



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERUGOYA

ELC CASE NO. 267 OF 2014

MARTA WANGECI KIMANI.....PLAINTIFF

VERSUS

SAMUEL KIMANI KAROKI.....1ST DEFENDANT

JAMES IRUNGU KANYUGA.....2ND DEFENDANT

JOSECK IKAI MUKUHA.....3RD DEFENDANT

UNAITAS SACCO SOCIETY.....4TH DEFENDANT

LAND REGISTRAR, MURANGA.....5TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....6TH DEFENDANT

RULING

On 1st October 2014 the plaintiff **MARTA WANGECI KIMANI** filed this suit against the defendants seeking amongst others, orders that the 5th defendant do cancel the transfer and titles of the suit property known as LOC.12/SUB-LOCK.1/GAKIRA/T.537 (herein the suit property) issued to the 2nd and 3rd defendants and the same to be registered in the joint names of the plaintiff and the 1st defendant. The plaintiff also sought a declaration that the transfer, registration and change of titles of the suit property by the defendants was fraudulent and therefore null and void and an order of permanent injunction restraining the 1st, 2nd, 3rd and 4th defendants, their agents or servants from interfering with the said suit property. The claim was premised on the pleading that at all material times, the suit property was matrimonial property belonging to the plaintiff and 1st defendant and for whose development the plaintiff contributed more than half of the resources utilized in the development of the same by the construction of a four storey building whose rental income is Ksh. 2,160,000 per annum. However, on or about 1st July 2014, the 1st defendant without the consent and knowledge of the plaintiff, fraudulently transferred the suit property to the 2nd defendant who then on 24th July 2014 transferred it to the 3rd defendant who on 6th August 2014 charged it to the 4th defendant for Ksh. 12 million. Allegations of fraud have been levelled against all the defendants herein.

Simultaneously with the plaint, the plaintiff filed a Notice of Motion under **Order 40(1) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act** seeking the following reliefs:-

1. Spent

2. Spent

3. That pending the hearing and determination of this suit, the proceeds from the suit property be deposited in a joint account in the name of both the plaintiff and the 1st defendant to take effect immediately.

4. That pending the hearing and determination of this suit, this Honourable Court do grant a temporary injunction restraining the 1st to 5th defendants, their agents and/or servants or otherwise whatsoever from trespassing on or disposing or in any way registering any transaction on or in whichever way interfering with all that parcel of land known as LOC.12/SUB-LOCK 1/GAKIRA/T.537.

5. That costs of this application be provided for.

The application was based on the grounds set out therein and supported by the plaintiff's affidavit.

The gist of the application is that whereas the suit property is matrimonial property acquired jointly by the plaintiff and the 1st defendant during the subsistence of their marriage, the 1st defendant without the spousal consent of the plaintiff transferred the same to the 2nd defendant on 1st July 2014 and on 24th July 2014 it was transferred to the 3rd defendant who, on 6th August 2014, charged it with the 4th defendant for Ksh. 12 million. All this was done fraudulently as the plaintiff had placed a caution on the suit property which was removed without her knowledge. On the suit property is a four storey building with rental income of Ksh. 180,000 per month. Annexed to the supporting affidavit is a copy of marriage certificate showing that the plaintiff and the 1st defendant were married on 21st February 1959, a copy of registration of the caution, an order issued in **MURANGA CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 225 of 2014** restraining the 1st defendant from disposing off the suit property but which was over-taken by events as the 1st defendant had already sold the land to 2nd defendant and a copy of certificate of search showing that the suit property was on 24th July 2014 registered in the names of the 4th defendant – annexures **MKW 1 to MKW 5**.

In resisting the application, the 1st defendant **SAMUEL KIMANI KAROKI** filed a replying affidavit in which he deponed, inter alia, that the suit property is registered in the names of other persons and that consent for that transfer was legally obtained a copy of which is annexed (annexture **SKK 1**). That the suit property is residential and the insinuation that the plaintiff financed it is false and in any case, he has transferred to the plaintiff plots at Kenyatta University, Kayole and Zimmerman as well as a beer distributor which earn Ksh. 350,000, 50,000 and Ksh. 8,000,000. That there was no fraud involved in removing the caution and the plaintiff has previously filed for application of injunction in Muranga Court and also an Originating Summons for Division of matrimonial property being Case No. 62 of 2014 at Nairobi.

