



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

**MILIMANI COURT**

**CIVIL SUIT NO. ELC 110 OF 2017**

**JANE WAMBUI MACHARIA.....PLAINTIFF**

**VERSUS**

**WAIS CAPITAL LIMITED..... 1<sup>ST</sup> DEFENDANT**

**C. NYAKUNDI LAND REGISTRAR..... 2<sup>ND</sup> DEFENDANT**

**VUSHA SUZANNE MUHONJA, MAMBIRI ITIEVA MAGDALENE &**

**ONSEMBE ESTHER MORAA all trading as VUSHA, ONSEMBE, & MAMBIRI**

**ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**CENTRAL BANK OF KENYA..... 4<sup>TH</sup> DEFENDANT**

**CABINET SECRETARY, NATIONAL TREASURY.....5<sup>TH</sup> DEFENDANT**

**ANTHONY KANJA GIKUNO.....6<sup>TH</sup> DEFENDANT**

**HON. ATTONEY – GENERAL..... 7<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....8<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff filed the application dated 15/2/2017 seeking 11 orders which are set out on the face of the application. At the hearing the Plaintiff's Counsel informed the court that the Plaintiff was seeking prayers No. 3, 5, 7 and 9 which seek various injunctive relief. Firstly, the plaintiff seeks to restrain the Chief Land Registrar or any other land officer from receiving, booking, recording or registering any transfer, charge, assignment, lease, mortgage or any other instruments against flat B situated on L. R. No. 1870/VI/158, Westlands Nairobi registered on title I.R. 104473( the Suit Property). Secondly, the Plaintiff seeks an injunction to restrain the Defendants from entering, letting out, leasing, alienating, selling, charging, transferring, claiming, or in any manner holding out as being entitled to a legal, equitable or beneficial interest in the Suit Property pending hearing and determination of the suit. Thirdly, the Plaintiff seeks to have the rent collected from the Suit Property deposited in court and she also seeks to have the rent deposited in a joint account to be opened by the Plaintiff and the 6<sup>th</sup> Defendant.

The application is supported by the Plaintiff's affidavit and grounds listed at paragraphs (a) to (y) of the application. The Plaintiff's case is that she approached the 1<sup>st</sup> Defendant for financing and that she never executed a charge in favour of the 1<sup>st</sup> Defendant. The Plaintiff claims to have entered into a credit agreement with the 1<sup>st</sup> Defendant. The Plaintiff gives conflicting information in her affidavit. On the one hand she denies having been advanced any monies by the 1<sup>st</sup> Defendant but on the other hand she concedes she was advanced monies but claims that she has not been furnished with statement of accounts by the 1<sup>st</sup> Defendant to show the loan outstanding. The Plaintiff denies executing the charge and maintains that she only signed blank documents with the 1<sup>st</sup> Defendant. She disputes that a proper transfer was made of the Suit Property to the 6<sup>th</sup> Defendant. She claims to have leant on 26/1/2015 that the Suit Property had been advertised for sale. She disputes the charge which she claims is uncertain and unenforceable. She denies being served with a notice of sale under section 90 of the land Act and the notice to sell under section 96(2) of this Act. Her other contention is that the charge is based on passed consideration which by law is not good consideration. The Plaintiff's lawyers M/s Mungai Kalande and Company Advocates wrote to the 1<sup>st</sup> Defendant on 15/1/2015 asking for a statement of account to enable the Plaintiff make arrangements to settle the outstanding loan amounts. In that letter, the date is admitted and it is also stated that the loan was secured by a charge over the Plaintiff's property which is the Suit Property herein.

The Defendant proposed the application for injunction on the main ground that this is the 2<sup>nd</sup> time the Plaintiff is challenging the sale of the charged property having previously filed Nairobi HCC No. 44 of 2015 which was dismissed by Gikonyo J on 29/7/2015. The Defendants urge that this application is *res judicata*.

The issue for determination is whether the Plaintiff has a Prima facie case with a probability of success. The 2<sup>nd</sup> issue the court has to deal with is whether she will suffer a reparable injury if the court does not grant orders she seeks. If the court is in doubt then it will decide the application on the balance of convenience.

Having considered the application together with the affidavit sworn in support of and against the application, the court is not persuaded that the Plaintiff has a prima facie case against the Defendant. From the documents annexed, it is clear that the Plaintiff acknowledged receipt of monies from the 1<sup>st</sup> Defendant and has previously offered to settle the matter with the 1<sup>st</sup> Defendant. On 28/8/2015 the Plaintiff through her lawyers offered to pay the sum of Kshs 7 million to the 1<sup>st</sup> Defendant Advocates while stating that this sum was to be paid from the sale proceeds of the charged property by way of private treaty. The court agrees with the 1<sup>st</sup> Defendant submission that this application for injunction is *res judicata*. The Plaintiff has not demonstrated that the 1<sup>st</sup> Defendant may not meet an award of damages. Any loss which the Plaintiff may suffer can be compensated by an award of damages which can easily be quantified. The Plaintiff admits that the Suit Property has changed hands and that it is now owned by the 6<sup>th</sup> Defendant. It is only at the trial that all the facts in dispute can be resolved and a fair determination made and not on an application.

The court declines to grant the orders sought by the plaintiff and dismisses the application dated 15/2/2017 with costs to the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants.

Dated and delivered at Nairobi this 28<sup>th</sup> day of September 2017.

**K. BOR**

**JUDGE**

In the presence of: -

No appearance for the Plaintiff

Mr. Maina for the 1<sup>st</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants

Ms. Omambia for the 4<sup>th</sup> Defendant

Mr. V. Owuor- Court Assistant