

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO.16 OF 2010 (O.S.)

NELLIE MUMBI NDUNG’U.....
.....**PLAINTIFF**

VERSUS

PETER NDUNG’U CHECHE..1ST
DEFENDANT

GRACE WANJIKU NDUNG’U.....2ND
DEFENDANT

R U L I N G

The plaintiff filed an originating motion pursuant to the provisions of **Section 17** of the **Married Women Property Act, 1882** seeking certain declaratory orders against the defendants. The plaintiff sought a declaratory order that the property known as LR.No.Kabete/Kibichiku/618 (*the suit property*) currently registered in the name of the 2nd defendant is held in trust between the said defendants and the plaintiff in equal shares. The plaintiff further sought an order of the court that she be registered as the co-owner of the suit property. contemporaneous with filing suit, the plaintiff filed an application pursuant to the provisions of the then **Order XXXIX Rule 1(a)(now Order 40)** of the **Civil Procedure Rules** seeking orders of this court to restrain the defendants, by themselves or through their servants or agents from selling, transferring, disposing or in any other way alienating the suit property pending the hearing and determination of the suit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The defendants filed a replying affidavit in opposition to the application.

At the hearing of the application, this court heard submissions made by Miss Bigambo for the plaintiff and by Mr. Kimani for the respondent. Having read the pleadings filed by the parties herein, and considered the arguments made in court, the issue for determination by this court is whether the plaintiff established a case to entitle this court grant the interlocutory orders of injunction sought. The principles to be considered by this court in determining whether or not to grant such application is settled. The plaintiff must establish a prima facie case with a probability of success. She must also establish that she would suffer irreparable harm that may not likely be compensated by an award of damages. If the court shall be in doubt, it shall determine the case on a balance of convenience (**see Giella vs Cassman Brown [1973] EA 358**).

In the present application, certain facts are not in dispute. It is not disputed that the plaintiff is married to the 1st defendant having been so married in 1975. The plaintiff annexed a copy of the marriage certificate in the affidavit in support of the application. The plaintiff and the 1st defendant were blessed with three children before they were separated in 1983. The 1st defendant started cohabiting with the 2nd defendant in 1985. According to the defendants, the cohabitation has resulted in the birth of nine children. The plaintiff claims that the suit property was a matrimonial home and therefore she is entitled to a declaration that she is a joint owner of the same. On the other hand, it is the defendants’ case that the suit parcel of land was owned by the father of the 1st defendant, one John Cheche Mukira (the deceased) who died on 4th March 1986 after the plaintiff had left the matrimonial home. It is further the defendants’ case that the 2nd defendant was registered as the owner of the suit property on transmission after the Kiambu Resident

Magistrate's Court had distributed the estate of the said John Cheche Mukira (deceased) in Succession Cause No.189 of 1991. The defendants therefore argue that the plaintiff cannot claim the suit parcel of land in view of the fact that at the time the plaintiff lived on the suit parcel of land, it was owned by the deceased and not the 1st defendant.

Upon evaluation of the facts of this application, it was clear to the court that if the plaintiff were to succeed in her application, she must put forward a case which, prima facie, establish that she contributed to the purchase or the development of the suit property. Other than claiming that she resided on the suit property when she was living with the 1st defendant, the plaintiff has not brought forth any evidence to support her claim that she is entitled to be declared the owner or joint owner of the suit property pursuant to the provisions of the **Married Women Property Act, 1882**. This court is therefore of the view that the plaintiff fail to establish a prima facie case. The plaintiff's application, cannot, in the circumstances, therefore succeed. It is not necessary for this court to consider the other principles laid down in **Giella vs Cassman Brown**.

The application lacks merit and is hereby dismissed with costs to the defendants.

DATED AT NAIROBI THIS 4TH DAY OF MARCH, 2011

L. KIMARU
JUDGE