



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

THIKA LAW COURTS

ELC CASE NO.622 OF 2017

JOSPHAT KIHIA NGUGI.....PLAINTIFF/APPLICANT

-VERSUS-

JOYCE WANJIKU NGUGI.....1ST DEFENDANT/RESPONDENT

GEORGE NJUGUNA NJOROGE....2ND DEFENDANT/RESPONDENT

SPRINGBOARD CAPITAL LTD.....3RD DEFENDANT/RESPONDENT

LAND REGISTRAR, KIAMBU.....4TH DEFENDANT/RESPONDENT

RULING

By a **Notice of Motion** application dated **21st June 2017**, the Plaintiff/Applicant herein sought for the following orders:-

1) Spent.

2) Spent.

3) That this Honourable Court be pleased to issue a temporary injunction restraining the Defendant jointly and severally by itself through their agents, servants and/or employees or otherwise howsoever from trespassing on, selling, transferring, alienating and/or interfering with the parcel of land known as Title No.Karai/Gikambura/1412 or advertising the suit property for sale pending the hearing and determination of this suit.

4) That this Honourable Court be pleased to grant such other/further orders as it deems fit.

5) That the costs of this application be provided for.

The application is premised on the following grounds:-

a) The Applicant/Plaintiff is the beneficial owner of the parcel of land known as Title No.Karai/Gikambura/1412, registered in his wife's name who is the 1st Defendant/

Respondent, as his trustee having contributed to its purchase and it being their matrimonial home.

b) The Applicant/Plaintiff was surprised to learn on 8th May 2017, that the 2nd Defendant/Respondent fraudulently transferred the said property to himself on 5th June 2015, without the Applicant's/Plaintiff's knowledge and consent in breach of Section 93 of the Land Registration Act, No.3 of 2012 and Section 12 (1) of the Matrimonial Property Act, No.49 of 2013.

c) The 2nd Defendant/Respondent in furtherance of his fraud against the Plaintiff/Applicant proceeded to charge the Plaintiff's/Applicant's said property by obtaining a loan from the 3rd Defendant/Respondent in November 2015 and failed to repay the loan with the aim of ensuring the property was out of the Plaintiff's/Applicant's reach.

d) *The Plaintiff/Applicant has never sold his proprietary interest in Title No.Karai/Gikambura/1412 to the 2nd Defendant/Respondent and neither has he ever taken a loan from the 3rd Defendant/Respondent using the said parcel of land as security.*

e) *That further the Applicant/Plaintiff was never called to the Land Control Board as required to enable him be aware and to object to the fraudulent transaction to sell his land as a beneficial owner and the consent to transfer was obtained fraudulently and behind his back.*

f) *The Applicant/Plaintiff stands to suffer irreparable damages should the 3rd Defendant/Respondent sell his matrimonial home due to the fraud perpetrated by the 2nd Defendant/Respondent in breach of the requirement of obtaining spousal consent under the Land Registration Act and the Matrimonial Property Act.*

It is also supported by the *Affidavit of Josephat Kihia Ngugi*, the Applicant herein who averred that he is the husband of the 1st Defendant whom he got married to on 3rd January 1976 as is evident from *annexture JKN-1*. He also averred that in 1990, jointly with the 1st Defendant, they purchased the suit property herein *Karai/Gikambura/*

1412, which was registered in the 1st Defendant's name as his trustee and thereafter she obtained a loan from her employer *Pan Africa Insurance Co. Ltd* to construct their home on the said property as per *annexture JKN-2*. Further that upon the retrenchment of the 1st Defendant from *Pan Africa Insurance Co. Ltd*, the Applicant continued to service the loan until the said loan was fully repaid and the title discharged and returned back to them.

He contended that they occupied the said parcel of land in 1993 and the house therein is their matrimonial home and that is where they have raised their three children, two of whom still reside with them. It was his further contention that they have *enjoyed 24 years of uninterrupted quiet possession* of the said suit property until the 3rd May 2017, when Auctioneers visited the suit property and purported that they had been sent by 3rd Defendant to serve a *Notice of the Sale* of the property upon the 2nd Defendant apparently for defaulting in repayment of a loan against the title as security. The said *Notification* was marked *JKW-3*. That upon inquiring from his wife the 1st Defendant, she informed him that she had given the original title deed to the 2nd Defendant, *George Njuguna Njoroge* after he promised to fund her to acquire a green house. That his wife, 1st Defendant informed him that she

never received the said money.

