



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

**MILIMANI LAW COURTS**

**ELC NO. 107 OF 2013**

**REDEMPTA SUSAN CHETAMBE KEHR.....PLAINTIFF**

**VERSUS**

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

**THE DISTRICT LANDS REGISTRAR, KAJIADO.....2<sup>ND</sup> DEFENDANT**

**BRENDA JEROTICH CHEPKIYENG.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff filed an application dated **27<sup>th</sup> June 2014**, and sought an order of injunction restraining the 1<sup>st</sup> and 3<sup>rd</sup> Defendants from taking possession, threatening, and/or harassing or in any manner interfering with the Plaintiff's quiet possession of the matrimonial property known as **Ngong/Ngong/42046**, pending the hearing and determination of the suit. The Plaintiff also sought an order restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from any further dealings, registration and further transfer of the property pending determination of the suit.

The application is premised on grounds that the transfer from the 1<sup>st</sup> Defendant to the 3<sup>rd</sup> Defendant is unlawful and an abuse of the court process in view of the suit property being subject of a pending suit. The Plaintiff states that she will suffer great prejudice that cannot be compensated by way of damages if the 3<sup>rd</sup> Defendant is not restrained from evicting, harassing and/or threatening the Plaintiff to vacate the suit premises.

The application is supported by an affidavit sworn by the Plaintiff wherein she deposed that the 1<sup>st</sup> Defendant fraudulently transferred the suit property to itself resulting to the present suit where she has sought orders barring the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from any further dealings on the suit property and the cancellation of the title issued in favour of the 1<sup>st</sup> Defendant. The Plaintiff deposed that the 1<sup>st</sup> Defendant has persistently been involved in unlawful acts of harassing her with intent to evict her from the suit property. It was her deposition that the 3<sup>rd</sup> Defendant came to the suit property claiming ownership on the premise after allegedly of purchasing it from the 1<sup>st</sup> Defendant. Indeed upon conducting a search on **26<sup>th</sup> June 2014**, she found that the 1<sup>st</sup> Defendant had transferred the suit property to the 3<sup>rd</sup> Defendant sometimes in **May 2014**. The Plaintiff deposed that it was only prudent that the 3<sup>rd</sup> Defendant be

restrained from evicting and further dealing with the property as she stood to suffer irreparably by losing her matrimonial home.

**Daniel K. Rono**, a Director with the 1<sup>st</sup> Defendant, in response, swore a Replying Affidavit on **19<sup>th</sup> November 2014**. He deposed that the Plaintiff, voluntarily entered into a sale agreement on **27<sup>th</sup> January 2010** with the 1<sup>st</sup> Defendant for the sale of the suit property at a consideration of **Kshs. 4 Million**. It was his deposition that upon the Plaintiff's request, the 1<sup>st</sup> Defendant advanced her **Kshs. 2 Million** on **21<sup>st</sup> July 2010** and a further **Kshs. 3.2 Million** on **23<sup>rd</sup> July 2011**. Further, that it was mutually agreed that the 1<sup>st</sup> Defendant would hold the title as security for the monies advanced to the Plaintiff. It was deposed that the Plaintiff proceeded to execute a transfer and applied for consent from the Land Control Board. Therefore, that the 1<sup>st</sup> Defendant had authority to dispose off the property in the event that the Plaintiff failed to pay the monies advanced.

The deponent stated that the Plaintiff had deliberately failed to disclose the details of loan agreements with the 1<sup>st</sup> Defendant and the default in making payments causing the 1<sup>st</sup> Defendant to dispose off the property to recover its money. Further, that the Plaintiff having voluntarily executed the sale agreement and the consent to transfer the suit property, she cannot make allegations of fraud or secrecy on the part of the 1<sup>st</sup> Defendant. The deponent also stated that the suit property having been transferred to the 3<sup>rd</sup> Defendant, it was only fair that the latter be given vacant possession.

The 3<sup>rd</sup> Defendant swore a Replying Affidavit on **18<sup>th</sup> November 2014**, in opposing the application. She deposed that she entered into an agreement with the 1<sup>st</sup> Defendant on **15<sup>th</sup> May 2013**, for the purchase of the suit property at a consideration of **Kshs. 6 Million**. Upon payment of the purchase price and other costs inclusive of stamp duty, the property was transferred to her in accordance with the terms of the sale agreement and title deed issued on **8<sup>th</sup> May 2014**. The 3<sup>rd</sup> Defendant contends that she is an innocent purchaser for value and acquired a valid, legal and enforceable interest over the said property upon becoming the absolute proprietor thereof, whilst the Plaintiff does not have legal or other interest thereon, and thus a trespasser on the property.

