



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

CIVIL CASE 52 OF 2005

MARY MULWA NDUTO PLAINTIFF

VERSUS

RAMESHANDRA GULAB PARMAR

PRAVIN GULAB PARMAR DEFENDANTS

J U D G M E N T

The applicant, Mary Mulwa Nduto, has moved this court by way of Chamber Summons dated 9/6/05, seeking an order of injunction to restrain the defendant/Respondents either by themselves, their servants or agents from alienating, transferring, leasing, offering for sale or in any other way dealing with the title of the plot No. Machakos Town Block 11/268 pending hearing and determination of this application. She also asks for costs. The application is supported by grounds found on the face of the application and a supporting affidavit sworn by the applicant. The application was opposed and a replying affidavit was sworn by Pravin Gulab Parmar.

The plaintiff and defendants are tenants in common in equal shares in the plot Machakos Town Block 11/268 which is fully developed and has rental houses which have been let out to tenants. The applicant deposes that the parties share the rents accruing there from equally but that recently the defendants informed the plaintiff that they intent to sell the property as they want to leave the country. She has learnt that the defendants have entered into negotiations for the sale of the property to a third party. That the rents she gets from the plot is her only source of livelihood and if the property is sold she will suffer irreparably. It is her case that the property cannot be partitioned and that any sale without her consent is null and void.

It was urged for the plaintiff that the purported sale offends provisions of Section 103 (2) of the Registered Land Act which provides that no proprietor in common shall deal with land unless with consent of the other proprietor. That it also offends Section 105 (1) of Registered Land Act because the property cannot be partitioned, the land Registrar should value it and have it sold by public auction. The applicant argues that she has not agreed to the sale because the defendants have never approached her but sent emissaries and that the defendant should comply with the law.

The defendant has filed H.C.C.C. 44/05 seeking that the consent be dispensed with. (PGB 2 b) and the applicant denies having been served with summons in that case by the time this application was filed and that therefore this suit is not meant to circumvent the defendant/Respondent's suit.

In opposing the application the Respondent deposes that indeed they own the suit land as tenants in common, they share the rents equally. They deny any intention to dispose of the property secretly because on 3/2/05 they approached the plaintiff and informed her of the intention to dispose of the land

and that they sought the plaintiff's consent as evidenced by the letter from Sila Advocate, dated 7/2/05 'P EXP1'. They do concede to the fact that the Land Registrar should value the land, the necessary consent be obtained and that the consent of the plaintiff should not be unnecessarily withheld. That the Respondents do not intend to dispossess the plaintiff and it is unjust for the applicant to hold the Respondents at ransom by refusing to consent to the sale and that the applicant has not come to court with clean hands but intends to circumvent the defendants' suit H.C.C.C. 44/05. The Respondent denies that the applicant has fulfilled the requirements for grant of an order of injunction.

I have carefully considered the application, the affidavits filed plus the annexures thereto, submissions by counsels. There is no doubt that the plaintiff and the two defendants are proprietors of the suit land, Machakos Town Block 11/268. A true copy of the Land Register is displayed as annexure 'NNWI'

From the pleadings it is also apparent that the defendants wish to sell their interest in the said plot. The filing of H.C.C.C 44/05 does confirm their intention. The issue is whether the defendants are doing so secretly without the consent of the plaintiff and whether they should be stopped from disposing of their interest. Have they gone about the sale lawfully? Under Section 103 of Registered Land Act, a proprietorship in common is said to be any land, lease or charge owned in common, and each proprietor is entitled to an individual share in the whole. It was agreed that the suit property is incapable of being partitioned.

Section 103 (2) of Registered Land Act goes on to provide that proprietor in common shall deal with the individual share in favour of any other person other than another proprietor in common of the same land except with the consent, in writing of the remaining proprietor or, but that such consent shall not be unreasonably withheld. In this case, we have the word of the plaintiff as against that of defendant. Whereas defendant claims to have sought the consent of the plaintiff, the plaintiff denies that.

It is after consent is given that an application is made to the Land Registrar in the prescribed form for the partition of the same. We have evidence that this plot is built up and cannot be partitioned. Section 105 provides for the procedure to be followed where the land is incapable of partition as is this case. The Registrar on application will value the land and the shares of the proprietors in common and order the sale of the land by way of public auction and make any other order for disposal of the application as he deems fit.

In the present case, if indeed the plaintiff was withholding the consent the Registrar should have been informed and an application for sale of the property should have been sought through the Registrar. There is no evidence that the Registrar has been moved by the defendants. Instead the defendants have gone ahead to file suit. There is provision on how the parties should deal with such a situation first and I believe that the defendants have jumped the gun. They had not complied with the law as per provisions of Registered Land Act and should so comply.

The applicant has established her interest in the disputed land in that she is a tenant in common. It is also apparent that the procedure for sale of the said plot is flouted. The plot is said to be plaintiff's main stay. If transferred or sold without her knowledge she is bound to suffer irreparable loss. The evidence of convenience would also tilt in plaintiff's favour.

As to whether the applicant brought this suit to forestall H.C.C.C. 44/05, there is no evidence to that effect. It was submitted that the applicant was not aware of that suit and had not been served with the summons in that case. That assertion has not been denied by the Respondents. The suit was filed when the applicant had no idea that the Respondents had filed another suit.

In my considered view the applicant has established a prima facie case with chances of success and shows that she will suffer irreparably if the sale is not stopped till the procedure is followed.

In the Chamber Summons application, the prayer is that an injunction be granted pending hearing and determination of the application. There is no prayer for an injunction pending hearing and determination of the suit. This application has been heard and this is the determination of the same. The court can only

grant the orders for which it has been moved. This matter ends here and there is no order to be granted further than today. An interim order had been granted which lapses with this ruling. It cannot be given again. That order is spent and cannot be granted again. I hereby dismiss the application dated 9/6/05 with costs.

R.V. WENDOH

JUDGE

Dated at Machakos this 6th day of October 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE