



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

**THIKA LAW COURTS**

**ELC.585 OF 2017**

**JAMES NDEGWA NGANGA.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER KAMAU KARIUKI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GRACE WANGARI WAIRIMU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

The matter for determination is the *Notice of Motion* application dated **30<sup>th</sup> May 2017**, brought by the Plaintiff/Applicant herein, **James Ndegwa Nganga**, against the Defendants/Respondents and has sought for the following orders:-

**1) Spent.**

**2) Spent.**

**3) Pending the hearing and determination of this suit, an interim injunction be and is hereby granted restraining the Respondents, their agents and or servants from in any way taking possession, trespassing, transferring and or in any way dealing with the property land parcel Ruiru East Block 1/3924.**

**4) Cost of this application.**

This application is premised upon the grounds stated on the face of the application and on the annexed *Affidavit* of **James Ndegwa Nganga**. These grounds are:-

**1) The 1<sup>st</sup> Defendant and the Applicant entered into a land sale agreement dated the 31<sup>st</sup> day of May 2017.**

**2) The subject of the sale was LR.No.Ruiru East Block 1/3924 which the purchase price was Kshs.750,000/=.**

**3) The Applicant paid the whole purchase price upon execution of the agreement and the completion date was ninety (90) days upon execution.**

**4) The 1<sup>st</sup> Defendant delivered the original title deed, duly executed purchase price, passport**

*photos, copies of Identity Card and PIN.*

*5) On the 8<sup>th</sup> January 2013, the Defendants applied to Land Control Board for consent, and on the 5<sup>th</sup> February 2013, the Land Control Board Consent was issued.*

*6) Further the 1<sup>st</sup> Defendant demanded more money claiming that the value of the land had gone up.*

*7) The Applicant is justifiably apprehensive that the Respondents herein may move to dispose off the property to an innocent third party purchaser for value.*

*8) It is in the interest of justice that subject matter of the suit be preserved.*

In his Supporting Affidavit, the Applicant herein reiterated the contents of the grounds in support of the application and further averred that he registered a caution over the suit property on **10<sup>th</sup> May 2017**, to prevent any transactions on the property as is evident from **JNN3**. Further that unless the 1<sup>st</sup> Defendant is compelled to execute the transfer documents and present the Plaintiff with all the completion documents, the Defendants may never fulfil their obligations under the Sale Agreement. He also contended that in case the Defendants fail to execute the document, the Deputy Registrar of the court may be directed to execute the transfer on behalf of the Defendants.

The application is contested and both the Defendants herein swore their separate Replying Affidavits.

**Peter Kamau Kariuki**, the 1<sup>st</sup> Defendant/Respondent averred that the intended sale of **LR.No.Ruiru East Block 1/3924**, was to offset a debt of **Kshs.750,000/=** owed to the Applicant. Further that the said **Kshs.750,000/=** was given to him as a loan and was not paid upon execution of the Sale Agreement. He also contended that the Land Control Board Consent was not successful as his wife, the 2<sup>nd</sup> Defendant did not give her consent or the spousal consent for the sale of the suit property. Further that the 2<sup>nd</sup> Defendant refused to give her consent for the said sale of the land as the said land was an inheritance for their children. That as a family, they agreed to refund the purchase price of **Kshs.750,000/=** to the Plaintiff/Applicant. He refuted the claim that he has intention of selling the subject property to a 3<sup>rd</sup> party but alleged that he is preserving the same for her children. He reiterated that he has been ready and willing to refund the purchase price to the Applicant since the **year 2012**, but the Applicant has refused to accept the said money. It was his contention that the caution referred to is a further infringement of his right to property and the sale agreement herein is a nullity. He urged the Court to dismiss the instant application.

**Grace Wangari Wairimu**, the 2<sup>nd</sup> Defendant/Respondent also swore her Replying Affidavit and averred that even if she attended the Land Control Board, they were sent away because she did not give her consent for the sale of the land and she is surprised to see the Land Control Board Consent annexure **JNN3**. It was her contention that they have always been willing and ready to refund the purchase price to the Applicant as the suit property is not for sale. Further that she is a stranger to the sale agreement referred to by the Plaintiff/Applicant. She also reiterated that she has no intention of selling her land to the Applicant or any other person as alleged by the Applicant as the land is an inheritance for her children. She also contended that the caution registered on the suit property by the Applicant is unlawful as she has never given her consent for sale of the land. It was her further averment that they are willing and ready to refund the purchase price to the Applicant as she has never given her consent nor signed the spousal consent form at all. She urged the Court to dismiss the 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 annexures thereto, the cited authorities and the relevant provisions of law and the Court makes these findings:-

The application in issue is 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 David Kamau Gakuru...Vs...National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001, (2001) LLR 4951, where the Court held that:-

***“It is trite 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 that discretion has not been exercised judicially”.***

Further, as the Court considers the available evidence and determines whether the Applicant is deserving of the orders sought, it will not delve into substantive issues with finality but will only consider whether the Applicant is deserving of the orders sought. See the case of Agip (K) Ltd...Vs...Maheschandra Himatlal Vora & 2 Others, Civil Appeal NO.213 of 1999, 2EA 285, where the Court held that:-

***“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.***

The Court will determine the issues herein based on the usual criteria set in the case of Giella...Vs...Cassman Brown & Co. Ltd 1973 EA 358. The set principles are:

- a) The Applicant must establish that he has a prima facie case with probability of success.***
- b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.***
- c) When the Court is in doubt, to decide the case on a balance of convenience.***

Therefore, the Applicant herein had a duty to establish the above stated principles.

