



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 230 OF 2002**

**ROSE AUMA KHABEKO ..... PLAINTIFF**

**VERSUS**

**1. HENRY KHABEKO AMBETSA ..... 1ST DEFENDANT**

**2. PETER MWALIMU MIWA ..... 2ND DEFENDANT**

**R U L I N G**

The plaintiff filed suit on 7th June, 2002 against the two Defendants seeking the following orders:

- a) *A declaration that the house without land on Plot No.2134 (Magongo Santana which was/is owned by 1 st defendant as the registered owner or owner thereof is/was jointly owned by the 1 st defendant and the plaintiff.*
- b) *A declaration that the purported sale of the house by the 1st defendant to the 2 nd defendant was in breach of trust and fraudulent and is therefore void and illegal and therefore cancelled.*
- c) *An Injunction perpetually restraining the 1 st and 2nd defendants whether or otherwise howsoever from transferring, alienating, selling or otherwise disposing the house or interfering with the plaintiffs peaceful occupation thereof.”*

Together with the said plaint, the plaintiff on the same date filed a Chamber Summons brought under the Provisions of order 39 r2 and Section 3A of the Civil Procedure Rules and Act. The Application filed under a certificate of urgency was heard ex-parte and an interim order of an injunction against both defendants issued on 10.6.2002. It is the said application that come up for hearing inter parties on 22.10.2002. When the matter was called out at 9.15 a.m. there was no representation on the part of the defendants and the same was set aside for hearing at 10.45 a.m. when Mr. Busieka appeared and informed the court he was holding brief for Mr. Gikandi. He applied to have the matter put aside for another 10 minutes to allow Mr. Gikandi time to appear. This request was however turned down by the Court and the matter did proceed.

The application is supported by a detailed Affidavit sworn by the plaintiff on 7th June, 2002. The reasons for seeking the said order are that the first defendant who is her husband has purportedly sold the family house situated at Magongo Santana to the 2nd Defendant without the consent of the plaintiff. Trouble started when the first plaintiff found himself engulfed in a lot of debts after taking a loan from Barclays Bank of Kenya Ltd. purporting it was to be used to purchase a plot for the family. Instead the plaintiff says he moved in with another woman with whom he cohabited with at Mombasa and later they moved to

their rural home when his creditors began to catch up with him. The plaintiff further deponed that she travelled to their rural home to find out from her husband what was going on as creditors were now pursuing her to settle his debts. He admitted the debts and instructed her to repay them using the Rent she collected from the suit property. She and their 8 children also live on the same property. Through her efforts she managed to repay most of her debts and to support the first defendant. Copies of receipts for payments and letters from the 1st defendant to the plaintiff requesting for money are annexed to the affidavit.

The plaintiff further depones that the 1st defendant tricked her and the children to travel home for a family ceremony which was never to be only to learn from her brother-in-law that her husband wanted to sale the disputed property. She then registered her protest and returned to Mombasa but her husband went ahead and sold the property to the 2nd defendant through Munyitha Advocate to whom the issue of her protest does not appear to have been disclosed although both defendants were well aware that the firm of Mogaka & Omwenga Advocates had instructed them to get the plaintiff's consent before the sale transaction could be legalized.

She now seeks an injunction as the 2nd Defendant has made attempts to have her, the children and other Tenants evicted. The plaintiff has annexed a letter from the chief from their village home confirming that she is the legal wife of the 1st defendant. The letter from him to her dated is clearly addressed "Kwa muke wangu Rosa" For the orders sought to issue one must show that the principals governing the grant of an injunction as laid down in the Giella -vs- Cassman Brown's Case have been met. To her supporting Affidavit the plaintiff has annexed documents to show she and the 1st defendant share a husband and wife relationship.

She has also deponed that the property was bought during the subsistence of the said marriage. As to whether or not she is entitled to any share is not for the court to decide at this point. She has further said that she and the children reside on the same property which is not disputed. In fact the 2nd Defendant depones in his Affidavit in reply that the 1st defendant told him the plaintiff was a mere Tenant. The money she collects from the rent is what she uses to support the children and will suffer irreparable loss while the 2nd defendant can indeed recover his money from the 1st defendant. Mr. Busieka for the Defendants did not wish to offer any submissions but said he fully relied on the replying Affidavit. I have read the replying Affidavit sworn by the 2nd defendant. He says he is a bona fide purchaser and was not aware the plaintiff was the 1st defendant's wife.

However, he does not dispute that the Firm of Mogaka & Omwenga had refused to draw up the sale agreement in the absence of the plaintiff's consent. I find the actions of the defendants herein were well calculated and they had no intention of considering the plaintiff's interest if any. This being a family property and on which the plaintiff and children reside, in my view, it is not to be handled casually as the defendants would want it to be. In the interest of justice to all parties I find the issue as to whether the plaintiff has any legal claim need to be addressed and for the said reasons, the order of an injunction shall issue as against both defendants who shall refrain from evicting or doing anything that amount to interfering with the plaintiff's stay or management of the disputed property pending the hearing and determination of the suit.

Costs shall be to the plaintiff.

**Dated and Delivered at Mombasa this 21st day of November, 2002.**

**P.M. TUTUI**

**COMMISSIONER OF ASSIZE**

