



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**BMM v EMM & 3 others (Environment & Land Case 541 of 2017)  
[2019] KEELC 5102 (KLR) (7 February 2019) (Ruling)**

*B M M v E M M & 3 others [2019] eKLR*

Neutral citation: [2019] KEELC 5102 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 541 OF 2017**

**SO OKONG'O, J**

**FEBRUARY 7, 2019**

**BETWEEN**

**BMM ..... PLAINTIFF**

**AND**

**EMM ..... 1<sup>ST</sup> DEFENDANT**

**PATRICIA NDUNGU MUTHONI T/A P. M. NDUNGU & CO.**

**ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**JASON MBUVI MAINGI ..... 3<sup>RD</sup> DEFENDANT**

**CHARLES KOECH T/A CHARLES KOECH & ASSOCIATES .. 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff and the 1<sup>st</sup> defendant were a husband and wife. During their marriage, they purchased a property in the City of Nairobi known as Apartment No. [...] erected on L.R No. [...] (hereinafter referred to as “the suit property”) on 24<sup>th</sup> October, 2007 at a consideration of Kshs.7,400,000/-. Although the suit property was paid for by the plaintiff and the 1<sup>st</sup> defendant equally and was owned by them in equal shares, the same was registered solely in the name of the 1<sup>st</sup> defendant. In recognition of the plaintiff’s interest in the suit property, the 1<sup>st</sup> defendant executed a declaration of trust on 28<sup>th</sup> November, 2007 in which the 1<sup>st</sup> defendant acknowledged that the plaintiff had contributed Kshs.3,700,000/- towards the purchase of the suit property and that she held a half share of the suit property in trust for the plaintiff.
2. The marriage between the plaintiff and the 1<sup>st</sup> defendant encountered difficulties which led the plaintiff to file a petition for divorce against the 1<sup>st</sup> defendant at the Chief Magistrate’s court in Nairobi. On 2<sup>nd</sup> November, 2011, the marriage between the plaintiff and the 1<sup>st</sup> defendant was dissolved and a decree



nisi issued which was made absolute on 2<sup>nd</sup> May, 2012. As at the time of dissolution of their marriage the plaintiff and the 1<sup>st</sup> defendant had two children out of the union.