Firstly, the Applicant needed to establish that he has a *prima-facie* case with probability of success. In the case of Mrao Ltd...Vs...First American Bank of Kenya & Others (2003) KLR 125, the Court held that:-

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

The Applicant herein needed to show that there is infringement of his right and that his case has a high probability of success at the trial.

The Applicant herein alleged that he entered into a Sale Agreement with the 1<sup>st</sup> Defendant on **31<sup>st</sup> May 2012**, for sale and purchase of **LR.No.Ruiru East Block 1/3924**, for a consideration of **Kshs.750,000/=**. Further that he paid the full purchase price and the 1<sup>st</sup> Defendant gave him the **original title deed, passport photographs, ID card and PIN certificate**. He also alleged that they went before the Land Control Board and 1<sup>st</sup> Defendant gave his consent and the Land Control Board Consent, **JNN3** was granted. However, the 2<sup>nd</sup> Defendant refused to give her spousal consent and therefore the said parcel of land was never transferred to the Applicant. Further that now the Defendants are demanding for more money before any further transaction with the Plaintiff/Applicant and have threatened to sell the suit property at a higher price.

The Defendants have denied the above allegations and have averred that indeed the 1<sup>st</sup> Defendant owned the Plaintiff **Kshs.750,000/=** and that the sale agreement was signed after the **year 2012**. That the date on the said sale agreement has been altered and that the Plaintiff has not come to Court in good faith and this application should be dismissed.

As the Court stated earlier, it will not delve into substantive issues before hearing oral evidence. All the denials that are made by the Defendants can only be substantiated by calling of evidence in the main trial.

What is evident is that there is a Sale Agreement entered between **Peter Kamau Kariuki**, the 1<sup>st</sup> Defendant as the **Vendor** and **James Ndegwa Nganga**, the Plaintiff/Applicant as the **Purchaser**. The sale agreement is over sale of land known as **Ruiru East Block 1/3924**, the suit property herein. The sale agreement does not state of all that it is over a debt owed to the Plaintiff by the 1<sup>st</sup> Defendant. On whether the sale agreement was made on **31<sup>st</sup> May 2012**, or any other date that the Plaintiff later altered is an issue to be determined by calling of evidence.

What is evident is that parties are bound by the terms of the sale agreement entered by the said parties. The Court cannot infer terms that are not specifically provided for in the sale agreement from the explanation given by a party who is alleged to have breached the said sale agreement. It is evident that there is a consent to transfer the suit property given by the **Land Control Board, Ruiru Division**. On whether the 2<sup>nd</sup> Defendant gave her consent or not, is also a matter to be determined at the full trial. For now the Court finds and holds that there is a sale agreement and a consent from the Land Control Board to transfer the suit property from 1<sup>st</sup> Defendant to the Plaintiff herein. The Court finds and holds that the Defendant had intention of selling the suit property to the Plaintiff and a sale agreement was entered and executed. Full purchase was paid and the consent from the Land Control Board was obtained. For all intents and purposes, the Plaintiff herein did purchase the suit property.

It is also evident that the Defendants have not transferred the said property to the Plaintiff. The Defendants have alleged that the suit property is their matrimonial home and an inheritance for their children and they have no intention of selling the same. That is a disputed issue which can only be determined after the calling of evidence.

Having carefully considered the available evidence, the Court finds that the Applicant has established that he has a *prima-facie* case with probability of success.

On the second limb, the Applicant needed to establish that the will suffer irreparable loss which cannot be compensated by an award of damages. The Respondents have alleged that they live on the suit property and that if the orders sought are granted, they will be barred from utilizing the suit property wherein they have lived all along with their children. The Plaintiff has never lived on the suit property. He will therefore not suffer irreparable loss which cannot be compensated by an award of damages if orders sought are not granted. See the case of **Wairimu Mureithi..Vs...City Council of Nairobi, Civil Appeal No.5 of 1979(1981) KLR 322**, the Court held that:-

***“However strong the Plaintiff’s case appears to be at the stage of interlocutory application for injunction, no injunction should normally be granted if damages in the measure recoverable at common law would be adequate remedy and the Defendant would be in a financial position to pay them”.***

On the 3<sup>rd</sup> limb, the Court finds that there is an allegation that the Defendants intend to sell the property to a 3<sup>rd</sup> party. If that is the intention of the Defendants, then the Court will need to preserve the suit property until the matter herein is heard and determined. The Court finds that the balance of convenience herein tilts in favour of preserving the suit property, until the suit is heard and determined. There is already a caution placed on the suit property and the Court will also emphasize that the Defendants herein should be restrained from transferring the suit property until the matter is heard and determined. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

***“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.***

Having now carefully considered the available evidence, the Court finds that the Applicant is deserving of the orders sought on the following terms which will ensure that the *status quo* is maintained and the *status quo*

herein is the preservation of the suit property;-

***a) That pending the hearing and determination of the suit herein, an interim injunction be and is hereby granted restraining the Defendants/Respondents, their agents and/or servants from transferring the suit property LR.No.Ruiru East Block 1/3924 to anyone or to any third party.***

***b) Costs of the application to the Applicant.***

***c) Further the parties to comply with Order 11 of the Civil Procedure Rules within the next 45 days from the date hereof and thereafter fix a date for Pre-trial Conference before the Deputy Registrar of this Court and then set the matter down for full hearing expeditiously.***

It is so ordered.

Dated, Signed and Delivered at Thika this **18<sup>th</sup> day** of **December 2017**.

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kaniaru for the Plaintiff/Applicant

Mr. Kaburu holding brief for M/S Kiongera for Defendants/Respondents

Diana - Court clerk.

**L. GACHERU**

**JUDGE**

**Ruling** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**18/12/2017**