The Plaintiff swore a Supplementary Affidavit on **1<sup>st</sup> December 2014** in response to the Defendants' replies. She referred to the sale agreement entered into between the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and deposed that that the 1<sup>st</sup> Defendant had failed to disclose to the 3<sup>rd</sup> Defendant of the pending suit over the property. The latter was also misled into believing that the suit property is vacant yet the Plaintiff and her family have been in occupation. Further, that the 3<sup>rd</sup> Defendant did not inspect the property before the purchase as captured in the said agreement.

The application was canvassed by way of written submissions, which I have carefully read and considered the authorities referred to me by counsels. The issue for determination is whether the Plaintiff has met the threshold for the grant of injunction orders as stated in the case of **Giella v Cassman Brown (1973) E.A. 358**. The Plaintiff filed suit against the 1<sup>st</sup> Defendant and sought orders, inter-alia, that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent and therefore the title, in its favour, be cancelled and the same be re-issued to her. In the said Plaintiff, the Plaintiff made allegations of fraud on the part of the 1<sup>st</sup> Defendant and outlined the particulars thereunder. It is not in dispute that the Plaintiff was originally the proprietor of the suit property. The 1<sup>st</sup> Defendant contends that the transfer of the property to itself was voluntary and on the basis of the Plaintiff defaulting in making payments to the monies advanced to her. During the pendency of the suit, the 1<sup>st</sup> Defendant transferred the suit property to the 3<sup>rd</sup> Defendant who is presently registered as proprietor, hence this application. Notably, there was no order restraining the 1<sup>st</sup> Defendant from transferring the property.

**Section 26 of the Land Registration Act** provides that the certificate of title issued upon registration or to a purchaser of land upon a transfer shall be taken as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. Further that such title cannot be challenged except:

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party;  
or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

It is noteworthy that the Plaintiff has made allegations of fraud against the Defendant. It is her contention that the transfer and subsequent registration in favour of the 1<sup>st</sup> Defendant was done without her knowledge and fraudulently. An allegation of fraud is among the grounds upon which title can be challenged. In this case, the title has already been transferred to a third party, the third Defendant herein, who maintains that she is an innocent purchaser for value. The question as to whether the title to an innocent purchaser is impeachable was discussed in the case of **Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another Eldoret E&L Case 609 (B) of 2012 [2013] eKLR** where Munyao J. observed:

*As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.... Is the title impeachable by virtue of Section 26(1) (b)? First, it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions”.*

It is evident that it matters not that the title has been transferred to a third party as **Section 26** of the Land Registration Act is crafted to protect the real owner from being deprived of their title by subsequent transactions.

Allegations of fraud made against the 1<sup>st</sup> Defendant is an issue that the Court cannot delve into at this juncture, as the same can only be determined with finality after examination of the evidence at full trial. *“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”* See the case of **Mbuthia v Jimba Credit Finance Corporation & another (1988) KLR**

This court finds that it is in the interest of justice that the suit property be preserved pending the hearing and determination of the suit. In that regard, the Court makes the following orders:-

- 1. The Defendants are restrained from interfering with the Plaintiff’s possession and from any further dealings, registration and further transfer of the property pending determination of the suit, or until further orders of this court.*
- 2. For the avoidance of doubt, the 3<sup>rd</sup> Defendant is hereby joined to the proceedings as a Defendant.*
- 3. The Plaintiff is hereby granted leave of 14 days to amend the Plaint accordingly. Corresponding leave is hereby given to the Defendants to amend their Defences within 21 days of the date of service.*
- 4. Costs shall be in the cause.*

***It is so ordered.***

**Dated, Signed and Delivered this 10<sup>th</sup> day of July,2015**

**L.GACHERU**

**JUDGE**

In the Presence of:-

M/s Wambugu holding brief for Mandala for the Plaintiff/Applicant

None attendance for the 1<sup>st</sup> Defendant/Respondent

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

Mr Analo holding brief Mr Mukele for the 3<sup>rd</sup> Defendant/Respondent

Lerionka: Court Clerk

**L.GACHERU**

**JUDGE**