3. While the divorce proceedings were going on, the 1<sup>st</sup> defendant instituted proceedings against the plaintiff at the Children's Court in Nairobi seeking maintenance for their two children. On 16<sup>th</sup> December, 2010 the court made an interim order giving custody of the children to the 1<sup>st</sup> defendant with unhindered access to the plaintiff. The court ordered further that the suit property be leased to a third party with effect from 1<sup>st</sup> January, 2011 and all the rent received therefrom be utilised towards the payment of school fees and related expenses for the children. Following that order, the suit property was let to a tenant and a joint account opened in the names of the plaintiff and the 1<sup>st</sup> defendant in which the rent from the suit property was to be deposited before being paid out to meet education and other needs for the children.
4. On 19<sup>th</sup> January, 2012, the court made a further interim order that the children be enrolled in school and that the plaintiff does cater for their school fees and related expenses. In the Children's Court case, the plaintiff was represented by the firm of Letangule & Company Advocates and the advocate in that firm who was in charge of the case on behalf of the firm was Mr. Charles Koech. Mr. Charles Koech later on left Letangule & Company Advocates and established his own firm, Charles Koech and Associates Advocates. It is not clear from the record as to when Mr. Charles Koech established his law firm. Mr. Charles Koech is the 4<sup>th</sup> defendant in this suit. The firm of P. M. Ndungu & Co. Advocates was acting for the 1<sup>st</sup> defendant in the Children's Court case. An advocate in the firm, Patricia Muthoni Ndungu has been sued as the 2<sup>nd</sup> defendant in this suit. From the order that was issued by the Children's Court on 19<sup>th</sup> January, 2012, it appears that the plaintiff had difficulties in paying school fees for his children with the 1<sup>st</sup> defendant. On 13<sup>th</sup> December, 2016, a meeting was held in the office of the 2<sup>nd</sup> defendant which was attended by the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants. At the meeting, the parties and their advocates agreed that the suit property which was the only asset owned by the plaintiff and the 1<sup>st</sup> defendant be sold.
5. The plaintiff brought this suit by way of a plaint dated 22<sup>nd</sup> August, 2017 which was amended on 14<sup>th</sup> September, 2017 seeking a declaration that the plaintiff and the 1<sup>st</sup> defendant own the suit property in equal shares and that the said property be registered in the names of the plaintiff and the 1<sup>st</sup> defendant as co-owners. The plaintiff also sought the eviction of the 3<sup>rd</sup> defendant from the suit property and in the alternative, an order that the defendants pay him Kshs.7,781,500/- being his share of the proceeds of sale of the suit property. In his amended plaint, the plaintiff averred that sometimes in March, 2017 while on a routine visit to the suit property he found the 3<sup>rd</sup> defendant renovating the property and upon inquiry, the 3<sup>rd</sup> defendant informed him that he was in the process of purchasing the property at Kshs.15, 800,000/- and that he had already paid a deposit to the 2<sup>nd</sup> defendant who was acting for him and the 1<sup>st</sup> defendant in the transaction. The plaintiff averred that he was not involved in the sale of the suit property to the 3<sup>rd</sup> defendant and that he had not consented to the transaction.
6. The plaintiff averred further that he had never instructed the 4<sup>th</sup> defendant to act for him in the sale of the suit property to the 3<sup>rd</sup> defendant and that if at all the 4<sup>th</sup> defendant was involved in the transaction, he did so without instructions. The plaintiff averred that the 2<sup>nd</sup> defendant had ignored and/or refused to involve him in the sale of the suit property to the 3<sup>rd</sup> defendant even after being requested to do so. The plaintiff averred that if that was not enough, the 2<sup>nd</sup> defendant had also refused to disclose the details of the transaction to him although she was aware that he was a co-owner of the suit property. The plaintiff averred further that the 3<sup>rd</sup> defendant was also aware that the suit property was co-owned by the plaintiff and the 1<sup>st</sup> defendant before commencing the purchase of the suit property. The plaintiff averred that the defendants had hatched a scheme to fraudulently dispose of the suit property without



compensating him or securing his interest in the property. It was on account of the foregoing that the plaintiff sought the reliefs I have set out herein earlier.

7. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 22<sup>nd</sup> August, 2017 seeking the following orders:
  - (i) A temporary injunction restraining the defendants from transferring the suit property pending the hearing and determination of this suit.
  - (ii) An order directing the 2<sup>nd</sup> defendant to provide the plaintiff with the agreement for sale that was entered into between the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant and all other related documents pending the hearing and determination of this suit.
  - (iii) An order that the sum of Kshs.15,800,000/- that was paid by the 3<sup>rd</sup> defendant be deposited in a bank account in the joint names of the 2<sup>nd</sup> defendant and the plaintiff's advocates on record pending the hearing and determination of the suit.
  - (iv) The costs of the application.
8. The application was supported by the affidavit of the plaintiff sworn on 22<sup>nd</sup> August, 2017 and was brought on the following grounds. The plaintiff averred that the 1<sup>st</sup> defendant and the plaintiff were co-owners of the suit property having purchased the same in 2007 while they were still married. The plaintiff averred that they contributed to the purchase of the suit property equally. The plaintiff averred that after the dissolution of their marriage, the 1<sup>st</sup> defendant purported to sell the suit property without his consent and without involving him in the transaction. The plaintiff averred that in unilaterally dealing with the suit property, the 1<sup>st</sup> defendant had arrogated to herself the sole ownership of the said property. The plaintiff averred that the 1<sup>st</sup> defendant's actions were inconsistent with the plaintiff's interest in the suit property and the declaration of trust that the 1<sup>st</sup> defendant had made in favour of the plaintiff. The plaintiff averred that the 1<sup>st</sup> defendant's actions aforesaid were illegal because the 1<sup>st</sup> defendant could not deal with the suit property without the involvement of the plaintiff. The plaintiff averred that he was apprehensive that unless the 1<sup>st</sup> defendant was restrained by the court, she would proceed with the transaction to the great prejudice of the plaintiff. The plaintiff averred that he had met the conditions for granting a temporary injunction.
9. The plaintiff's application was opposed by all the defendants through separate replying affidavits filed for that purpose. In response to the plaintiff's application, the 1<sup>st</sup> defendant in her affidavit sworn on 13<sup>th</sup> December, 2017 averred that the plaintiff had not established a prima facie case against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 1<sup>st</sup> defendant denied that the suit property was co-owned by her and the plaintiff. The 1<sup>st</sup> defendant admitted that she executed a declaration of trust in favour of the plaintiff in respect of a half share of the suit property. The 1<sup>st</sup> defendant contended however that the said trust was subject to the charge for Kshs.5,500,000/- that was registered against the title of the suit property in favour of Co-operative Bank of Kenya Ltd. The 1<sup>st</sup> defendant averred that the said trust recognised that the joint ownership of the suit property between the plaintiff and the 1<sup>st</sup> defendant was subject to the full payment of the principal sum of the loan and interest to the said bank. The 1<sup>st</sup> defendant averred that the plaintiff had failed to disclose to the court the fact that the loan due to Co-operative Bank Kenya Ltd. that was secured by the charge over the suit property had not been paid and that he had arrears of school fees for their children which he had a duty to pay pursuant to the orders that were issued in Children's Court case No. 942 of 2010. The 1<sup>st</sup> defendant averred that at a meeting that was held on 13<sup>th</sup> December, 2016 between the plaintiff and the 1<sup>st</sup> defendant and their advocates being the 2<sup>nd</sup> and 4<sup>th</sup> defendants respectively, it was agreed that the suit property be sold and the proceeds of



sale be put in an escrow account in the names of the 2<sup>nd</sup> and 4<sup>th</sup> defendants who were to act for the 1<sup>st</sup> defendant and the plaintiff respectively in the transaction. The 1<sup>st</sup> defendant averred that to facilitate the sale of the suit property, the plaintiff agreed to lift the caveat he had registered against the title of the suit property and further that after the sale of the property the proceeds thereof would be distributed between them taking into account the loan that was payable to Co-operative Bank of Kenya Ltd., past and future school fees for their two children, the disbursements, commission and legal fees. The 1<sup>st</sup> defendant averred that pursuant to what was agreed at the said meeting, the plaintiff signed a notice of removal of caveat and the same was lodged for registration by the 4<sup>th</sup> defendant who was then acting for him. The 1<sup>st</sup> defendant averred that the plaintiff and the 1<sup>st</sup> defendant were both at liberty to source for a purchaser for the suit property.

