



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1860 OF 1993

MRS A W W.....APPLICANT/OBJECTOR

VERSUS

G.C. M.....RESPONDENT

AND

M & W T/A R ENTERPRISES.....1ST INTERESTED PARTY

S W M.....2ND INTERESTED PARTY

RULING

The Applicant/Objector filed a Notice of Motion dated 20th March 2014 under section 3,3A, 34A and 63 (e), Civil Procedure Act, Order 22 Rule 51, 52, 53, 54 Articles 28, 29, 40, 43,45, 57, 48,50 of the Constitution, section 93(2) Land Registration Act 2012 and other enabling provisions of law, seeking the following orders;

- a. Spent.
- b. That ex-parte interim orders do issue to stay any execution and or further execution and or any further proceedings towards the advertisement and or publication and or valuation and or sale and or any other manner of alienation whatsoever of land parcel Title Number Nairobi Block **[particulars withheld]** pending an intimation from the decree holder /attaching creditor whether he proposes to proceed with the attachment and execution.
- c. That without prejudice to prayer “b” above, ex-parte interim orders do issue to stay any execution and or further execution and or any further proceedings towards the advertisement and or publication and or valuation and or sale and or any other manner of alienation whatsoever of land parcel Title number Nairobi Block **[particulars withheld]** pending inter-partes hearing of this application.
- d. That any execution and or further execution and or any further proceedings towards the advertisement and or publication and or valuation and or sale and or any other manner of alienation whatsoever of land parcel Title number Nairobi Block **[particulars withheld]** be set aside in toto.
- e. That costs be provided for.

The application is based on the following grounds that;

1. That she is the wife of S W M
2. As the wife of the 2nd interested party, she makes this application to seek stay of sale of land

- parcel Nairobi Block **[particulars withheld]** considering that (a) she is a co-owner of a wife/spouse who invested in it, and (b) a wife entitled to it under married women properties Act and (c) an entitlement protected by the Constitution, statutes, equity and fact.
3. The objector has legal, equitable, and factual rights over and interests in the whole land parcel Nairobi Block **[particulars withheld]**, hereinafter referred to as “*the parcel*” together with all the developments therein as she has incurred. As she has incurred expenditure on the property towards construction of the house situated on the property, maintenance of the property.
 4. The objector has acquired spousal interest in the said land parcel Nairobi Block **[particulars withheld]**.
 5. Any debt incurred by the 2nd interested party/”judgment debtor”, if actually incurred is no justification to punish, penalize, disposes and destitute the objector and her children for no fault of their own.
 6. The parcel, valued at over Kshs.30 Million, represents the objector’s whose lifetime’s savings and investments and its sale shall render her destitute, homeless and abjectly poor, it also represents the sum total of her quest for happiness and fulfillment in the form of a family unit. Under the constitution she is entitled to protection of the family as the fundamental unit of society and the necessary basis of social order enjoying recognition and protection of the state.
 7. The parcel is her matrimonial home, where she accommodates and cares for her children and her spouse/2nd interested party. The property and the housing therein is used to enable her discharge her duties and obligations to her children. Her obligations to her children are founded on inter-alia the constitution and the Children Act 2001 which provides for the paramourcy of child welfare and the attendant parental duties including housing, educating, mentoring and all sundry aspects of protecting and maintaining their children.
 8. The sale of the parcel will deprive her of her constitutional rights to property, right to protection of law, right to happiness and fulfillment, right to fair administrative action, right to human dignity, right to have, maintain and advance the welfare of her family, right to fair hearing before being prejudiced by way of the proposed sale, right to al express and implied socio-economic rights, inclusive of housing.
 9. A sale shall take away her legitimate expectation to secure enjoyment of her savings, investments and rights.
 10. She has learnt from the 2nd interested party that the property is at the risk of sale on account of a debt allegedly incurred in February 1993, albeit contested by the 2nd interested party, including an appeal pending at the court of appeal.
 11. If orders of stay of execution are granted, the Decree holder/Respondent shall suffer no prejudice. This suit, has been ongoing since 1993, judgment having been given in December 2007. If the interim orders of stay are found to have been unfounded then the plaintiff is fully secured as he will be able to execute and recover his claim plus interest with excess.

