



**REPUBLIC OF KENYA**

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

**ELC CASE NO.792 OF 2017**

**AKK.....PLAINTIFF/APPLICATION**

**VERSUS**

**JMK.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EMILY NJERI KIMINDI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**EQUITY BANK KENYA LIMITED.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**SIDIAN BANK LIMITED.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application dated **13<sup>th</sup> October 2017**, brought by the Plaintiff/Applicant herein under **Sections 1A, 1B, 3 and 3A** of the **Civil procedure Act** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, wherein the Plaintiff/Applicant has sought for the following prayers:-

- 1) That the 2<sup>nd</sup> Defendant/Respondent be restrained by an order of injunction either by herself, her servants, employees, agents, personal representatives and/or any other person acting for her and/or on her behalf from selling, disposing off, further charging and/or alienating in anyway, excavating, destroying, damaging, erecting any structures, dumping stones and/or any other building materials on and/or otherwise dealing with all that property known as LR.No.[xxx] pending the hearing and determination of the suit herein.**
- 2) That the 2<sup>nd</sup> Defendant/Respondent be ordered to provide reasonable access to the Plaintiff/Applicant and her family to the bore hole situate on LR.No.[xxx], to fetch water therefrom for the Plaintiff's/Applicant's use and that of her entire family pending the hearing and final determination of this suit.**
- 3) That the Defendant/Respondent be restrained by an order of injunction either by themselves, their servants, employees, agents, personal representatives and/or any other person acting for them and/or on their behalf from further selling, disposing off, charging, alienating and/or otherwise dealing with all those properties known as LR.No.[xxx] and LR.No.[xxx] pending the hearing and determination of this Application.**
- 4) That the costs of this Application be provided.**

The Application is supported by the *Affidavit* of the Plaintiff/Applicant and on the grounds stated on the face of the Application and these grounds are:-

- a) The Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent are husband and wife having legally gotten married on 29<sup>th</sup> March 1975.**
- b) The Plaintiff/Applicant singlehandedly acquired the suit properties and registered the name of the 1<sup>st</sup> Defendant/Respondent in the year 1992, and therein established a matrimonial home wherein she resided and lived with her family to date.**
- c) The Plaintiff/Applicant erected a perimeter wall around the suit properties to form a large family compound erected the matrimonial/family house on the side of the compounding falling on LR.No.[xxx], sunk a borehole for use by the family for use by the family on the side of the family on the side of 5<sup>th</sup> compound falling on LR. No.[xxx], and erected a large general house measuring about 50fts by 30fts consisting of a servants quarters, a chicken house and a store in the middle of the compound traversing both suit properties.**

d) *The Plaintiff/Applicant has learnt that the 1<sup>st</sup> Defendant/Respondent sold LR.No.[xxxx] to the 2<sup>nd</sup> Defendant/Respondent and charged LR.No.[xxxx] to 4<sup>th</sup> Defendant/Respondent without her knowledge and consent.*

e) *The 2<sup>nd</sup> Defendant/Respondent forcefully entered the suit land and caused to be erected a perimeter wall in the middle thereof, destroyed a half portion of the general house standing and completely cutting off access to the borehole from the main house.*

f) *The suit lands jointly constitute matrimonial property and the purported sale and charge thereof by 1<sup>st</sup> Defendant/Respondent without consent of the Plaintiff/Applicant is void ab initio.*

g) *The Plaintiff/Applicant and her family have now been barred from accessing the borehole and unless the 2<sup>nd</sup> Defendant/Respondent is restrained by an order of injunction she will continue to destroy and damage the Plaintiff's/Applicant's structures and may deal with the suit property in a way that is detrimental to the Plaintiff/Applicant.*

The Plaintiff/Applicant in her **Supporting Affidavit** averred that she got married to the 1<sup>st</sup> Defendant/Respondent on **29<sup>th</sup> March 1997**, and singlehandedly bought the suit lands where they established their matrimonial home. They then set up their family house and sunk a borehole. It was her contention that whereas the suit properties are registered in the name of the 1<sup>st</sup> Defendant/Respondent, she paid the full purchase price and undertook all the developments. She further averred that on **21<sup>st</sup> September 2017**, the 2<sup>nd</sup> Defendant/Respondent entered upon the suit properties and erected a perimeter wall as evidenced by the **annexture AKK-2 to AKK-5**.