The 2nd defendant also filed a replying affidavit in which he deponed, inter alia, that he was registered as the owner of the suit property on or about July 2014 having obtained it from the 1st defendant and having done the necessary search and he in turn transferred it to the 3rd defendant as he was the indefeasible owner and therefore entitled to do so.

The 3rd defendant in his replying affidavit deponed that he bought the suit property for value from the 2nd defendant on 24th July having done an official search and confirmed that there were no encumbrances thereon. He later approached the 4th defendant and obtained a loan of Ksh. 12 million using the title as security. That any allegation of fraud or collusion between him and the 1st, 2nd and 4th defendants is farfetched and a mere illusion calculated to divert this Court's attention from the real issues in controversy.

The 4th defendant filed grounds of opposition to the effect that an injunction cannot issue to restrain an event that has already taken place and in any event, the plaintiff is not the registered owner of the suit

property and therefore has no right protected by law.

The 5th and 6th defendants did not file any response to the application although a defence has been filed to the main suit.

Submissions have been filed by the firms of Lesinko Njoroge and Gathogo Advocates for the plaintiff, N.M. Kiriba Advocates for the 1st defendant, Mbue Ndegwa Advocates for the 2nd and 3rd defendants and Waiganjo Wachira Advocates for the 4th defendant.

I have considered the application, the rival affidavits and annextures including the plaintiff's further affidavit and the submissions of counsel.

This application seeks two substantive remedies being:-

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, the proceeds from the suit property be deposited in a joint account in the name of the plaintiff and the 1st defendant to take effect immediately and

4. That pending the hearing and determination of this suit, this Honourable Court do grant a temporary injunction restraining the 1st to 5th defendants, their agents and/or servants or otherwise whatsoever from trespassing on or disposing or in any way registering any transaction on or in whichever way interfering with the suit property.

With regard to the prayer that the proceeds of the suit property be deposited in a joint account in the names of the plaintiff and 1st defendant, I take it to mean that the plaintiff seeks an order that the rental income from the suit property be deposited in a joint account in her names and that of the 1st defendant. This is because, in paragraph 19 of her supporting affidavit, she has deponed as follows:-

“That I am a disabled person and I do need a constant supply of income to sustain me and it is from the proceeds from the rental houses from the suit property that I obtain my finances. Annexed herein and marked ‘MWK 6’ is a copy of my National Council for Persons with Disabilities Card”.

The 1st defendant in his replying affidavit (paragraph 7 and 8) has deponed that in fact the suit property is residential and the plaintiff has never benefited from the proceeds thereof. This Court would have expected better evidence showing that indeed there are tenants on the suit property with a record showing the rental income therefrom. And even then, **Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules** provides that:-

“Where in any suit it is proved by affidavit or otherwise

a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree or

b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit

The Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further

orders”.

Clearly therefore, the provisions of **Order 40 of the Civil Procedure Rules** do not donate to the Court the power to grant the orders sought in prayer No. 3 of the Notice of Motion subject of this ruling. **Order 40 of the Civil Procedure Rules** only gives protection where the property in dispute is likely to be wasted, damaged, alienated, sold, removed or disposed off before the suit is heard and determined.

Secondly, any interlocutory orders sought by a applicant prior to the hearing of the main suit must not be at variance with the prayers sought in the suit itself. This is because, it is the substantive prayers in the suit that support the granting of any interlocutory relief before the main trial. In the plaint filed herein on 1st October 2014, the plaintiff seeks the following remedies:-

a. A declaration that the transfer, registration and charge of the titles to the suit property by the defendant was fraudulent and therefore null and void.

b. An order compelling the 5th defendant to cancel the transfers and titles of the suit property issued to the 2nd and 3rd defendants and the same to be registered in the joint names of the plaintiff and the 1st defendant.

c. An order compelling the 5th defendant to cancel the charge registered against the title of the suit property.

d. An order for permanent injunction restraining the 1st, 2nd, 3rd and 4th defendants, their agents or servants from interfering with the suit property.

e. Costs and interest of this suit.

f. Any other relief that this Honourable Court may deem fit and just to grant.