The application is supported by the affidavit of Mrs. A W W dated the 20/3/2014. The application was opposed. The respondent/plaintiff filed a replying affidavit dated the 14/2/2014. The 2nd interested party through the firm of Mr. Katwa Company advocate, filed grounds in support of the objector’s spouses objection to the affidavit.

The background of this application is that the plaintiff sued the defendant. On the 5th December 2007 judgment was entered against the defendant. The plaintiff/decree holder thereafter began the execution process. On the 19/3/14 the Deputy Registrar gave a ruling for the settlement of terms and conditions of sale. The gist of the ruling dated 19/3/2014 is that the plaintiff /decree holder was allowed to sell the property L. R No. **[particulars withheld]** situated in Nairobi on the 20/3/2014. The applicant/objector filed the application under consideration.

The applicant in her grounds stated on the face of the application sets out her case. The said have been set out in this application and I need not repeat them. In her affidavit she reiterates the same facts.

The plaintiff/defendant in opposing the application has raised the following issues; that procedure of filing the objection proceedings does not fall within the Civil Procedure Act ;that there is no procedure to

move the court by way of notice of motion; that the 2nd rights of the applicant are not reflected on the title; that the affidavit did not disclose when she became aware of the matter; that S W M is not registered as a trustee and therefore cannot purport to hold the land parcel in trust for the children; that the decretal sums is now Ksh.1.8 Million; that the Land Registration Act No. 3 of 2012 does not apply retrospectively; and that the Constitution cannot create rights by the time the matter was litigated and that such rights cannot be raised to prohibit the execution of the Court order as it will result in injustice; that the respondent too has equal rights to the applicant and that the alternative methods to receive the decretal sum has not been disclosed.

Mr. Katwa for the 2nd interested party supported the applicant's application. He submitted that Constitution obligates all institutions including the court to give regard to the family unit and disposal of the family property will interfere with the family unit contrary to the provisions of the Constitution. That even though the decree holder states he has constitutional rights his rights cannot displace the objector's rights; and that they co-exist. He submitted that the plaintiffs have other alternative ways of execution.

I have considered the facts as deponed by the parties and the oral submissions that were made in court. The Civil Procedure Rules sets out the procedure of how objection proceedings are to be conducted. The procedure is set out in Order 22 rules 51 to 54. The objector has filed a Notice of Motion. In the said Notice of Motion the applicant has also cited the provisions of the Constitution and the Land Registration Act which she has considers are necessary for her application. In my view what the applicant has done is not fatal considering that her application cites the provisions of the Constitution and the Land Registration Act, further guided by the provisions of Article 159 (2) (d) of the Constitution, I will consider the application on its merits.

It is not in dispute that the applicant and one S W one of the directors of R Enterprises Ltd are husband and wife. The applicant states that the property L. R Nairobi Block **[particulars withheld]** is their Matrimonial home. The Respondent has submitted that the provision of the Land Registration Act No. 3 of 2012 does not apply retrospectively. The execution process the attachment of the property the subject of the application began in March 2014. In my view the provisions of the Constitution and the Land Registration Act do apply. I do agree that the provisions section 93 (2) & (3) of the Land Registration Act applies in this case as it is not in dispute that L. R. Nairobi no. **[particulars withheld]** is Matrimonial property. The provisions of the Land Registration Act No. 12 are clear of what needs to happens in the event a property is to be disposed. The consent of the spouse has been given. The objector by filing these proceeding has demonstrated that she does not consent to the disposal of the said property. A spousal right in a matrimonial property is an overriding right which the court cannot ignore. With these provisions of the Land Registration Act in mind I find that the Decree Holder cannot continue with the execution. I also agree with Mr. Katwa's submissions that the family is the fundamental unit of any Society (see Article 45(1) of the Constitution) and that if the said order is given the applicant's family shall be affected. The Civil Procedure Rules provides other modes of execution, let the respondent pursue the said modes of execution.

I therefore find merit in the applicant's application and grant the following order; that any execution on further execution and or further proceedings towards the advertisement and/or publication or valuation and/or sale and/or any other manner of alienation whatsoever of land parcel title No. Nairobi No Block **[particulars withheld]** is set aside. Costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 7th Day of November 2014

R. E. OUGO

JUDGE

.....**APPLICANT/OBJECTOR**

.....**PLAINTIFF/RESPONDENT**

.....**1ST INTERESTED PARTY**

.....**2ND INTERESTED PARTY**

.....**COURT CLERK**