



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 3087 OF 1981**

**MARGARET ROSE WAMBUI ..... PLAINTIFF**

**VERSUS**

**SILVESTER JOHN NJOROGE.....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 16<sup>th</sup> June 2014 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent.
2. That this Honorable Court be pleased to issue an order restraining the 2<sup>nd</sup> Respondent/Interested Party whether by itself, servants or agents from transferring, alienating or otherwise dealing with L.R. No. 209/66/43 (hereinafter referred to as the "subject property") pending the hearing and determination of this Application.
3. That this Honorable Court be pleased to issue an order directing the Interested Party to forthwith deposit in court the title document for the subject property pending the hearing and determination of this Application.
4. That this Honorable Court be pleased to issue an order setting aside the sale and transfer of the subject property by the 1<sup>st</sup> Respondent herein to the Interested Party.
5. That this Honorable Court be pleased to issue an order directing the Chief Lands Registrar and/or the Land Registrar Nairobi to cancel the transfer of the subject property and instead thereof to register the Applicant as joint owner thereof.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the Plaintiff, Margaret Rose Wambui Njoroge, sworn on 16<sup>th</sup> June 2014, in which she averred that by a judgment made on 7<sup>th</sup> June 2002, this Honorable Court decreed that the subject property was matrimonial property and that she was entitled to a half share in it. She stated further that consequently, this Honorable Court made an order on 9<sup>th</sup> February 2010 directing the 1<sup>st</sup> Respondent to deposit the title to the subject property in court. She further averred that the 1<sup>st</sup> Respondent refused to comply with the court's order to deposit title and she was forced to take out contempt proceedings upon which the 1<sup>st</sup> Respondent was committed to civil jail on 21<sup>st</sup> October 2011. She further averred that the order for committal to civil jail was temporarily suspended when the 1<sup>st</sup> Respondent paid a sum of Kshs. 80,000/- from the rent he had been collecting from the tenants in the subject property but that thereafter he reverted to disobeying the

court's order to deposit the title documents. She stated further that she was forced to make another application to recommit the 1<sup>st</sup> Respondent to civil jail on 3<sup>rd</sup> December 2013 and on 16<sup>th</sup> May 2014, the court granted her prayers and ordered that the 1<sup>st</sup> respondent be committed to civil jail. She further averred that the 1<sup>st</sup> Respondent has since gone underground and she has applied for arrest warrants against him. She further stated that she has recently come to learn that during the pendency of the application to recommit him to civil jail, the 1<sup>st</sup> Respondent in gross disobedience and contempt of the court order sold the subject property to the 2<sup>nd</sup> Respondent, Messrs Reliable Electrical Engineers (Nrb) Ltd, and the transfer registered on 11<sup>th</sup> March 2014. She added that she had obtained copies of the transfer, which she annexed, which clearly revealed that the transferor of the subject property is the 1<sup>st</sup> Respondent. She further added that the 1<sup>st</sup> Respondent also swore an affidavit in support of the transfer, a copy of which she annexed, confirming that he is the registered proprietor of the subject property, a position that she has all along urged in the court with him denying the same. She further averred that in all his responses to her applications seeking compliance with the court's order, the 1<sup>st</sup> Respondent has continuously lied to this court that the subject property belonged to his late father and not him as the reason why he could not comply with the court's order. She further stated that in the circumstances, the sale is null and void having been made in blatant contravention and gross disobedience of this court's orders. She averred further that the aforesaid sale of the subject property by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent is tainted with illegality in view of the false and fraudulent declarations made by the 1<sup>st</sup> Respondent. She further stated that according to **section 157(1)(a) & (b) of the Land Act Number 6 of 2012**, it is an offence to make a false statement in connection with any disposition and/or to fraudulently procure the making of an entry or the endorsement of any matter or document under the Act and she urged the court to sanction the 1<sup>st</sup> Respondent. She further stated that by virtue of **section 157(6) of the Land Act Number 6 of 2012**, this court is empowered to direct the Registrar to cancel any entry in any Register obtained on account of the offences set out in the section. She urged the court, in light of the foregoing, to set aside the fraudulent sale and direct the immediate deposit of the title to the subject property in this court and to grant such other orders that it would deem fit to safeguard her interest in the subject property.