10. The 1<sup>st</sup> defendant averred that a purchaser was found for the property who is the 3<sup>rd</sup> defendant in the suit. The 1<sup>st</sup> defendant averred that after an agreement for sale was executed between her and the 3<sup>rd</sup> defendant and 50% of the purchase price paid, the 3<sup>rd</sup> defendant was given possession of the suit property with the full knowledge and authority of the plaintiff and the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant averred that the 3<sup>rd</sup> defendant had paid the full purchase price for the suit property and that the plaintiff had been informed of the same. The 1<sup>st</sup> defendant averred that the suit herein was filed in bad faith and that the plaintiff's complaint seemed to be limited to his representation in the transaction. The 1<sup>st</sup> defendant averred that she had no interest in the proceeds of sale of the suit property save for her share. The 1<sup>st</sup> defendant averred that despite being ordered by the Children's Court to pay school fees and related expenses for their children, the plaintiff refused to do so. The 1<sup>st</sup> defendant averred that the plaintiff refused to pay school fees for one of their children, KMM amounting to Kshs.2,165,000/= even after several demands were made to him to do so. The 1<sup>st</sup> defendant averred that she made it clear to the plaintiff that she would recover this amount from the plaintiff as a debt from the proceeds of sale of the suit property. The 1<sup>st</sup> defendant averred that at the said meeting that was held on 13<sup>th</sup> December, 2016 between the plaintiff and the 1<sup>st</sup> defendant and their advocates it was agreed that the suit property be sold and that the purpose for selling the property was to help in refunding monies that had been paid towards school fees for the children on behalf of the plaintiff and for the payment of future school fees. The 1<sup>st</sup> defendant averred that in 2010 and 2017 their two children were admitted to universities abroad to pursue further education at a cost of Kshs.4,470,000/-. The 1<sup>st</sup> defendant averred that after consulting the plaintiff's then advocate, the said sum of Kshs.4,470,000/- was deducted from the plaintiff's share of the proceeds of sale of the suit property and transferred to a trust account held in the name of one of the children, DWM and the 1<sup>st</sup> defendant at Bank of Africa Kenya Limited. The 1<sup>st</sup> defendant averred that at another meeting that was held in the 2<sup>nd</sup> defendant's office which the plaintiff refused to attend but was attended by his advocate, the 4<sup>th</sup> defendant, it was agreed that the proceeds of sale of the suit property together with interest of Kshs.322,273/- making a total of Kshs.16,122,273/= less expenses of Kshs.1,152,000/= be disbursed as follows:-

The plaintiff, 50% Kshs.7,485,136/50

Less:

1. Refund to the 1<sup>st</sup> defendant for school fees , Kshs.2,165,000/-.
2. University fees for the two children Kshs.4,470,000/-

Total Kshs.6,635,000/-

Balance Kshs.850,000.50

The 1<sup>st</sup> defendant, 50% Kshs.7,485,136/50



Less:

