



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC NO. 150 OF 2014**

**PHOEBE NJOKI GITHAE.....PLAINTIFF**

**VERSUS**

**FRANCIS OWINO RAO.....1<sup>ST</sup> DEFENDANT**

**HENRY OKWARE EMUYE.....2<sup>ND</sup> DEFENDANT**

**BARCLAYS BANK OF KENYA.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff filed an application dated 14<sup>th</sup> February, 2014, seeking orders that:

- a. *Pending the hearing and determination of this suit, the Court be pleased to issue a temporary injunction against the Defendants either jointly and/or severally, restraining them whether by themselves, their agents and/or servants whatsoever from selling, disposing, taking possession, transferring and/or interfering with the Plaintiff's possession of Flat No. 3 Land Reference No. 205/62.*
- b. *Pending the hearing and determination of the suit, the Court be pleased to compel the Defendants either jointly and/or severally to supply the Plaintiff with the following documents:-*
  - a. *Letter of Offer in relation to sale of Flat No. 3 Land Reference No. 205/62;*
  - b. *Sale Agreement of Flat No. 3 Land Reference No. 205/62*
  - c. *Letter of Acceptance in relation to sale of Flat No. 3 Land Reference No. 205/62;*
  - d. *A copy of Charge/Mortgage of Flat No. 3 Land Reference No. 205/62;*
  - e. *Transfer of Flat No. 3 Land Reference No. 205/62 from the 1<sup>st</sup> Defendant to any of the Defendants;*
  - f. *Statement of Loan Account in Flat No. 3 Land Reference No. 205/62, if any.*

g. *Any other document transferring proprietary interest on Flat No. 3 Land Reference No. 205/62 from the 1<sup>st</sup> Defendant to any person.*

The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Plaintiff. She deposes that she is married to the 1<sup>st</sup> Defendant and that in 2008 they entered into an agreement for the purchase of Flat No. 3 Land Reference No. 205/62 (suit property). Subsequently, on **6<sup>th</sup> June 2008**, they acquired suit property from the vendor by a Transfer of Lease at a consideration of **Kshs. 6,700,000/-**. The deponent states that she made substantial contributions towards the purchase of the property and entered into a co-ownership agreement with the 1<sup>st</sup> Defendant that the suit property will be registered his name but he shall hold it in trust for her and their children.

The Plaintiff further deposes that they have been enjoying quiet possession of the property until January 2014, when strangers visited the property alleging that they were owners thereof. It is her deposition that on **11<sup>th</sup> February, 2014**, she learnt that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had obtained a loan facility from the 3<sup>rd</sup> Defendant using the suit property. She also deposes that it was a term of the co-ownership agreement that the 1<sup>st</sup> Defendant will not sale, lease and/or charge the property without her consent and therefore the 1<sup>st</sup> Defendant's action is illegal, fraudulent thus null and void. The Plaintiff deposed that unless the orders sought are granted, she and the children stood to suffer irreparably as there is a real danger that the property will be alienated in a manner prejudicial to her proprietary interest.

In a lengthy Replying Affidavit sworn on **3<sup>rd</sup> March 2014** the 1<sup>st</sup> Defendant gave a history of his friendship and business partnership with the 2<sup>nd</sup> Defendant. The deponent stated that sometime in 2010, he and the 2<sup>nd</sup> Defendant decided to invest in a business in Kisumu and to obtain funds for the investment, they entered into a gentleman's arrangement that he transfers the suit property to him to charge the same in favour of the 3<sup>rd</sup> Defendant and after the project materializes, the 2<sup>nd</sup> Defendant would transfer back the property. The deponent states that it was clear that the investment in the project was for mutual financial benefit and in the event of loss, the same would be borne by both in equal proportion.

As agreed, the 1<sup>st</sup> Defendant deposes that he transferred the property on the pretense that he had sold it to the 2<sup>nd</sup> defendant for a purchase price of Kshs. 11 Million and thereafter, the 2<sup>nd</sup> Defendant charged it for the sum of Kshs. 9.9 Million. The deponent states that they further agreed not to disclose their plan to their respective wives uncertain as to whether they would oppose and eventually sabotage it. The 1<sup>st</sup> Defendant deposes that on receiving the loan amount, they invested monies into two projects but immediately thereafter, one of the projects stalled on the basis of a double allocation which is yet to be addressed by the Lands Registry, Kisumu, 4 years on. He deposed that they continued with their original arrangement despite the setbacks until **19<sup>th</sup> November 2013**, when the 2<sup>nd</sup> Defendant demanded that he vacates the suit property. That the 2<sup>nd</sup> Defendant demanded further that he refunds Kshs. 5.4 Million being the money that he has been servicing and take over remitting the monthly installments of Kshs. 139,000/- per month failing which he would instruct the 3<sup>rd</sup> Defendant to sell the property. Following the said demands, the 1<sup>st</sup> Defendant deposed that he has faithfully serviced the loan by paying the said monthly installments as instructed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. It is his disposition that the 2<sup>nd</sup> Defendant has become uncooperative on resolving the matter amicably but continues to threaten that he will instruct the 3<sup>rd</sup> Defendant to dispose the suit property.

