



**REPUBLIC OF KENYA**

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

**ELC NO. 57 OF 2015**

**PAULINE MUKUHI NG'ANG'A**

**(Suing as the personal representative of the**

**estate of the late JOSEPH KARUNGU NDINIKA).....PLAINTIFF**

**VERSUS**

**JOHN KARINGE NDINIKA.....1<sup>ST</sup> DEFENDANT**

**CONSOLIDATED BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**MARY WANJIKU.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff is the widow of Joseph Karungu Ndinika, deceased (hereinafter referred to as “the deceased”). The 1<sup>st</sup> Defendant was a brother to the deceased while the 3<sup>rd</sup> Defendant is said to have entered into a marriage with the deceased during the period when the Plaintiff and the deceased had separated. At all material times, the deceased owned all that parcel of land known as LR No. RuiruKiu/Block 3/189 on which he constructed a matrimonial home(hereinafter referred to as “the suit property”). The deceased and the Plaintiff lived on the suit property until sometimes in the year 1998 when they separated on account of what the Plaintiff has referred to as “cruelty by my husband”. The Plaintiff did not occupy the suit property again during the lifetime of the deceased who died on 12<sup>th</sup> October 2013. In the absence of the Plaintiff, the 3<sup>rd</sup> Defendant lived on the suit property with the deceased until his death.

On 10<sup>th</sup> January, 2012 the deceased charged the suit property to the 2<sup>nd</sup> Defendant to secure financial facilities for a maximum sum of Kshs.2,500,000/= that was made available by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant. The said charge was registered on 25<sup>th</sup> January, 2012. By the time of the deceased’s death on 12<sup>th</sup> October, 2013, the suit property was still charged to the 2<sup>nd</sup> defendant.

The Plaintiff brought this suit against the Defendants on 27<sup>th</sup> January, 2015 claiming that the charge over the suit property was illegal, null and void on the ground that the same was executed by the deceased without her consent contrary to the provisions of the Land Registration Act, 2012. The Plaintiff contended further that the 3<sup>rd</sup> defendant was a trespasser on the suit property and should be ordered to vacate the same forthwith.

Together with the plaint, the Plaintiff brought an application by way of Notice of Motion dated 26<sup>th</sup>

January, 2015 seeking a temporary injunction to restrain the 2<sup>nd</sup> Defendant from selling the suit property or alienating the same in any manner howsoever, and the 3<sup>rd</sup> Defendant from occupying, residing on, entering, letting or otherwise claiming title or interest in the suit property pending the hearing and determination of this suit. The application was brought on the same grounds set out in the plaint which I have highlighted above. The application was opposed by all the Defendants. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants filed grounds of opposition dated 13<sup>th</sup> February, 2015 and a replying affidavit sworn by the 1<sup>st</sup> Defendant on the same date. The 2<sup>nd</sup> Defendant opposed the Plaintiff's application through a replying affidavit sworn by its legal Manager, Janet Mwaluma on 3<sup>rd</sup> March 2015. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants contended that the 3<sup>rd</sup> Defendant was a wife to the deceased and was living with the deceased on the suit property when he was alive and continued living therein after his death. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants contended that the charge in dispute was registered on 25<sup>th</sup> January 2012 when no spousal consent was required to charge a matrimonial property. They termed the Plaintiff's application frivolous and an abuse of the process of the court. On its part, the 2<sup>nd</sup> Defendant contended that the charge that was made in its favour by the deceased was lawful and valid. The 2<sup>nd</sup> Defendant contended that no spousal consent was required before the suit property could be charged to the 2<sup>nd</sup> Defendant.

The Plaintiff amended the plaint on 21<sup>st</sup> April, 2015. In the amended plaint, the Plaintiff dropped her claim that the charge in dispute was executed without her consent. The Plaintiff introduced a new claim that the 2<sup>nd</sup> defendant had rescheduled the 1<sup>st</sup> Defendant's loan by extending the repayment period without the deceased's consent thereby discharging the deceased's guarantee to the 2<sup>nd</sup> Defendant together with the charge. The Plaintiff did not however amend the application to put forward this new claim. The application remained grounded on lack of spousal consent.

The application was argued by way of written submissions. I have considered the application together with the affidavits which were filed in support thereof. I have also considered the grounds of opposition and the replying affidavits which were filed by the Defendants in opposition to the application. I am in agreement with the Defendants that the Plaintiff has not met the threshold for grant of a temporary injunction. As I have mentioned above, the only ground upon which the Plaintiff's application was brought was that the charge executed by the deceased in favour of the 2<sup>nd</sup> Defendant was invalid for want of spousal consent and that the 3<sup>rd</sup> Defendant was a trespasser on the suit property. The Plaintiff has not placed any material before the court showing that spousal consent was required when the charge in dispute was executed. I am in agreement with the Defendants that no such consent was required. There is also no evidence that the 2<sup>nd</sup> Defendant varied the terms of the loan which it had advanced to the 1<sup>st</sup> Defendant. The fact that the loan was not repaid within 36 months is not a proof that the terms of the loan were varied. The Plaintiff has also not placed any evidence before the court that the 3<sup>rd</sup> Defendant is a trespasser on the suit property. The 3<sup>rd</sup> Defendant has contended that she was living on the suit property with the deceased as his wife before his death. I don't think that the mere fact that the marriage between the deceased and the 3<sup>rd</sup> Defendant may be invalid renders the 3<sup>rd</sup> Defendant a trespasser on the suit property which she entered with the consent of the then registered owner. I am not satisfied that the Plaintiff has established a prima facie case against the Defendants with a probability of success. That being my view on the matter, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable injury if the orders sought are not granted.

In the final analysis and for the foregoing reasons, the plaintiff's Notice of Motion dated 26<sup>th</sup> January, 2015 fails and the same is dismissed with costs to the Defendants.

**Delivered, Dated and Signed at Nairobi this 28<sup>th</sup> day of April 2017**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**Mr. Karanja**                    **for the Plaintiff**

**Ms. Anyango**                **for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants**

**Mr. Barago**                   **for the 2<sup>nd</sup> Defendant**

**Kajuju**                         **Court Assistant**