The Application is contested. The Interested Party filed the Replying Affidavit of Rameshchandra Chandulal Shah, a director, sworn on 17<sup>th</sup> July 2014 in which he averred that the Interested Party has never been a party to this suit and has never known of its existence until they were served with this Application. He further averred that the decree, order or judgment of the court allegedly made on 7<sup>th</sup> June 2002 has never been registered against the title documents as confirmed by the official search annexed. Further, he confirmed that the subject property, a remainder of L.R. No. 209/66/15, was purchased by the Interested Party for value and without notice of the pendency of this suit. He further averred that the subject property was purchased from the 1<sup>st</sup> Respondent and he swore an affidavit confirming that he was the registered owner of the subject property and that the subject property was not matrimonial property and they had no reason not to believe him. He further stated that the subject property rightfully belongs to the Interested Party having acquired the same for value without notice after paying Kshs. 50 million for it as per the annexed sale agreement. He further stated that at the time of purchasing the subject property, they instructed their then advocates, Bengi Miriti & Co. advocates to conduct due diligence on the subject property which was done by way of official search. He further stated that the official searched showed only one encumbrance which was that there was a charge to Barclays Bank of Kenya Ltd which was discharged before the transfer in their favour. He further stated that it is evident from the official search that there has never been any order in favour of the Plaintiff or issued by this court registered against the title. He further stated that the Plaintiff has never been the registered owner of the subject property and neither has she communicated any change in ownership of the subject property to the Lands Registry. He added that they further sought to know from the 1<sup>st</sup> Respondent whether he was married or whether the subject property was encumbered in any other way and the 1<sup>st</sup> Respondent swore a declaration stating that the subject property was not matrimonial property and that he was not married. He averred further that having conducted the due diligence, the necessary transfer documents were then registered at the lands office for purposes of registration. He added that they purchased the subject property through a loan granted by I&M Bank Limited and the charge is in the process of being registered against the title. He stated further that the Interested Party cannot comply with prayer number 3 as the title documents are

with the said bank. He further stated that the Applicant has not stated or deposed that the Interested Party acquired the subject property illegally or that the Interested Party was aware of the court orders issued, if any, or of the pending suit or the relationship between the Plaintiff and the Defendant, if any. He stated that accordingly, the Interested Party was an innocent purchaser for value without notice and is protected by **section 24 to 30 of the Land Registration Act** and the transfer should thus not be cancelled. He added that they purchased the subject property for purposes of developing it, they have since made the relevant applications for approval and obtained the approval for change of user, they have invested heavily on the subject property on which they intend to put up multi-serviced dwelling apartments and that they have since demolished the dilapidated building that was there to pave way for the construction. He stated further that it is evident that great prejudice would be occasioned to the Interested Party if the transfer is cancelled. He reiterated the fact that the Interested Party has never been a party to these proceedings and no order or application by the Plaintiff seeking to add the Interested Party as a party to these proceedings has ever been filed. He stated that it is trite law that substantive orders cannot be issued against a party who has not been enjoined in the proceedings.

Both the Plaintiff/Applicant and the Interested Party filed their respective written submissions.

At this juncture, it is clear that prayers no. 2 and 3 of this Application cannot be granted for the reason that the subject property has already been transferred to the Interested Party and the title document thereto is in the hands of I&M Bank Limited. That leaves prayer no 4 and 5 which seek for an order setting aside the sale and transfer of the subject property by the 1st Respondent to the Interested Party and an order directing the Chief Lands Registrar and/or the Land Registrar Nairobi to cancel the transfer of the subject property and instead thereof to register the Applicant as joint owner thereof.

I will revisit the decision by Mbitio J at page 6 paragraph 4 of the judgment where he stated that,

***“The next property is LR No 209/66/15 registered in the name of Njoroge Mwangi which according to the plaintiff is the name the defendant is also known. In his replying affidavit he does not deny being the owner of the said property.....I therefore find his contention at the hearing that that is his father’s name an afterthought more especially as the signatures on the conference are his own. I find that this property was acquired after the subsistence of the marriage of the parties herein”.***

There is also a replying affidavit of the 1<sup>st</sup> Respondent sworn on 4<sup>th</sup> June 2012 where he deposed that this property was subdivided by his father Njoroge Mwangi in 1980 into two portions being LR No 209/66/43 and LR No 209/66/44 and stated that the latter was later disposed of leaving LR No 209/66/43. This is the portion the Applicant is now laying claim upon. I have read the ruling delivered by Nambuye J on 21<sup>st</sup> October 2011 on LR No 209/66/15 she stated at page 18 on the explanation as to why the 1<sup>st</sup> Respondent was unable to comply with respect to LR No 209/66/43 Mogotio Road Parklands where he claimed that the property belonged to his deceased’s father. The judge went on to state that the court gave consideration to his explanation and found that that his explanation does not hold water because the 1<sup>st</sup> Respondent has never produced any identification documents to prove that the names Njoroge Mwangi were his names or his father’s names. A look at the ruling delivered by Odunga J in his ruling dated 16<sup>th</sup> July 2012 gave a verdict that the judgment delivered by Mbitio J made a finding that the subject property belonged to the 1<sup>st</sup> Respondent stating that the same was matrimonial property and that the 1<sup>st</sup> Respondent was in active control thereof. Half of the property LR No 209/66/44 has already been disposed of therefore what the 1<sup>st</sup> Respondent was expected was to avail to this court the title to half the property which is LR No. 209/66/43 which he did not. These are the findings I made in an earlier application filed by the Plaintiff seeking to have the 1<sup>st</sup> Respondent committed to civil jail for disobedience of this court’s orders. I agreed with the Plaintiff and proceeded to commit the 1<sup>st</sup> Respondent to civil jail. He served his 6 month sentence at the Industrial Area Prison. It is now evident that subsequent to that, the 1<sup>st</sup> Respondent went ahead to transfer the subject property to the Interested Party in complete and blatant disobedience of this court’s orders that the deposit title to the subject property in court.

