



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 210 OF 2016

ALICE MWIKALI MUTISYA.....PLAINTIFF

VERSUS

DAVID MAKUMBI MUTISYA.....1ST DEFENDANT

GLOBAL TRUCKS LIMITED.....2ND DEFENDANT

BARCLAYS BANK OF KENYA LIMITED.....3RD DEFENDANT

RULING

1. In the Application dated 4th December, 2017, the Plaintiff is seeking for the following orders:

a. That pending the hearing and final determination of this suit the 2nd and 3rd Defendants, their servants and agents be stopped and restrained from selling, disposing off, attempting to sell, charging, mortgaging or in any manner alienating or dealing further with the properties known as L.R. No. 7149/146 (I.R No. 146134) and L.R. No. 7149/147 (I.R. No. 146135).

b. That the costs of this Application be provided for.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the 1st Defendant is her husband of 50 years; that in the course of their marriage, they acquired many properties including L.R. Nos. 7149/146 and L.R. No. 7149/147 situate along Mombasa Road in Nairobi and that the titles were registered in favour of the 1st Defendant.

3. The Plaintiff deponed that in the year 2008, she discovered that the 1st Defendant was suffering from dementia and organic personality syndrome which forced her to put caveats on some of the properties; that the said caveats were removed in unclear circumstances and that the suit properties were then sold to the 2nd Defendant and charged to the 3rd Defendant.

4. The Plaintiff finally deponed that the suit properties have been advertised for sale by the 2nd Defendant and that unless an injunctive order is issued, then the suit land will be sold to her detriment.

5. The 1st, 2nd and 3rd Defendants filed Grounds of Opposition in which they averred that the Plaintiff has not made a case to warrant granting of the orders of injunction; that there is no proof of any impending sale of the suit property and that the said orders should not be granted.

6. The Plaintiff's advocate submitted that the suit property constitutes matrimonial property; that matrimonial property is any property jointly owned and acquired during the subsistence of the marriage; that the Plaintiff has a legal interest in the said properties and that there was no spousal consent before the suit land was sold and charged to the 2nd and 3rd Defendants.

7. The 1st and 2nd Defendants' advocate submitted that the suit properties were registered in the name of the 1st Defendant; that it was the duty of the Plaintiff to register her claim of any interest in the ownership of the land and that the 2nd Defendant is an innocent purchaser of the suit land.

8. The 1st and 2nd Defendants' advocate finally deponed that the Plaintiff has failed to establish a prima facie case with chances of success and that the Plaintiff has not demonstrated any possible harm or loss that she will suffer.

9. In his submissions, the 3rd Defendant's advocate submitted that the 2nd Defendant purchased the suit properties from the 1st Defendant and

executed charges dated 6th November, 2014 and 1st April, 2015 respectively; that the charges were registered simultaneously with the Transfers and that the Transfers were accompanied by a spousal consent of one Stellamaris Ndinda Nzioka who deponed to be the 1st Defendant's wife. According to the 3rd Defendant's advocate, the Plaintiff has not established a prima facie case with chances of success or the irreparable loss that she will suffer if the orders of injunction are not granted.

10. It is not in dispute that the 1st Defendant was registered as the proprietor of land known as L.R No. 7149/146 and L.R. No. 7149/147. According to the Certificates of Title annexed on the Plaintiff's Affidavit, the said parcels of land were transferred to the 2nd Defendant on 13th April, 2015 and charged in favour of the 3rd Defendant on the same day.

11. The Plaintiff has annexed on her Affidavit a letter from Dr. J.K. Mutiso dated 9th November, 2008. In the said letter, the doctor stated that the 1st Defendant was suffering from dementia and organic personality syndrome and was not mentally fit to manage himself or his Estate.

12. The 1st Defendant did not file an Affidavit to dispute the depositions of the Plaintiff that the suit land is matrimonial property; that he was mentally unfit when he purported to transfer the suit properties to the 2nd Defendant and that the Plaintiff did not have any right over the suit land. Indeed, the 2nd Defendant did not also file an Affidavit to show that a valid Sale Agreement was entered into between himself and the 1st Defendant in respect to the suit land.

13. Strangely, the 3rd Defendant did not also file an Affidavit to explain the circumstances under which it charged the suit properties and whether a spousal consent was ever obtained from the Plaintiff.

14. In the absence of the Affidavit by the Defendants to controvert the Plaintiff's assertions that the suit land was matrimonial property which could not be sold or charged without a spousal consent, and in the absence of a Sale Agreement that was entered into between the 1st Defendant and the 2nd Defendant, together with the charge document, I find that the Plaintiff has established a prima facie case with chances of success.

15. Indeed, considering that the Title document is in the hands of the 3rd Defendant who is likely to sale the land by way of public auction; or by way of private treaty, the Plaintiff is likely to suffer irreparable damage unless the injunctive orders are granted.

16. For those reasons, I allow the Application dated 14th December, 2017 as prayed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 14TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE