



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 252 OF 2015**

**MBODZE NGOWA MWARINGA.....PLAINTIFF/APPICANT**

**-VERSUS-**

**SIMON NGOWA MWARINGA.....DEFENDANT/RESPONDENT**

**RULING**

1. For determination is the notice of motion dated 1<sup>st</sup> October 2015 filed by the plaintiff pursuant to the provisions of Order 40 & 51 of the Civil Procedure Rules and section 1A, B & 3A and 63 (e) of the Civil Procedure Act. The plaintiff hereinafter referred to as the applicant sought the following orders:

**1) Spent**

**2) Spent**

**3) That this Honourable Court be pleased to issue an order of injunction restraining the Respondent by himself and/or his agents, servants and or any persons working for him from selling and/or disposing off the property measuring 45 acres situated at Samburu in Kwale County pending hearing and determination of this suit.**

**4) That the cost of this application be provided for.**

2. The application is premised on the grounds that the respondent is rapidly and irresponsibly disposing off the family land to 3<sup>rd</sup> parties and the family is in danger of being left destitute. Secondly that the said parcel of land is solely for the use of the family. The application is also supported by the affidavits of Mbodze Ngowa Mwaringa in which she deposed that she has been married to the Respondent since 1948. That in 2012, the Respondent approached her & her three (3) sons to sell a portion of their plot in Nyongoni to meet his personal needs.

3. The applicant deposes that she consented to the sale of 3 ½ acres. However the Respondent in breach of this agreement went on disposing off the family land to third parties without her consent and unless the orders sought are not granted, the family will be rendered destitute. The applicant also filed a further affidavit on 2<sup>nd</sup> March 2016 in reply to the Respondent's affidavit. In it she deposed that the Respondent has not accounted for the monies realized from the sale of the two acres. That the replying affidavit has not shown satisfactory reasons for the sale of the land. Unfortunately I did not find the replying affidavit in the file while writing this ruling. The defendant has however filed his defence and witness statement filed in Court on 17.4.16.

4. The parties filed written submissions which I have considered. Key to the Respondent's submission is that the applicant has not presented any material to show that she has a right over the subject matter. Secondly that the plaintiff having admitted that her consent was sought the burden was put on her under the provisions of section 107 and 109 of the Evidence Act to demonstrate that the Respondent had breached their agreement if any existed. The Respondent submitted that the issue of education of their 2 grand children was discussed and agreed between the parties hence the sale of the 2 acres. Lastly that failure to account for the monies received is not a ground for obtaining the orders sought.

5. The applicant on her part submitted that they own about 45 acres at Nyangoni where they have settled on with their children. The applicant concedes to giving consent of the sale of 3 ½ acres but states that the Respondent has continued to sell the land to 3<sup>rd</sup> parties and has sold additional 20 acres. She cited the provisions of article 27 of the Constitution which gives freedom from discrimination and article 45 (3) on equal rights of parties to a marriage. The applicant also submitted that on the provisions of section 93 (3) of the Land Registration Act which puts requirement on obtaining of spousal consent. She urged the Court to grant the orders sought.

6. It is not in dispute that the parties herein have been married for a long time. The applicant deposes that she gave consent to the Respondent to sell 3 ½ acres of their family land but the Respondent has went on to sell more. To support this averment, she annexed a sale agreement between the Respondent and Mwero Dzombo dated 19<sup>th</sup> May 2014. She was not a witness to this sale agreement. The last payment as that document was made on 29<sup>th</sup> July 2015.

7. The Respondent challenged the application that once the applicant gave her consent, she should not be allowed to change her mind. This in my mind forms the subject of the dispute i.e. whether the consent as initially given was open ended. The applicant has sought an order in the main suit that this sale be declared null and void and for an order of permanent injunction against the defendant. Although the burden rests on the plaintiff to show breach of that consent, that burden be discharged at an application stage. Therefore to the extent that the pleadings show there is a dispute whether consent was given or not and if given whether breached I am satisfied that this is satisfactory proof of prima facie case and on this account I am convinced in the merits of the application. I am not required under the law to consider all the principles laid out in the case of **Giella vs Cassman Brown**.

8. In light of paragraph 7 above, I do allow the application and the following order:

*“An order of temporary injunction be and is hereby issued restraining the Respondent and or his agents from now on in entering into any new sale transactions and or disposing off their family land in any manner situated at Nyongoni Samburu, Kwale County pending the hearing and determination of this suit. The costs of the application are ordered in the cause.”*

**Dated, signed & delivered at Mombasa this 12<sup>th</sup> day of May 2017**

**A. OMOLLO**

**JUDGE**