There is therefore no prayer in the plaint requiring that the proceeds from the suit property be deposited in a joint account in the joint names of the plaintiff and the 1st defendant. In the circumstances, there would be no legal basis for this Court to grant an interlocutory relief which is not among the reliefs sought in the suit itself. Prayer No. 3 of the Notice of Motion is therefore not available to the plaintiff.

In prayer No. 4, the plaintiff seeks a temporary order of injunction to restrain the 1st to 5th defendants, their agents and/or servants or otherwise whatsoever from trespassing on or disposing or in any way registering any transaction or interfering with the suit property. Her claim is that she contributed more than half of the resources utilized in developing the said property and therefore she has a beneficial interest in the same. In paragraph 9 of the plaint, she has averred that the suit property is matrimonial property. She has produced a copy of the marriage certificate showing that she and the 1st defendant were married on 21st February 1959 – annexure **MWK 1**. That the plaintiff and 1st defendant were once married is not disputed. What is not clear is when they stopped living as man and wife. In paragraph 8 of his replying affidavit, the 1st defendant has deponed that he developed the suit property on or around 2011 “***when the applicant was long gone***”. However, in paragraph 3 of her replying affidavit, the plaintiff has deponed that she is still legally married to the 1st respondent and there are no divorce proceedings. These will be issues for trial.

What concerns me at this time is whether the plaintiff has met the requirements to entitle her to the relief of a temporary injunction as set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

a. An applicant must show that he has a prima facie case with a probability of success at the trial.

b. An applicant must demonstrate that unless the order for injunction is granted, he might suffer irreparable injury that cannot be compensated by an award of damages, and

c. If in doubt, the Court will decide the application on the balance of convenience.

As to what amounts to a prima facie case, the Court of Appeal defined it in the case of **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL NO. 39 of 2002 (2003) e K.L.R** as:-

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

And as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL ER 772**, the Court considering such an application should consider taking the course that appears to carry the lower risk of injustice.

This Court will be guided by the above broad principles in determining this application.

With regard to the 1st and 2nd defendants, they no longer have any interest in the suit property and neither are they in possession of the same. The suit property was sold by the 1st defendant to the 2nd defendant who in turn sold it to the 3rd defendant in whose names it is now registered. The order sought by the plaintiff cannot therefore be available with respect to the 1st defendant **SAMUEL KIMANI KAROKI** or the 2nd defendant **JAMES IRUNGU KANYUGA**.

The 3rd defendant **JOSECK IKAI MUKUHA** is the current registered owner of the suit property which he admits having charged to the 4th defendant for a loan of Ksh. 12 million without any notice of any fraudulent dealing. The 4th defendant filed grounds of opposition to the application stating that the plaintiff has no right in the suit property but in its submissions, it admits that it charged the suit property but was not aware of any other party's claim to the same other than that of the 3rd defendant and all along, it acted in good faith. The 5th and 6th defendants were content with their joint defence in which they plead, inter alia, that their dealing with the suit property was lawful, regular and in furtherance to their statutory duties.

The issue for determination is whether or not the plaintiff has established a prima facie case against the 3rd, 4th and 5th defendant.

As to whether the suit property is matrimonial or not, that will be an issue for trial and at this stage, this Court is not at liberty to make any conclusive findings on contested issues. What this Court has already found is that the plaintiff and 1st defendant were married in 1959. The plaintiff's case is that she contributed towards the development of the suit property. Under **Section 93(2) of the Land Registration Act**, where land is held in the name of one spouse but the other spouse contribute by labour or other means towards its improvement, that spouse shall be deemed to have acquired an interest in the land. And under **Section 93(3) (b) of the Land Registration Act**, spousal consent would be required before any transfer. The plaintiff has deponed in paragraphs 11 and 12 of her supporting affidavit that not only had she registered a caution on the suit land but also, that the transfer to the 2nd defendant was done without her consent. The 1st defendant has only annexed the consent of the Land Control Board but there is no evidence that the plaintiff gave her consent. Prima facie therefore, the transfer by the 1st defendant and subsequently thereafter to the 2nd and 3rd defendant can be impugned for illegality and since the 3rd defendant is the current registered owner of the suit land, he can be injuncted.