He also contended that he thereafter went to the offices of the 3rd Defendant where he met one *Mr. Kariuki* and he informed him that the suit property belonged to himself and his wife, the 1st Defendant who was the registered owner. He further informed the said *Mr. Kariuki* that the 2nd Defendant was a stranger to him. That he was shocked to learn that the 2nd Defendant transferred the said parcel of land to himself on 5th June 2015 and then proceeded to charge the said property to 3rd Defendant on 13th November 2015 for a loan of *Kshs.3 million*. Further that the said 2nd Defendant registered the transfer without the knowledge of the Applicant and without the requisite *Spousal Consent* which was a breach of the provisions of Land Registration Act.

He further contended that he has always lived on the suit property with his family and if the 3rd Defendant carried due diligence, he ought to have established that the suit property was occupied. It was his further contention that his advocate has informed him that the transfer of the suit property to 2nd Defendant was *null and void* for breach of the law and therefore he had no legal right to charge the suit property to the 3rd Defendant. Therefore the 3rd Defendant has no right to sell the suit property that was fraudulently acquired by the 2nd Defendant. He reiterated that it was in the interest of justice that his prayers should be granted and he urged the Court to allow the same.

The application is contested by the 3rd Defendant who filed a

Replying Affidavit through *Wilson Karanja*, a *Director* and *Chief Executive Officer* of the said Company. He averred that the instant application is *mischievous* and *deliberately misleading* the court as it is based on omission of facts. It was his contention that on 12th October 2015, the 2nd Defendant applied and obtained a loan from the 3rd Defendant of *Kshs.3,000,000/=* which amount was secured through a legal Charge over title *Karai/Gikambura/1412*, which charge was duly registered at Kiambu Lands Registry on 26th October 2015. He averred that the 3rd Defendant conducted due diligence and confirmed that the 2nd Defendant was the registered owner of the suit property and also confirmed that the title document was valid and unchallenged. Further the 3rd Defendant confirmed that at the time of the charge, the 2nd Defendant was the absolute and registered proprietor of the suit property.

However, after taking the loan, the 2nd Defendant defaulted in making repayment and the 3rd Defendant issued the necessary *Demand Notices* to the 2nd Defendant who failed to honour the said demands. He averred that the 2nd Defendant was also served with *Statutory Notice* dated 14th September 2016, but he refused and/or failed to settle the outstanding amount which had *accumulated* to the tune of *Kshs.3,621,398/=* as at 14th September 2016. After the 2nd Defendant failed to pay the amount within the Statutory given time, the 3rd Defendant instructed *Regent Auctioneers* to issue a *Notification of Sale* which was served on 3rd May 2017 and the *Public Auction* was to be done on 5th July 2017. The property was *advertised for sale* on 19th July 2017 in accordance with the law but could not proceed due to this suit. It was his contention that the 3rd Defendant conducted due diligence before charging the suit property and the process of charging the said property was done in accordance with the law.

It was his allegation that the Plaintiff and 1st Defendant are intent of defrauding the 3rd Defendant as they still reside on the suit property and the property ceased being a matrimonial property the moment the 1st Defendant transferred it to 2nd Defendant. It was further alleged that the

Plaintiff/Applicant has no legal recourse against the 3rd Defendant who never transacted with him nor 1st Defendant to warrant the orders sought against the 3rd Defendant. He urged the Court to disallow the instant application as the 3rd Defendant is likely to suffer irreparably if the intended sale is stopped and the loan continues to outgrow the value of the property.