The deponent stated that the dispute herein is between him and the 2<sup>nd</sup> Defendant which can be resolved amicably. It was his deposition that he was willing to take over the repayment of the loan but on condition that reconciliation of accounts be undertaken to include the properties jointly acquired, a reasonable timeline to be agreed to refund the 2<sup>nd</sup> Defendant any monies owed to him and both parties sign a deed that upon refunding the 2<sup>nd</sup> Defendant any monies owed to him, he undertakes not to lay any claim on the proceeds of the project. The deponent urged the court to allow for the parties to explore alternative dispute resolution as provided for in Article 159(2) (c) of the Constitution.

Waweru Mathenge, Advocate Acting Head of Legal, and Secretarial Services with the 3<sup>rd</sup> Defendant swore a Replying Affidavit on **30<sup>th</sup> May 2014**, wherein he refuted the claim that the 3<sup>rd</sup> Defendant has intimated any intention to sale, dispose off, take possession, transfer, and/or interfere with the Plaintiff's possession of the suit property. The deponent stated that on 13/1/2010, the 2<sup>nd</sup> Defendant duly executed a letter of offer from the 3<sup>rd</sup> Defendant and was granted loan facilities for the sum of Kshs. 9.9 Million secured by a charge of the suit property. The deponent annexed a copy of the Statement of Account showing that the 2<sup>nd</sup> Defendant has been servicing the loan through monthly instalments save for three missed payments. Further, that the 3<sup>rd</sup> Defendant is not privy to any agreements or dealings previously entered into by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in respect to the suit property. The deponent contends that the application has been wrongly brought as against the 3<sup>rd</sup> Defendant. The 2<sup>nd</sup> Defendant did not file a reply to the Plaintiff's application.

The Plaintiff swore a Supplementary Affidavit on 1<sup>st</sup> September 2014 wherein she reiterated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's purported action to transfer, lease, or charge the suit property was done without her consent and as such the purported transactions are null and void. She deposed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were already discussing the 3<sup>rd</sup> Defendant's expression of taking over possession of the suit property.

The application was canvassed by way of written submissions. Kithi & Co. Advocates for the Plaintiff filed submissions dated 24/9/2014. Counsel submitted that the suit property, though registered under the Repealed Registration of Titles Act, the suit was instituted during the subsistence of the new land laws, thus the Land Registration Act, 2012 applies. It was submitted by counsel that the property is matrimonial property as defined in the Land Act and the Matrimonial Property Act, 2013. Counsel also submitted that the Plaintiff had established that she was at risk of losing her proprietary interest, the property having been transferred to the 2<sup>nd</sup> Defendant and subsequently charged to the 3<sup>rd</sup> Defendant. It was submitted that the transfer was done illegally, and further that there was an implication that in the event of default, the bank will exercise its statutory power of sale especially because of the 3<sup>rd</sup> Defendant's admission that there have been three missed payments. Counsel submitted that the Plaintiff was in imminent danger of losing her matrimonial home.

Khayega Chivai & Company Advocates for the 1<sup>st</sup> Defendant filed submissions dated 9<sup>th</sup> November 2014 wherein counsel submitted that indeed the suit property was a matrimonial property which was jointly acquired in 2008. Counsel recapped the 1<sup>st</sup> Defendant's depositions and urged the court to direct the parties to explore alternative resolution mechanism.

Miller & Company Advocates for the 3<sup>rd</sup> Defendant filed submissions dated 10<sup>th</sup> October 2014, wherein counsel submitted that granting an injunction at this stage would be premature as the inbuilt statutory protection is yet to crystalize. It was submitted that there was no connection between the Plaintiff and the 3<sup>rd</sup> Defendant since the property was transferred to the 2<sup>nd</sup> Defendant in 2010 before the Land Registration Act came into effect thus Section 28 thereof cannot hold as spousal rights over matrimonial property as an overriding interest was not applicable. It was also pointed out to the court that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, do not contest the agreement giving rise to the transfer and registration of title in favour of the 2<sup>nd</sup> Defendant. With respect to the co-ownership agreement, counsel submitted that the Plaintiff has a remedy under common law against the 1<sup>st</sup> Defendant for breach of contract.