She averred that there being no **Spousal Consent** in the sale and charging of the suit properties, the sale is *void ab initio*. She averred that the second Defendant/Respondent is offering the suit property for sale and if he is allowed to sell and or transfer **LR.No.[xxxx]**, to third parties it would be difficult for her to recover the same. She further alleged that the 2<sup>nd</sup> Defendant/Respondent is yet to comply with all the requirements of the **Sale Agreement** as he is yet to pay the full purchase price and urged the Court to allow the Application.

The 1<sup>st</sup> Defendant/Respondent acting for himself filed his **Replying Affidavit** on **27<sup>th</sup> November 2017**. He confirmed that he got married to the Plaintiff/Applicant in **1975** and though they still live together, their relationship is strained. He averred that **L.R 14870/353**, was bought from family finance by the Plaintiff/Applicant. He stated that the 2<sup>nd</sup> Defendant/

Respondent purchased the suit property but he is yet to comply with the special conditions of the **Sale Agreement**.

The Application is opposed and the 2<sup>nd</sup> Defendant/Respondent filed her **Replying Affidavit** on **6<sup>th</sup> December 2017**. She averred that she entered into a **Sale Agreement** with 1<sup>st</sup> Defendant/Respondent which land was duly registered under his name. She further alleged that the Plaintiff/Applicant swore a spousal consent stating she had no objection as evidenced by **annexture ENK-8** and the transfer and charge for registration were registered on **7<sup>th</sup> March 2014** and he was paid the **Kshs.3,700,000/=**. It was her contention that she paid the said balance on various dates and became the registered owner of **LR.No.[xxxx]**.

When she visited the suit property on **15<sup>th</sup> February 2015**, it was vacant and she informed the 1<sup>st</sup> Respondent of her desire to take possession of the suit property. She stated that she informed the 1<sup>st</sup> Respondent of her desire to fence the said property but he advised her to go with a surveyor and on **26<sup>th</sup> February 2015**, she went accompanied with surveyor to replace the missing beacons and they performed the said task in the presence of Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent. She further visited the property the **1<sup>st</sup> March 2015**, and informed the 1<sup>st</sup> Defendant/Respondent of her desire to fence the plot but when she tried to take possession of the land, the 1<sup>st</sup> Defendant/Respondent refused and she reported the matter to the police and further filed a suit being **Milimani CMCC 1765 of 2015** and on the **29<sup>th</sup> April 2016**, an order of Injunction was issued as against the 1<sup>st</sup> Defendant/Respondent. That despite presence of the said **Court Order** and the 1<sup>st</sup> Defendant/Respondent being aware of it, the 1<sup>st</sup> Defendant/Respondent continued to encroach and it was not until **September 2017**, that the police assisted her in gaining access. She alleged that the suit has been brought in bad faith and urged the court to discharge the interim orders and dismiss the Application with costs.

The 3<sup>rd</sup> Defendant/Respondent also opposed the said Application and filed its **Replying Affidavit** on **5<sup>th</sup> December 2017** sworn by **Kariuki Kingori**. He alleged that the 2<sup>nd</sup> Defendant/Respondent applied for a loan from them it was secured by charge over property **LR.No.14870/353**, registered and stamped in favour of the 3<sup>rd</sup> Defendant/Respondent as evidenced by **annexture KK-3**. It was his contention that the 2<sup>nd</sup> Defendant/Respondent applied for a further loan and that the same was also secured by a Charge over the suit property and other subsequent facilities advanced.

He further alleged that the Plaintiff/Applicant was aware of the transaction as she gave her **Consent** through the **Affidavit** annexed as **KK-5** before the transfer of the suit property and averred that it undertook all due diligence. It was his contention therefore that the Plaintiff/Applicant has not approached the court with clean hands and urged the Court to dismiss the Application.