The 1st Defendant, **Joyce Wanjiku Ngugi** also filed a **Replying Affidavit** and confirmed that the Plaintiff is her husband whom she got **married** to in **1976** and the suit property is their matrimonial home where they live with their children. She further confirmed having given the title deed for **Karai/Gikambura/1412**, to the 2nd Defendant as **security** for a loan of **Kshs.300,000/=** so that she could construct a green house. She also contended that the said title deed was in her name but she did not inform the Plaintiff about the release of the title deed to the 2nd Defendant. However the 2nd Defendant did not give her the money even after receiving the title deed. That she was later surprised to learn that the 2nd Defendant had transferred the suit property to his name without her consent. She denied ever having sold the suit property to the 2nd Defendant as her intention was to seek a loan from him which he never gave her and she did not receive the said loan nor the purchase price. She also claimed that they did not attend any **Land Control Board** for **Consent** to transfer the land to the 2nd Defendant and that the said transfer was fraudulent. Further that she did not authorize the sale of their matrimonial home and the 2nd Defendant's action was unlawful.

The Applicant filed a further affidavit in which she reiterated the contents of his earlier averments and further alleged that the 3rd Defendant is an accessory to the fraudulent and illegal charging of the suit property as there was no evidence adduced of how the 3rd Defendant conducted due diligence on the property. Further that the 3rd Defendant's attempt to sell their matrimonial home despite him having informed them of the fraudulent transfer of the suit property reflects bad faith on the part of the 3rd Defendant. He further urged the Court to allow his instant application.

The application was canvassed by way of **written submissions** which this Court has carefully read and considered. The Court has also considered the pleadings in general and annexures thereto, the cited authorities and the relevant provisions of law and the Court makes the

following findings:-

There is no doubt that the Plaintiff/Applicant and the 1st Defendant/

Respondent are husband and wife who got married on **3rd January 1976**, as per the **Marriage Certificate** produced as **JKN-1**. There is also no doubt that the suit property **Karai/Gikambura/1412**, was registered in the name of 1st Defendant on **12th January 1990**, during the subsistence of their marriage. Further, it is evident that the suit property was later registered in the name of 2nd Defendant, **George Njuguna Njoroge** on **5th June 2015**, and as per the **Certificate of Official Search**, the property was charged to 3rd Defendant on **13th November 2015** to secure **Kshs.3,000,000/=**.

The Applicant and the 1st Defendant have alleged that the suit property is their matrimonial home and that is where they live and reside with their children. Though the 3rd Defendant has contested the application, it has not denied that the suit property herein is the matrimonial home of the Applicant. Since the suit property was transferred to 2nd Defendant in **2015**, then **Section 93(3)** was applicable and **Spousal Consent** was a requirement of such disposition.

The Applicant has alleged that he never gave his **Spousal Consent** for disposition of their matrimonial property and therefore the said transfer was **null** and **void** and the subsequent charge to the suit property was irregular. The 2nd Defendant did not enter any appearance nor file defence.

The above are the undisputed facts. The issue now for determination is whether the Applicant is deserving of the orders sought herein.

The applicant has sought for injunctive orders which are equitable reliefs granted at the discretion of the Court. However the said discretion must be exercised judicially. See the case of **Hasmukh Khetshi Shah...**

Vs...Tinga Tranders Ltd, Civil Appeal NO.326 of 2002, where the Court held that:-

“It must be stated at the outset that the granting of an interim injunction is an exercise of judicial discretion.... And an appellate court will not interfere, unless it is shown that the discretion has not been exercised judicially”.

Further, it is evident that at this stage of interlocutory application, the Court is not supposed to determine the disputed facts with finality. All that the Court is supposed to consider is whether the Applicant is deserving of the orders sought based on the usual criteria. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

The criteria to be considered in determination of this application is the one laid down in the case of **Kibutiri...Vs...Kenya Shell, Nairobi HCCC No.3398 of 1980 (1981) KLR 390**, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless

the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.” See also E.A Industries ..Vs..Trufoods (1972) EA 420.

The above criteria has been reiterated in many other judicial pronouncements in this country.

Firstly, the Applicant needed to establish that he had a *prima-facie* with probability of success at the trial and that his rights have been infringed. See the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & 2 Others 2003 KLR 125*, the Court held that:-

“A prima-facie case means more than an arguable case. It means that the evidence must show infringement of a right and probability of success of the Applicant’s case at the trial”.

Has the Applicant herein established that he has a *prima-facie* case?