It is also not lost to this Court that whereas the plaintiff lodged a caution on the suit property on 27th June 2014 (annexture **MKW 2**), the same was transferred by the 1st defendant to the 2nd defendant on 1st July 2014 who on 24th July 2014 transferred it to the 3rd defendant who on the same day charged it with the 4th defendant. That is not disputed. While the law has no restriction on how long you can hold land or indeed any property before transferring it, the circumstances in which these transfers were hurriedly done lead to the irresistible inference that there was a scheme to defeat the plaintiff's interest more so considering that she had lodged a caution on the suit land. Whether or not all the parties concerned acted

in good faith will be a matter for trial. For now, and based on the material placed before me, I am satisfied that the plaintiff has established a prima facie case to warrant the grant of injunctive reliefs sought herein and whereas injunctive orders cannot be issued against the Government, there is nothing wrong in restraining a Government officer the Land Registrar Muranga from registering any transactions with regard to the suit land pending the hearing of this suit. This is because, unless the said Land Registrar is so restrained, any injunctive reliefs issued against the 3rd and 4th defendants would be in vain.

The plaintiff having established a prima facie case, this Court must also consider whether an award of damages would be adequate remedy. This is because the principles set out in the GIELLA case (supra) have to be considered sequentially – see NGURUMA LIMITED VS JAN NELSEN & 2 OTHERS C.A CIVIL APPLICATION NO. 77 of 2012 and also KENYA COMMERCIAL FINANCE CO. LTD VS AFRAHA EDUCATION SOCIETY (2001) 1 E.A 86.

I did not hear the plaintiff by her supporting affidavit plead that any injury she will suffer if the injunction is not granted is not capable of being compensated in damages. And neither did the defendants in their replying affidavits depone that damages would be adequate compensation. Nonetheless, the plaintiff claims that the suit property is matrimonial property and the Court is guided by the Court of Appeal's decision in MUIRURI VS BANK OF BARODA (KENYA) LTD (2001) K.L.R 183 at page 188 where it said:-

“Besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

Similarly, in JAJ SUPER CASH AND CARRY LTD VS NAIROBI CITY COUNCIL AND TWO OTHERS C.A CIVIL APPEAL NO. 111 of 2002, the Court stated that a party should not be denied an order for injunction simply because the defendant can pay damages. I am guided by those observations from the Superior Court and hereby find that in the circumstances of this case, damages would not be adequate compensation.

In the circumstances therefore, I am satisfied that the plaintiff has established a case to warrant the grant of injunctive reliefs as sought in her Notice of Motion dated 30th September 2014 and filed herein on 1st October 2014 and I make the following orders:-

- 1. The 3rd and 4th defendants are restrained from disposing or in any way registering any transaction on the land parcel No. LOC.12/SUB-LOCK.1/GAKIRA/T.537 pending the hearing an determination of this suit or further orders of this Court.***
- 2. The 5th defendant is similarly restrained from registering any transactions or whichever way interfering with the land parcel No. LOC.12/SUB-LOCK.1/GAKIRA/T.537 pending the hearing of this suit or further orders of this Court.***
- 3. Costs shall be in the cause.***
- 4. The parties to expedite compliance with the provisions of Order 11 Civil Procedure Rules so that this suit is heard and determined in the next 12 months.***

It is so ordered.

B.N. OLAO

JUDGE

12TH MAY, 2016

Ruling delivered, dated and signed in open Court this 12th day of May, 2016

Ms Kiragu for Mr. Njoroge for Plaintiff present

Mr. Macharia for Mr. Gachau for 4th Defendant present.

B.N. OLAO

JUDGE

12TH MAY, 2016