On behalf of the 4<sup>th</sup> Defendant/Respondent, **Beverline Chweya** a **Legal officer** filed her **Replying Affidavit** on **11<sup>th</sup> November 2017**. She averred that **John Maina Kigundi** applied for a banking facility from the 4<sup>th</sup> Defendant/Respondent and the 1<sup>st</sup> Defendant/Respondent agreed to unconditionally guarantee the repayment of all monies that shall fall due payable to 4<sup>th</sup> Defendant/Respondent on account of **John Maina Kigundi** as evidenced by **annexture BC-3** and thereafter issued an additional security in the nature of a Charge over property **LR.No.[xxxx]**. She further averred that at the time of the registration of the charge, the 1<sup>st</sup> Defendant/Respondent was the registered owner of the said property and that they secured the Plaintiff's/Applicant's **Affidavit of Consent** as evidenced by **annexture BC-6**. She alleged that she was informed by the Advocate then, **M/S Stephen Mwaura Muhia**, that the Plaintiff/Applicant personally appeared before him and executed the said **Spousal Consent**. She further averred that the Plaintiff's/Applicant's signature as appended on the **Affidavit of Consent** resembles her signature as appended on her **Supporting Affidavit**. She averred that the suit against the 4<sup>th</sup> Defendant/Respondent lacks merit and urged

the Court to dismiss the same.

In answer to the **Replying Affidavits** filed by the Defendants/Respondents, the Plaintiff/Applicant filed a **Supplementary Affidavit** on the **7<sup>th</sup> February 2018**. She reiterated the contents of her **Supporting Affidavit** and stated that she did not consent to the sale and transfer of **LR.No. [xxxx]** and that she is a stranger to the purported **Affidavit of Consent**. She also denied knowing either the borrower **John Maina** nor **M/S Stephen Mwaura Muhia Advocate** and urged the court to allow her Application.

The Application was canvassed by way of written submissions and the Plaintiff/Applicant through the **Law Firm of Kibett & Associates** filed their written submissions on the **15<sup>th</sup> March 2018** wherein she relied on various provisions of the Law and decided cases.

She relied on **Section 93** of the **Land Registration Act** that provides:-

**“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses and all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act.”**

She further relied on **Section 14(a)** of the **Matrimonial Property Act** which provides:-

**“...Matrimonial property is acquired during marriage in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse....”**

She therefore urged the court to allow her Application.

The **1<sup>st</sup>** Defendant/Respondent filed his submissions on **28<sup>th</sup> May 2018** and submitted that under the **Sale Agreement** executed by himself and the **2<sup>nd</sup>** Defendant/Respondent, It was agreed that the Plaintiff/

Applicant and himself would have reasonable access to fetch water from the said borehole. He further submitted that the suit properties were matrimonial properties and urged the court to annul the sale between him and the **2<sup>nd</sup>** Defendant/Respondent. He relied on the case of **William & Glyn's Bank...Vs...Boland (1979) 2 ALL ER 697**, where the Court held:-

**“Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it.He ought to make sure that the wife agrees to it or to go the ho0use and make enquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wifes interest or the possibility of it.....”**

He therefore urged the court to allow the Application by the Plaintiff/Applicant.

The **2<sup>nd</sup>** Defendant/Respondent through the **Law Firm of Mwangi Wahome & Co. Advocates**, filed their written submissions on **20<sup>th</sup> June 2018**. It was submitted that the threshold for granting interlocutory injunction has not been met. They relied on various provisions of law and case laws amongst them, the case of **Kenleb Cons Ltd....Vs....New Gatitu Service Station Ltd & Another**, where the Court held:-

**“..to succeed in an application for injunction an Plaintiff/**

**Applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable which requires protection by injunction.’**

The **3<sup>rd</sup>** Defendant/Respondent through the **Law Firm of Chege Kibathi & Co. Advocates**, filed their submissions on **12<sup>th</sup> June 2018**. It was submitted that the Plaintiff/Applicant has not established a *prima facie* case as defined in the case of **Mrao Ltd....Vs...First American Bank Ltd & 2 Others (2003) eKLR 125**;

