated and recorded in the name of the plaintiff. To my mind, this is not the requisite consent nor does the letter say whether or not the adjudication register had been finalized in all respects under section 29(3) of the Land Adjudication Act. On this ground, it cannot be said that the applicant's application is a sham. I rely on the judgment of the Court of Appeal in the Mark Mugenya Oimbo case (above) where the Court of Appeal held that unless an adjudication register has been finalized, a suit concerning an interest in land situated in the adjudication section under section 30(1) of the Land Adjudication Act (Chapter 284, Laws of Kenya) cannot be instituted without the written consent of the adjudication officer.

Without in any way purporting to deal with the applicant's application at this point, suffice it to say that the applicant has a point to make through her application and it is only fair and in the interest of justice that she be given a chance to ventilate her point. Whether she will succeed or not is a matter for the court when the application is canvassed before it.

It is worth noting that the applicant has all through the proceedings and even before kept her interest in the property alive. The defendant's allegation that the applicant made no contribution to the acquisition of the said parcel of land is a matter of evidence which can only come out if the applicant is given a chance to be heard. It does not matter that she unsuccessfully tried to bar the defendant from transferring the land to the plaintiff. As was held in Republic V Kigera (supra) and I am persuaded by the decision in that case that:- tural justice are inherent in all proceedings be they judicial or administrative, unless there are express provisions to bar a court form hearing any interested party."

The respondent has not shown that there is any relevant express provision baring the applicant from being heard. Infact, a close scrutiny of the plaint shows clearly that the applicant who had cautioned the land and who was admitted to be the wife of the defendant ought to have been joined as a party to the suit right from the beginning. She was said to have prevented the transfer of the land by the defendant to the plaintiff and this was the more reason why she should be heard now on her application to be joined as a party in the suit. For this reason, the applicant should be allowed to prove the point of deserving to be enjoined in the suit. Whether her application succeeds or not is another matter but she should not be shut out unheard. In the result, I find no merit in the plaintiff's preliminary objection. I accordingly dismiss the same with costs to the applicant. The applicant should now proceed to fix her application for hearing.

It is so ordered.

Dated and delivered at Meru this 19th day of April 2005.

RUTH N. SITATI

Ag JUDGE

19.4.2005