1. Loan Kshs.2,300,000/-

Total 2,300,000/-

Balance Kshs.4,185,136.50

11. The 1<sup>st</sup> defendant averred that the plaintiff had remarried and as such he had no interest in the education of their two children. The 1<sup>st</sup> defendant averred that she had no reason to doubt that the 4<sup>th</sup> defendant had instructions to act for the plaintiff in the sale transaction and in the release of the proceeds of sale of the suit property. The 1<sup>st</sup> defendant averred that the plaintiff was well aware of the manner in which the proceeds of sale of the suit property were disbursed and as such he was not entitled to the reliefs sought in his application. The 1<sup>st</sup> defendant averred that there was no way the plaintiff was going to be paid kshs.7,781,500/- from the purchase price for the suit property which was only Kshs.15,800,000/- in view of the expenses that were to be met, the loan to be cleared, the sum of Kshs.2,165,000/- owed to her on account of unpaid school fees and university fees for the children that was budgeted for in the sum of Kshs.4,470,000/-. The 1<sup>st</sup> defendant averred that the plaintiff's claim was incompatible with the orders that were made by the Children's Court and that the plaintiff's recourse if any should be directed at his children and not against any of the defendants.
12. In her affidavit sworn on 13<sup>th</sup> December, 2017, the 2<sup>nd</sup> defendant reiterated what is stated in the 1<sup>st</sup> defendant's affidavit which I have highlighted at length above. The 1<sup>st</sup> defendant contended that the plaintiff was ably represented in the sale transaction between the 1<sup>st</sup> and 3<sup>rd</sup> defendants and that he did not act diligently after allegedly knowing of the transaction in March, 2017. The 2<sup>nd</sup> defendant averred that the plaintiff took over 6 months before coming to court. The 2<sup>nd</sup> defendant averred further that the plaintiff had willingly signed a notice of withdrawal of caveat which was lodged at the land registry for registration by his advocate, the 4<sup>th</sup> defendant. The 2<sup>nd</sup> defendant averred that the plaintiff had given the 4<sup>th</sup> defendant instructions to act for him in the sale transaction in her presence and that she had no reason to disbelieve the 4<sup>th</sup> defendant when he acted in the sale transaction by approving the agreement for sale, assignment of lease and opening escrow account which holds the plaintiff's share of the proceeds of sale of the suit property. The 2<sup>nd</sup> defendant averred that the 3<sup>rd</sup> defendant who was an innocent purchaser of the suit property should not be dragged into the dispute between the plaintiff and the 1<sup>st</sup> defendant over the upkeep of their children.
13. The 2<sup>nd</sup> defendant averred that she had acted for the 1<sup>st</sup> defendant since 2010 and that she was aware that the plaintiff was ordered to pay school fees for his children. The 2<sup>nd</sup> defendant averred that when the plaintiff fell into arrears in the payment of school fees, he agreed to the sale of the suit property and that it was absurd that the plaintiff was claiming not to have been consulted in the sale of the property. The 2<sup>nd</sup> defendant confirmed the 1<sup>st</sup> defendant's account of how the proceeds of sale of the suit property were disbursed.
14. The 3<sup>rd</sup> defendant contended in his replying affidavit sworn on 13<sup>th</sup> December, 2017 that he was an innocent purchaser of the suit property for value and that he occupied the suit property with the full knowledge and approval of the plaintiff and the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant averred that he was improperly dragged into a matrimonial dispute between the plaintiff and the 1<sup>st</sup> defendant. The 3<sup>rd</sup> defendant averred that he was the rightful owner of the suit property having paid the full purchase price. The 3<sup>rd</sup> defendant averred that the plaintiff's claim was dishonest and fraudulent. He averred that he stood to suffer hardship and irreparable loss if the orders sought by the plaintiff were granted.



15. In his replying affidavit sworn on 18<sup>th</sup> December, 2017, the 4<sup>th</sup> defendant averred that he represented the plaintiff in the Children's Court Case No. 924 of 2010 where an order was made that the plaintiff pays school fees for his two children DWM and KMM. The 4<sup>th</sup> defendant averred that the plaintiff had not made any payment towards the school fees for the two children despite the said court order. The 4<sup>th</sup> defendant averred that the plaintiff had concealed the existence of the said court order and was in contempt of the said order. The 4<sup>th</sup> defendant averred that the plaintiff's case was premised on falsehood, deceit and lies aimed at circumventing the said court order so that he could escape his responsibilities as a father. The 4<sup>th</sup> defendant averred that the suit property was sold following an agreement which was reached between the plaintiff and the 1<sup>st</sup> defendant and was motivated by the need to educate their children. He stated that the plaintiff was peddling cheap lies when he claimed that he was not aware of the sale of the suit property. The 4<sup>th</sup> defendant averred that the plaintiff was not entitled to the proceeds of sale of the suit property because he had not paid for the upkeep of his children. The 4<sup>th</sup> defendant contended that he only rendered legal services to the plaintiff when he was sued and it was unfair for the plaintiff to paint him as a criminal.

**Determination:**

16. The plaintiff's application was argued by way of written submissions. I have considered the plaintiff's application together with the supporting affidavit. I have also considered the defendants' affidavits in opposition to the application. Finally, I have considered the written submissions on record and the authorities cited in support thereof. The plaintiff has sought temporary prohibitory and mandatory injunctions. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In the case of *Giella v Cassman Brown & Co. Ltd.* (1973) E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
17. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court applies in applications for interlocutory mandatory injunction were set out in the case of *Locabail International Finance Limited v Agro-Export* (1988) 1 All ER 901, where the court stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