**“so what is a prima facie case----- In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”**

The **4<sup>th</sup>** Defendant/Respondent through the **Law Firm of NOW Advocates LLP** filed their written submissions on **20<sup>th</sup> March 2018**. It was submitted that the material placed before court has failed to disclose that the Plaintiff/Applicant has any real chance of Success. They relied on provisions of the Law and various decided cases, among them the case of **Davis Nyanjui Njenga t/a Davis Academy & Another...Vs... National Bank (2015) eKLR**, where the Court held that:-

**‘An injunction may not issue if it is proved to the satisfaction of the court that the Plaintiff/Applicant is undeserving of such equitable relief’**

The Court has now carefully considered the pleadings herein and the annexures thereto. The Court has also considered the written submissions, the cited authorities and the relevant provisions of law and the Court renders itself as follows;

It is not in doubt that the Plaintiff/Applicant is married to the 1<sup>st</sup> Defendant/Respondent who is the registered owner of the suit properties LR.No.[xxxx] and was the registered proprietor of LR.No.[xxxx].

That via a **Sale Agreement** dated **18<sup>th</sup> November 2013**, the 1<sup>st</sup> Respondent sold LR.No.[xxxx], to the 2<sup>nd</sup> Respondent who obtained financing from the 3<sup>rd</sup> Respondent to be able to buy the said property. The **sale agreement** contained some special conditions including allowing the 1<sup>st</sup> Defendant/Respondent and his family to fetch water from the suit property. On the other hand in relation to LR.No.[xxxx], the 4<sup>th</sup> Defendant/Respondent averred that the 1<sup>st</sup> Defendant/Respondent issued the suit property as security in nature of a Charge.

It is also not in dispute that both the suit properties are part of matrimonial properties as the Plaintiff/Applicant lives in the said property together with her children and having sunk a borehole on the other suit property in which she fetches water from. Therefore the Court finds that the two issues for determination are:-

**a) Whether there was a valid Sale Agreement and Charge.**

**b) Whether the Plaintiff/Applicant has established the threshold for grant of the Injunctive Orders sought.**

**a) Whether there was a valid Sale Agreement and Charge.**

The contention of the Plaintiff/Applicant is that she did not give her **Consent** to either have the suit property sold or charged. The Court has noted that the **Sale Agreement** came into force on the **18<sup>th</sup> of November 2013**, and the suit property was charged via **Charge** dated **9<sup>th</sup> March 2016** after enactment of the **land Registration Act** that required **Spousal Consent** to be obtained. **Section 79(3)** of the **Land Act 2012** provides:-

**“A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the Chargor and any spouse of the Chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons”**

Though the Respondents have produced spousal consent signed by the Plaintiff/Applicant, the Plaintiff/Applicant has disputed and disowned these consents and alleged that the same are forgeries. As to whether these are forgeries or not evidence will have to be adduced at the hearing to be able to establish the same as at this stage the Court is unable to make conclusive findings on this matter. See the case of **Hosea Kiplagat & 6 Others....Vs....National Environment Management Authority & 2 Others (2015) eKLR**, where the Court stated:-

**“At the interlocutory stage the Court should not venture into making definitive findings of fact law and particularly where the affidavits filed are contradictory as the court cannot believe or disbelieve the statements made on oath of either party without in effect trying the case.”**

In the absence of the spousal consent or if the Court is to hold in its final findings that there was no spousal consent then, it follows that the Sale agreement and the Charge would automatically be invalidated. There is also doubt as to whether or not the 2<sup>nd</sup> Defendant/Respondent has fully performed her obligations under the **Sale Agreement**. Again this is a matter for trial and the Court is unable to make a conclusive finding on the issue.