As the Court observed earlier, the Applicant and 1st Defendant are husband and wife who live on the suit property with their family. It is also very clear that the suit property was acquired in **1990**, during the subsistence of their instant marriage. The Applicant alleged that though the suit property is in the name of the 1st Defendant, he largely contributed to its purchase and therefore for all practical purpose the property is a matrimonial property and the 1st Defendant was holding it in trust for him. There was no evidence to the contrary and *prima-faciely* for now the Court holds and finds that prior to **2015**, the suit property was a matrimonial property and therefore no disposition could take place without the consent of the other spouse.

It is also apparent that the suit property was transferred to the name of 2nd Defendant on **5th June 2015** and charged in favour of 3rd Defendant on **13th November 2015**. The Applicant alleges that he was not aware of the above stated transactions. It is also very clear that the said transfer took place while Plaintiff/Applicant was still residing on the suit property and he was not aware of the said transaction or disposition. Though the 3rd Defendant alleged that they undertook due diligence, it was not clear how they were not able to pick out that the people residing on the suit property were not the applicant of the loan. The Applicant has alleged that the transfer of the suit property to 2nd Defendant was fraudulent and further charging of the suit property was irregular and unlawful.

Though the suit property is in the name of 2nd Defendant, his acquisition of the same is challenged by the Applicant. Indeed Section **26(1)(a)&(b)** of the *Land Registration Act* provides that a proprietor’s title to land can be challenged if the same was acquired through **fraud** or through **misrepresentation**. It states as follows:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

(a) On the ground of fraud or misrepresentation to which the person is proved to be a party: or

(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

The allegations by the Applicant cannot be verified at this juncture but through the calling of evidence at the main trial. However, since the acquisition of the suit property by 2nd Defendant is questionable, the Court finds that its disposition should be halted until it is established exactly how the 2nd Defendant acquired it.

It is also apparent that 2nd Defendant obtained a loan from the 3rd Defendant and used the suit property as security. He has now defaulted and the 3rd Defendant is attempting to realize the security herein through exercising of its **Statutory Power of Sale**. However, it is apparent that the Applicant are living and residing on the suit property. Before the issues in controversy are resolved, the Court finds that the suit property needs to be preserved. If the 3rd Respondent is allowed to sell the property through Public Auction, the Applicant will definitely loose their matrimonial property, before the matter is heard and resolved. Therefore, before evidence is called to determine whether the 1st Defendant legally transferred the suit property to the 2nd Defendant, the Court finds that the suit property herein needs to be preserved.

For the above reasons, the Court finds and holds that the Applicant has established that he has a *prima-facie* case with probability of success at the trial.

Further, if the suit property is sold through Public Auction and the Plaintiff/Applicant and his family are kicked out of the same and the Court eventually finds in his favour, he stands to suffer irreparable loss which cannot be compensated by an award of damages. See the case of *Notco (mbsa) Ltd & Another...Vs...Halima Bakali Ramadhani, Civil Appeal No.158 of 1992*, where the Court of Appeal held that:-

“Where the plaintiff has been residing in the suit premises and that has been her home and the seat of the family for more than four decades, that place which she fondly calls her home has a value of which cannot be measured purely in economic terms as money cannot buy for the respondent a home with the same sentimental value and attachment as the suit property”.

On the balance of convenience, the Court finds that it tilts in favour of maintaining the *status quo* and the *status quo* herein is what prevailed before the suit property was transferred to the 2nd Defendant and charged to 3rd Defendant. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.

Having now carefully considered the available evidence, ***the Court finds that the Applicant’s Notice of Motion dated 21st June 2017 is merited. The same is allowed fully in terms of prayer No.3 with costs to the Applicant herein.***

The ***parties are directed to prepare the main suit for hearing expeditiously*** so that the issues in controversy are resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this 27th day of April 2018.

L. GACHERU

JUDGE

In the presence of

Mr. Thuo for Plaintiff/Applicant

Present in person for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

Mr. Ajika holding brief for Mr. Koceyo for 3rd Defendant/Respondent

No appearance for 4th Defendant/Respondent

Lucy - Court clerk.

L. GACHERU

JUDGE