



ELIZABETH NTHENYA WAMBUA..... PLAINTIFF

- VERSUS -

PHILIP WAMBUA MASILA1ST DEFENDANT

COL. CHARLES JOSEPH MASILA.....2ND DEFENDANT

THE REGISTRAR OF TITLES

GOVERNMENT LANDS.....3RD DEFENDANT

THE ATTORNEY GENERAL4TH DEFENDANT

RULING

1. This is the plaintiff's notice of motion dated 4th May 2012. The plaintiff prays for an interlocutory prohibitive injunction to restrain the defendants from interfering with, alienating or dealing with the property known as LR No 75/962/Buru Buru II, Nairobi. An order is also sought against the Commissioner of Lands prohibiting any further dealings on the property.
2. The plaintiff is the wife of the 1st defendant. She avers that they jointly purchased the suit property under a mortgage from East African Building Society. The property is a residential house in a housing estate known as Buru Buru Phase II, Nairobi. The plaintiff avers that this is a matrimonial home where she lives with her 3 children. Her case is that the house has been fraudulently transferred to the 2nd defendant who is now threatening to evict her and the children. Her husband has since left the matrimonial home. She is apprehensive that the 2nd defendant may be issued with a lease for the property or sells the property. Hence the prayers in the motion. All those matters are buttressed further in two depositions by the plaintiff: an affidavit sworn on 4th May 2012, and a further affidavit sworn on 17th July 2012 with leave of the court.
3. The motion is contested. The 1st defendant's case is that the suit property solely belongs to him having bought it in 1988 under a mortgage from Credit Kenya Limited. He was working there. In 1993 he arranged to transfer the mortgage debt to East African Building Society. In 1995, the loan was taken over by Barclays Bank. He then ran into financial headwinds. In 2005 he arranged to transfer the property to his brother, the 2nd defendant who loaned him some monies. The understanding was that his brother would pay the bank. The 1st defendant would then repay him. He thus denies any forgery. In particular, he contended that the signature of the applicant was not required for any of the lending or transfer transactions. He denied that the property is a matrimonial home of the applicant. In a synopsis, the defendant's case is that the applicant's claim has no legal foundation.
4. From the statement of defence of the 1st defendant dated 19th June 2012, it is pleaded that there was no fraud in the transfer of the property to the 2nd defendant. It is also clear at paragraph 5 thereof that the couple has a matrimonial dispute. The 1st defendant has moved out of the premises. There are allegations

that the applicant caused the 1st defendant to be arrested by the police. In the written submissions of the 1st defendant, he relied entirely on his replying affidavit sworn on 19th June 2012 whose key averments I have detailed earlier. The applicant and the 2nd respondent have also filed their written submissions. The 3rd and 4th defendants did not appear at the hearing of the motion or file any reply.

5. I have heard the rival submissions. I take the following view of the matter. The principles governing the grant of prohibitive injunctions are now well settled. When a litigant approaches the court for prohibitive injunction, she must rise to the threshold for grant of interlocutory relief set clearly in Giella Vs Cassman Brown and Company Limited [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See Kenya Hotels Limited Vs Kenya Commercial Bank and another [2004] 1 KLR 80. See also the Public Trustee Vs Nicholas Kabucho Murimi HCCC ELC 610 of 2011 [2012] e KLR, George Munge Vs Sanjeev Sharma & 3 others HCCC ELC 677 of 2011 [2012] e KLR.

6. When I juxtapose those principles against the available evidence, I find further as follows. The applicant and the 1st defendant were married under the Marriage Act on 20th December 1986. They have three adult children. There has been no divorce but the couple is now separated. The applicant is living in the suit property. The 1st defendant, her husband, has moved out. Those are matters truly within the province of a family court. They are however relevant in so far as whether the couple jointly bought the suit property. The applicant states that the property was bought under a mortgage loan of Kshs 384,000 advanced by East African Building Society in 1988. But from the certificate of lease annexed dated 31st October 1988, the property is registered in the name of Phillip Masila, the 1st defendant. I have seen an approval for a loan to the society dated 17th October 1988 in the joint names of the applicant and 1st defendant for Kshs 238,000. I have also seen an application in 1994 for a loan of Kshs 90,000 from the applicant's Ukulima Co-operative Savings and Credit Society to help offset a debt on the property. I have no clear evidence how the proceeds of the latter loan were applied. There was a notice of attachment from auctioneers, Virmir Auctioneers dated 26th July 2002. There is however no direct evidence that the plaintiff contributed to the purchase of the house or repayment of the loan.

7. It would be incumbent upon the applicant to bring suitable proceedings to establish a trust over the property. As it is, the plaint here prays for a declaration that she is the legal owner. Although that is for the trial court, it is not lost on me that that contradicts her deposition that the property was bought jointly. The applicant avers at paragraph 5 of the further affidavit that she supported the husband when he lost employment in 1993. I am alive that under article 40 of the Constitution, title to property is sacrosanct and should be protected.