18. In the case of *Shepherd Homes Ltd. v Shandahu* [1971] 1 Ch.304, Meggry J. stated as follows:

"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to



do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

19. From the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants and has also demonstrated that he stands to suffer irreparable harm if the orders sought are not granted. It was not disputed that the 1<sup>st</sup> defendant held half share of the suit property in trust for the plaintiff and that the plaintiff was entitled to participate fully in the sale and sharing of the proceeds of sale of the suit property. It was also not disputed that the plaintiff was entitled to 50% of the proceeds of sale of the suit property after deduction of any legal expenses associated with the sale of the property. It was not disputed that the plaintiff and the 1<sup>st</sup> defendant had agreed to sell the suit property and to share the proceeds thereof at a meeting that was held at the offices of the 2<sup>nd</sup> defendant on 13<sup>th</sup> December, 2016. The parties gave conflicting accounts of what was agreed on at the said meeting. Of all the accounts, I am inclined at this stage to accept the account given in the letter dated 19<sup>th</sup> December, 2016 addressed to the firm of Letangule & Company Advocates by the 2<sup>nd</sup> defendant. The letter was written a few days after the meeting of 13<sup>th</sup> December, 2016 before the current dispute arose later in 2017. According to the letter which is attached to the affidavit of the 2<sup>nd</sup> defendant sworn on 13<sup>th</sup> December, 2017 as annexure “PMN3” the following was agreed on at the meeting that was held on 13<sup>th</sup> December, 2016:
1. That Clermont House known as Flat No. CI on L.R 330/462 be sold at a consideration of not less than Kshs.17,000,000/=
  2. That our two firms of Advocates jointly act for the parties in the transaction for the sale and hold the proceeds of sale pending further instructions from our respective clients.
  3. That your clients do forthwith remove the caveat lodged against the property.
  4. Once the sale is concluded, parties to further agree on the apportionment thereof”
20. It is clear from the letter that as at the time when the meeting was held on 13<sup>th</sup> December, 2016 the plaintiff was represented by the firm of Letangule & Company Advocates. This explains why the letter by the 2<sup>nd</sup> defendant was addressed to that firm. The firm of Charles Koech & Associates was not in the picture. The 4<sup>th</sup> defendant, Mr. Charles Koech of Charles Koech & Associates Advocates has not placed any evidence before the court showing how and when he was instructed by the plaintiff to act for him either in the Children’s Court case or in the sale of the suit property. The plaintiff’s contention that the 4<sup>th</sup> defendant had no instructions to act for him is therefore arguable. Again, it is clear from the letter that I have reproduced above that the firms of Letangule & Company Advocates and the 2<sup>nd</sup> defendant were to “hold the proceeds of sale pending further instructions from our representative clients” and “once the sale is concluded parties to further agree on the apportionment thereof.” It is clear from the foregoing that the 2<sup>nd</sup> defendant and the firm of Letangule & Company Advocates or the 4<sup>th</sup> defendant assuming that he was instructed to act in the sale transaction had no authority to deal with the proceeds of sale of the suit property without joint instructions from the plaintiff and the 1<sup>st</sup> defendant. Furthermore, the instructions were clear that the suit property was not to be sold at less than Kshs. 17,000,000/-.
21. The material before the court shows that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants took it upon themselves to sell the suit property to the 3<sup>rd</sup> defendant at Kshs. 15,800,000/- and to disburse the proceeds of sale of the suit property without consulting the plaintiff and obtaining instructions from him. From the material on record, the plaintiff through his advocates on record registered his concern with the 2<sup>nd</sup> defendant over the manner in which the sale of the suit property was being handled on 28<sup>th</sup> March,