Matters have now evidently become more difficult with the introduction of the Interested Party in this suit. The Interested Party is the purchaser of the subject property from the 1<sup>st</sup> Respondent for the sum of Kshs. 50 million. It is this transfer that the Plaintiff seeks this court to set aside and to order that the Chief Registrar or the Land Registrar, Nairobi be ordered to enter the Plaintiff's name as a joint owner of the subject property alongside the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent has not concerned himself with this Application at all, after having pocketed the purchase price of Kshs. 50 million for the subject property. However, as can be expected, the Interested Party has on its part put forward a robust opposition to this Application. Their main line of argument is that the Interested Party is an innocent purchaser for value without notice of this suit, the judgment emanating here from or any relationship between the Plaintiff and the 1<sup>st</sup> Respondent. They argue that they came to be aware of this suit when they were served with this Application and added that the Plaintiff is the author of her own misfortune for failing to register this court's order against the title to the subject property. They argued that they conducted a thorough due diligence on the subject property before purchase and verified the ownership details through a search at the lands office. They argued that the search did not reveal the Plaintiff's interest, if any, in the subject property. This is by and large true. When one considers the various orders that have been issued in this matter in favour of the Plaintiff, it is not clear why none of them were registered against the title of the subject property. This no doubt left the subject property prone to sale or transfer as is the case here. Who is to blame for this gross omission other than the Plaintiff?

To compound matters further, I must say that it is clear that the Plaintiff was aware of the transfer of the subject property from the 1<sup>st</sup> Respondent to the Interested Party because the Plaintiff filed an Ex-parte application being Notice of Motion dated 23<sup>rd</sup> July 2014 wherein she sought that I&M Bank Ltd, the Garnishee, be ordered to pay to her all funds held in the 1<sup>st</sup> Respondent's Bank Account Number 01000859572410 Parklands Branch which held the sale proceeds of the subject property amounting to Kshs. 50 million. I do recall distinctly that counsel for the Plaintiff, Mr. Orina requested me in court on 31<sup>st</sup> July 2014 in the absence of counsel for the 1<sup>st</sup> Respondent to issue an order nisi to freeze that account as they serve the other party with their said application. I informed Mr. Orina that I needed to look through the file and consider his request and that I would communicate my decision on that request on the same day at 11.30 a.m. After perusing the file, I made the following finding which is in the court record:

"I hereby issue an order nisi to freeze the following account until further notice by this court:

Account Name: Njoroge Mwangi

Account No.: [particulars withheld]

Branch: Parklands.

Let the N/M dated 23/7/14 be served and further directions as to its hearing shall be given on 19/9/14."

When I returned to court to deliver my order, Mr. Orina for the Plaintiff did not appear in court though I waited for him for 15 minutes. To this date, no explanation has ever been offered by Mr. Orina as to why he failed to appear in court as I had directed. The above order was therefore never delivered and as a result the sale proceeds went beyond the reach of the Plaintiff. In my opinion, therefore, the Plaintiff has not been very serious in pursuing her entitlement with regard to the subject property and approaching this court at this time for a remedy against the Interested Party seems to be belated and wanting. I am of the view that the Plaintiff lost a golden opportunity to claim her half share of the sale money of the subject property when the funds were still in the account of the 1<sup>st</sup> Respondent.

My finding is that it is not fair or just to pursue the Interested Party for a claim that was not made against them in this suit. I agree with the Interested Party that they are innocent purchasers of the subject property for value without notice. Cancelling the sale of the subject property to them will occasion them gross

injustice, loss and hardship. They have explained that they already paid the 1<sup>st</sup> Respondent the entire purchase price and have proceeded to charge the subject property to their bank. They have also further demolished the structure that they found thereon and are in the process of constructing some new apartments. I find that the Plaintiff has no valid claim against the Interested Party at all.

Accordingly, this Application is hereby dismissed. Each party shall bear their own costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY 2016.**

**MARY M. GITUMBI**

**JUDGE**