



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.307 OF 2014**

**PHILOMENA WAMUHU .....PLAINTIFF**

**VERSUS**

**ZACHARIA MWITA GITONGA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MUTAI GITONGA.....2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR, NAKURU.....3<sup>RD</sup> DEFENDANT**

**RULING**

***(Application for injunction; plaintiff being wife of 1st defendant; 1st defendant allegedly selling matrimonial property without her consent; application not opposed; prima facie case established; application allowed)***

1. This suit was commenced by way of plaint filed on 4 November 2014. The plaintiff is wife to the 1st defendant and it is pleaded that they have been married since the year 1997, and that they have been living in the land parcel Dundori/Lanet Block 11/10, which is described as their matrimonial property, since the year 2004. It is claimed that the 1st defendant strayed from the matrimonial home in the year 2012 and intended to sell the matrimonial home but his efforts were thwarted by the plaintiff who placed a caution with the assistance of the 2nd defendant who is the Chief of the area. However, in June/July 2014, the 1st defendant revived his intention to sub-divide and sell the suit land, to an alleged 2nd wife, now with the approval of the 2nd defendant. In the case she wants the 1st defendant stopped permanently from disposing off the suit land. The plaintiff also wants the title of the suit land which is in the name of the 1st defendant, cancelled, and for the land to be registered in her name.

2. Together with the plaint, the plaintiff filed an application for injunction which is the subject matter of this ruling. It is the contention of the plaintiff that the defendant has threatened to evict her from the suit land.

3. Despite being served, the 1st defendant, and indeed neither of the other defendants, filed any reply to the application. The application is therefore unopposed.

4. The case of the plaintiff is that being matrimonial property, the 1st defendant has no right to dispose of the same. There could be substance in this argument given the provisions of Section 93 of the Land Act, Act No. 3 of 2012, which provides as follows :-

**93. (1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use**

*of both spouses or, all the spouses—*

*(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless—*

*(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or*

*(ii) the presumption is rebutted in the manner stated in this subsection; and*

*(b) the Registrar shall register the spouses as joint tenants.*

*(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered .*

*(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—*

*(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or*

*(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.*

*(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b), the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.*

5. Given the above, I am of the view that the plaintiff has established a prima facie case. I also think that the balance of convenience tilts in preserving the land, and there is no doubt that the plaintiff will suffer irreparable loss, if the 1st defendant sells the land or evicts the plaintiff.

6. I therefore allow the application and issue the following orders.

7. That pending the hearing and determination of this suit:-

*(a) The 1st defendant is barred from evicting the plaintiff from the land parcel Dundori/Lanet Block 11/10.*

*(b) The 1st defendant is barred from selling, charging, leasing or in any other way encumbering the land parcel Dundori/Lanet Block 11/10.*

*(c) Costs of the application shall be costs in the cause.*

It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 4<sup>th</sup> day of March 2015**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**In the presence of :-**

Mr Maragia for the plaintiff

Defendants : absent

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**AT NAKURU**