**Section 26 (1)** of the **Land Registration Act** provides that a Certificate of title issued by the Registrar upon registration or to a purchase of land upon a transfer is *prima-facie* evidence that the person named as proprietor of land is the **absolute** and **indefeasible** owner. Such a title is however subject to challenge on grounds of fraud or misrepresentation to which the person is proved to be a party or where the title has been acquired **illegally, unprocedurally** or through a **corrupt scheme**.

**b) Whether the Plaintiff/Applicant has met the threshold for grant of injunctive orders.**

As was stated in the case of **Giella....Vs...Cassman Brown Co. Ltd (1975) EA**, the Court finds that the Plaintiffs/Applicants first needed to establish that they have a *prima-facie* case with probability of success. *Prima-facie* case was described in the case of **Mrao Ltd ....Vs... First American Bank Ltd & 2 Others (2003) eKLR 125** to mean:-

**“So what is a prima-facie case ....In civil cases it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The Plaintiff/Applicant has cast doubt on the validity of the sale and the charge in the absence of spousal consent. In a *prima-facie* case, all the Plaintiff/Applicant need to show was genuine grievances in a form of right which has been infringed. In the case of **Nguruman Ltd... Vs...Jan Bonde Nielson & 2 Others, C.A No. 77 of 2012**, the Court held that:-

**“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it, the person applying for an injunction has a right which has been violated or is, threatened which violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Plaintiff/Applicant need not establish title; it is**

*enough if he can show that he has a fair and bonafide question to raise as to existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”*

Having found that the *Spousal Consent* is doubtful, the *Court finds that the Plaintiff/Applicant has established a prima-facie case with probability of success at the trial.*

On irreparable loss, the Plaintiff/Applicant stated that the suit property was their matrimonial home. *It is the Court’s view that the Plaintiff/Applicant is likely to suffer loss which cannot be compensated* if it is disposed off or further Charged or alienated in any way or the Plaintiff/Applicant is denied access to, before the underlying issues are resolved. See case of *Joseph Siro Mosioma...Vs...HFCK & 3 Others[...] eKLR*, where the Court held that:-

*“On my part, let me restate that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the Law ....a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction.”*

It is also prudent to note that the 2<sup>nd</sup> Defendant/Respondent and 1<sup>st</sup> Defendant/Respondent in their *Sale Agreement* put in a special condition that would see the family continue to fetch water from the said suit land thereby indicating that the Plaintiff/Applicant and her family depended on the same for their daily use and granting reasonable access will not prejudice the 2<sup>nd</sup> Defendant/Respondent.

On the balance of convenience, the *Court finds that the same tilts in favour of maintaining status quo*. The *status quo* herein is that the Plaintiff/Applicant is asking for is the one that is in place right now. In the case of *Ali Kitsao Katana...Vs...Kassim Mohammed Omar & 5 Others (2018) eKLR*, the Court stated that:-

*“The main dispute is whether or not the Plaintiff sold the suit property to the 2<sup>nd</sup> Defendant/Respondent. This is an issue that can be ascertained at the trial. Until that fact is established, it is only fair, that status quo prevailing be maintained, to my mind the injunction sought by the Plaintiff is for purposes of maintaining the status quo prevailing until the case is heard and determined.”*

Having now carefully considered the available evidence, the *Court finds the Plaintiff’s/Applicant’s Notice of Motion Application dated 13<sup>th</sup> October 2017 is merited and the same is allowed entirely in terms of prayers No.4, 5, and 6 with costs being in the cause.*

It is so ordered.

*Dated, Signed and Delivered at Thika this 3<sup>rd</sup> day of April 2019.*

**L. GACHERU**

**JUDGE**

**3/4/2019**

In the presence of

No appearance for Plaintiff/Applicant

No appearance for 1<sup>st</sup> Defendant/Respondent

No appearance for 2<sup>nd</sup> Defendant/Respondent

Mr. Mbeo holding brief for Mr. Juma for 3<sup>rd</sup> Defendant/Respondent

No appearance for 4<sup>th</sup> Defendant/Respondent

Lucy - Court Assistant

**Court** – Ruling read in open court in the presence of the above advocate.

**L. GACHERU**

**JUDGE**

**3/4/2019**