Counsel submitted that in the event the court found in favour of the Plaintiff, damages would be an adequate remedy as once a property is given as security, it becomes a commodity for sale, the value of which can be ascertained and any loss suffered is remediable by an award of damages. It was submitted that there was no imminent threat of sale whatsoever of the charged property and the court should not be called upon to act in vain. With respect to the production of documents, counsel submitted that this prayer had been overtaken by events noting that while filing the Replying Affidavit, the 3<sup>rd</sup> Defendant annexed copies of all the requested documents save for the ones between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to which the

3<sup>rd</sup> Defendant is not privy to. Counsel urged the court to dismiss the application submitting that the Plaintiff had failed to establish a prima facie case.

The current state of affairs is that the 2<sup>nd</sup> Defendant is the registered proprietor of the suit property and the same is charged to the 3<sup>rd</sup> Defendant. The Plaintiff claims to have entered into a co-ownership agreement in 2008 with the 1<sup>st</sup> Defendant to the effect they were both equal owners of the property but that the property would be registered in the first Defendant's name to hold the same in trust for her and their children. Further that her written consent must be obtained prior to any sale, lease, mortgage or transfer. It is on this basis that the Plaintiff deposes that such transfer to the 2<sup>nd</sup> Defendant and subsequent charge in favour of the 3<sup>rd</sup> Defendant is fraudulent since her consent was not sought. Further that the property is matrimonial property and in the event that the court does not issue the orders sought, she and her children will suffer irreparably as there is a real danger that the property will be alienated.

At this stage of the proceedings, the court is tasked to determine whether the Plaintiff has met the threshold for granting an injunction set out in **Giella Vs Cassman Brown & Co. Ltd (1973) E.A 358** that :-

***Firstly, an applicant must show a prima facie case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience***”.

It is clear from the narrative above that the 1<sup>st</sup> Defendant admits to having transferred the suit property to the 2<sup>nd</sup> Defendant who subsequently charged the same to the 3<sup>rd</sup> Defendant. It is also discernable that the transfer was effected before 2010 because as at **13<sup>th</sup> January 2010**, the 3<sup>rd</sup> Defendant gave the 2<sup>nd</sup> Defendant a letter of offer for a loan of **Kshs. 9.9 Million**.

The Plaintiff contends that the property is matrimonial property and that the new Land legislation applies. Section 93 of the Land Registration Act requires that spouses give consent to a transfer or charge of the matrimonial property. However, this Act came into operation on 2<sup>nd</sup> May 2012 way after the property had been transferred and charged. Both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had no duty to inquire whether the spouse had consented to the alienation. See the case of **Elizabeth Nthenya Wambua Vs. Philip Wambua Masila & 3 Others ELC No. 240 of 2012 [2013] eKLR**.

I also do find that the Plaintiff has not established her allegation of fraud since the 1<sup>st</sup> Defendant admits to having transferred the property to the 2<sup>nd</sup> Defendant who subsequently charged it to the 3<sup>rd</sup> Defendant. The property is now held as security by the 3<sup>rd</sup> Defendant. As rightly submitted by the counsel, there is no connection between the Plaintiff and the 3<sup>rd</sup> Defendant neither was it privy to the dealings between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Granting an injunction would amount to curtailing the 3<sup>rd</sup> Defendant from exercising its option of sale in the event of default.

On the grounds relied on by the Plaintiff and the circumstances I find that an injunction cannot issue. In respect to Prayer No. 5, the documents listed thereunder were filed alongside the 3<sup>rd</sup> Defendant's Replying Affidavit and whatever is filed in this court is served upon the parties. The prayer is thus overtaken by events.

Having now considered the pleadings generally and the submissions herein, the Court finds that the Plaintiff's application dated 14<sup>th</sup> February 2014, is not merited and I disallow the same. The interim injunction issued on 14<sup>th</sup> February 2014 is hereby discharged. Costs of the application shall be in the cause.

It is so ordered.

Dated, Signed and delivered this **9<sup>th</sup>** day of **March 2015**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

None attendance for the Plaintiff though served.

None attendance for the 1<sup>st</sup> Defendant though served.

None attendance for the 2<sup>nd</sup> Defendant

Mr Ndege holding brief Mr.Mare for the 3<sup>rd</sup> Defendant

Kamau : Court Clerk

**L.N. GACHERU**

**JUDGE**

**Court:**

Ruling read in open Court in the presence of the above advocate.

**L.GACHERU**

**JUDGE**