



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

E.L.C SUIT NO. 304 OF 2015

(Formerly NAIROBI ELC CASE NO 1268 OF 2015)

DAMARIS B WANJIRU MBUGUA.....PLAINTIFF/ APPLICANT

-VERSUS-

MICHAEL MBUGUA NGARORA.....1ST DEFENDANT/ RESPONDENT

SAMUEL NDUATI MACHARIA.....2ND DEFENDANT/ RESPONDENT

EQUITY BANK LIMITED.....3RD DEFENDANT/ RESPONDENT

LAND REGISTRAR, MURANGA COUNTY.....4TH DEFENDANT/ RESPONDENT

THE ATTORNEY GENERAL.....5TH DEFENDANT/ RESPONDENT

RULING

1. Before me for determination is the plaintiff's application dated **7th December, 2015** seeking to restrain the defendants/ respondents, their agents, servants, employees and anyone from subdividing, selling, disposing of, transferring or alienating land parcel **Loc.2/Gacharage/4104** (hereafter referred to as the suit property) pending the hearing and determination of the main suit. She also seeks that the 3rd defendant be restrained from releasing the sum of Kshs. 900,000 to the 1st defendant deposited by the 2nd defendant. Finally, she prays for mandatory orders against the 4th defendant to cancel entries made in the register effecting the transfer to the 2nd defendant and to revoke the said Certificate of Title as well as costs of the application.

2. The application is premised on the grounds stated on the face of the application and is supported by the applicant's affidavit sworn on **7th December, 2015**.

3. The applicant depones that she is the wife of the 1st defendant since 1964 and has annexed a marriage certificate as DBW1; that in 2014, she and her husband received the suit property as part of their inheritance from the 1st defendant's father. She further depones that she found out, by sheer chance, that her husband had executed an Agreement for Sale on 26th November, 2015 (DBW4) selling the suit property to the 2nd defendant for Kshs 1,500,000. She immediately wrote to the Deputy County Commissioner (being the Chairman of the area's Land Control Board) to try and stop the sale (DBW5).

This did not happen and a search conducted on 1st December, 2015 (DBW7) revealed that the 2nd defendant had already been registered as proprietor of suit property. This prompted her to file this suit, seeking that the whole transaction be nullified due to lack of spousal consent on her part.

4. The application is opposed. The 1st defendant vide his replying affidavit sworn on **29th December, 2015** depones that the suit property does not form part of the matrimonial property, having inherited it from his father. He averred that their matrimonial property is Title Number **Loc.2/Mairi/80** measuring 16 acres, which he had subdivided among his wife (the respondent) and his children.

5. He further depones that he had already sold the suit property to the 2nd defendant, having obtained all relevant consents; that 2nd defendant had already paid him Kshs 1,200,000 (Kshs 900,000 deposited in the 3rd defendant's bank and Kshs 300,000 in cash) to cater for his medical bills. He maintains that the application and the orders sought are an abuse of the process of the court and should in fact be dismissed with costs as the applicant is using the suit to settle their matrimonial issues.

6. The 2nd defendant also opposes this application vide his replying affidavit sworn on **29th December, 2015**. He depones that he is an innocent purchaser for value having paid the 1st defendant Kshs 1,200,000 and acquired a clean title on the basis of "willing buyer, willing seller".

7. The 3rd defendant equally opposes the application through Grounds of Opposition dated **18th December, 2015** that the Bank is merely a custodian of the funds entrusted to it by the 1st defendant and thus does not understand why it has been unnecessarily enjoined in the suit as the applicant does not have any claim against it.

8. The 4th and 5th defendants opposed the application through a Preliminary Objection as contained in their Statement of Defence. This objection was later withdrawn on 3rd March, 2016.

9. In a supplementary affidavit sworn on **17th February, 2016** she proposes that the 3rd defendant be enjoined in the suit as an interested party subject to the court's discretion.

10. The application was heard on 9th March, 2016. Counsels for the respective parties reiterated their pleadings as filed. Counsel for the 3rd defendant did not oppose the granting of the prayers for temporary injunction. Counsel for the 4th and 5th defendants submitted that some of the prayers sought (such as revocation of the title) were final orders in nature and could not be granted at this interlocutory stage.

11. The conditions for granting an injunction are well captured in the celebrated case of ***Giella v Cassman Brown and Co. Ltd & Another* [1973] E.A. 358**, where **Spry VP** held:

"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."

13. I have considered the pleadings of the parties herein. From the prayers sought, I find that some of them have already been overtaken by events; for example the prayer seeking that the defendants be restrained from subdividing, selling, disposing of, transferring or alienating the suit property. It is not in dispute that the 2nd defendant has already been registered as proprietor of the suit property. A court cannot grant orders to restrain that which has already happened. See the case of ***Esso (K) Ltd V. Mark Makwata Okiya, (Civil Appeal No. 69 of 1991)***.

14. With regard to the issue raised by the applicant that the suit property is matrimonial property, I hold

the view that this is an issue to be dealt with at the hearing of the suit as the same will require calling of witnesses and availing of documents. The same is also true of the mandatory orders sought with regard to the revocation of the title.

16. For the above reasons, I decline to grant prayers 3, 6, 7 and 8 and direct that the money held by the 3rd defendant be placed in an interest earning account pending the hearing and determination of this suit.

17. Costs of both applications shall be in the cause.

Dated, signed and delivered at Nyeri this 10th day of August 2016

L. N. WAITHAKA

JUDGE

In the presence of:

N/A for the applicant

N/A for the respondent

Court assistant - Lydia