2017. The 2<sup>nd</sup> defendant notified the 4<sup>th</sup> defendant of the plaintiff's concerns immediately and the 4<sup>th</sup> defendant thereafter sent to the plaintiff threatening text messages. On 31<sup>st</sup> March, 2017, the plaintiff wrote to the 4<sup>th</sup> defendant on the matter in which letter he mentioned to the 4<sup>th</sup> defendant that he had never instructed him to act for him in the sale of the suit property. It is shocking that even with this development, the 4<sup>th</sup> defendant and the 2<sup>nd</sup> defendant still went ahead to distribute the proceeds of sale of the suit property solely on the instructions of the 1<sup>st</sup> defendant. I have noted that the proceeds of sale of the suit property were disbursed between 2<sup>nd</sup> June, 2017 and 25<sup>th</sup> July, 2017.
22. I have noted further that the 4<sup>th</sup> defendant signed the letter dated 25<sup>th</sup> July, 2017 through which up to Kshs.7,251,563/50 was disbursed to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants. I wonder on whose instructions the 4<sup>th</sup> defendant was acting at this stage having been expressly told by the plaintiff that he had no instructions to act for him. Even if it is assumed that he had been given instructions earlier, such instructions were expressly withdrawn by the plaintiff in March, 2017.
23. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants went to great length to justify the distribution or disbursement of the proceeds of sale of the suit property. They dragged into the matter the Children's Court case and the orders which were made therein. In my view, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants had no right to forcefully take the plaintiff's share of the proceeds of sale of the suit property and use the same to settle the plaintiff's obligations in the Children's Court case.
24. The proper procedure should have been for the 1<sup>st</sup> defendant to obtain an order from the Children's Court attaching such proceeds. I would say that anything less than that was illegal however strongly they felt that the plaintiff was in contempt of the orders issued by that court. Out of a net sum of Kshs.7,485,136/50 which the plaintiff was entitled to after deduction of legal and other expenses relating to the sale of the suit property according to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' accounts, the 2<sup>nd</sup> and 4<sup>th</sup> defendants paid out to the 1<sup>st</sup> defendant a sum of Kshs.6,635,000/= without the plaintiff's consent or court order directing such payment to be made to the 1<sup>st</sup> defendant. I have noted that out of the proceeds of sale, only a sum of Kshs.850,136/50 remains in the joint account held by the 2<sup>nd</sup> and 4<sup>th</sup> defendants.
25. I am satisfied that the plaintiff has established a prima facie case that he never instructed the 4<sup>th</sup> defendant to act for him in the sale of the suit property and that neither the 2<sup>nd</sup> nor the 4<sup>th</sup> defendant had authority or right to pay out his share of the proceeds of sale of the suit property to the 1<sup>st</sup> defendant. I am not satisfied at this stage that the 3<sup>rd</sup> defendant was an innocent purchaser of the suit property without notice of the plaintiff's interest. The 3<sup>rd</sup> defendant was represented in the transaction by the 2<sup>nd</sup> defendant who was well aware of the plaintiff's interest in the suit property. In her letter to the firm of Letangule & Company Advocates dated 19<sup>th</sup> February, 2016, the 2<sup>nd</sup> defendant stated in the last paragraph as follows in reference to the plaintiff:
- .....Your client's interest is well secured as we noted the property is held by our client in trust for herself and your client."
26. The purported registration of the Assignment of Lease in respect of the suit property in favour of the 3<sup>rd</sup> defendant was done after the plaintiff had raised an objection to the exercise.
27. In the final analysis and for the foregoing reasons, I will allow the plaintiff's Notice of Motion application dated August 22, 2017 in terms of prayer 4 and 5 of thereof. With respect to prayer 5, the 2<sup>nd</sup> defendant shall only provide photocopies of the documents required. I have declined to grant prayer 6 of the application because the proceeds of sale of the suit property have already been disbursed leaving only a sum of Kshs.850,136/50. The plaintiff shall have the costs of the application.



**DELIVERED AND DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY 2019**

**S. OKONG'O**

**JUDGE**

Ruling read in open court in the presence of:

Mr. Kirimi for the Plaintiff

Mr. Chege h/b Mrs. Ndungu for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

N/A for the 4<sup>th</sup> Defendant

Roselyne-Court Assistant