8. I then mirror that version of evidence against that of the respondents. The 1st defendant has annexed a copy of the title. It is in his name. I readily find, on the face of it, that the applicant is not registered jointly with the applicant as proprietors. That is not to say that she does not have an interest. I am well alive that these are not matrimonial proceedings. There is a simmering and underlying marital dispute. It would be for the relevant trial court to determine whether the 1st defendant holds the property in trust for the applicant. What is clear is that the property housed the family. The applicant is living there. However, from the replying affidavit and defence of the 2nd defendant Col. Charles Masila, it is evident that the children of the marriage Sarah Mutheu and Ken Mwendwa are above 18 years. They are adults. They may be dependents but it is not clear that they reside in the suit premises. The applicant deliberately created the impression they are young children.

9. From the loan approval dated 17th October 1988, the mortgage loan was being advanced jointly to the applicant and the 1st respondent. I am fortified there because in the replying affidavit of the 1st defendant, he avers at paragraph 2 that he obtained a loan from his employer Credit Kenya Limited in 1988. But he does not annex any loan approval, charge or other document to show that. All he has annexed is a copy of

the title in his name and a letter dated 24th September 1988 by the conveyancing lawyers seeking consent to transfer. That letter does not even mention that the lawyers were acting for the bank. Again, if as he says in 1993 he transferred the facility to East African Building Society, or in 1995 to Barclays Bank, there would be correspondence, loan approvals, transfer of charge, discharges of earlier loans and so forth. I have thus formed the clear impression that the 1st defendant is less than candid and is determined to leave the court in a blind spot. The key problem now is that the suit property was transferred to the 2nd defendant in 2005. The injunction sought to restrain the 1st defendant from transferring the property is thus overtaken by events.

10. I would return to the deposition of the 2nd defendant Col. Charles Masila. It is evident that the suit property has been transferred to the 2nd defendant. That is clear from the certificate of search annexed marked “ENW 3” to the further affidavit of the applicant. The property was registered in the name of the 2nd defendant on 27th May 2005. There is a charge for Kshs 2,380,000 to Barclays Bank of Kenya. Rights of the chargee have been reserved under section 83 and 84 of the Registered Land Act (now repealed). The applicant does not seriously contest the fact. The apprehension expressed by the plaintiff that the 2nd defendant may be issued with a new lease anytime now is thus mistaken and clearly overtaken by events. I say so because at paragraph 11 of the original supporting affidavit she concedes the sale. She was then trying to purchase the property together with her son Ken Mwendwa Wambua and daughter Sarah Mutheu Wambua from the 2nd defendant and to repay the 2nd defendant a sum of Kshs 300,000. As the original title was in the name of the 1st defendant only, and the applicant’s interest had not been noted, I accept that the 1st defendant could transfer to the 2nd defendant. It might have been secret. But although the applicant says there was collusion or fraud between the two defendants and the Ministry of Lands, I do not have cogent evidence beyond the authenticated letter dated 7th June 2010. That was 5 years after the transfer.

11. It may be inferred. But there must be a basis. I am alive to the cardinal precept of the law of evidence that he who alleges must prove. I am also cognizant that the burden of proof of fraud is very high and beyond a balance of probabilities. See *Koinange and 13 others Vs Koinange* [1986] KLR 23. The standard of proof for fraud is very high approaching but below proof beyond reasonable doubt. See *Ratilal Gordhanbhai Patel Vs Lalji Makanji* [1957] E A 314, *Urmila Mahindra Shah Vs Barclays Bank International and another* [1979] KLR 67. It requires proof beyond the usual standard of balance of probabilities in civil cases. Again, the less I say the better to avoid encroaching on the province of trial court.

12. I have stated that a transfer to the 2nd defendant has been effected. There is a charge by Barclays Bank. Granted those circumstances and the evidence, it would not be prudent to grant an injunction against the present proprietor or chargee. The nature of the reliefs sought would prejudice other parties beyond the dispute between the plaintiff and 1st defendant. I would in the result find that the plaintiff has not established a strong *prima facie* case for injunction against the 2nd defendant, the interests of the chargee bank or the Commissioner of Lands.

13. I am also minded that the suit property has a determinable value. If in the end the plaintiff prevails in the declaration for ownership of a share of the property she can be compensated in damages. As I am not in doubt about those two heads of the *Giella* case, I need not consider the balance of convenience.

14. For all the above reasons, I find that the plaintiff’s application lacks merit. I order that the same be and is hereby dismissed. Costs shall abide the judgment.

It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of October 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

Mr. Busolo for Ms Mwendo for the 1st Defendant.

No appearance for the 2nd Defendant.

No appearance for the 3rd and 4th Defendants.