



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 541 OF 2014

NANCY NYAMBURA KARORI.....PLAINTIFF

VERSUS

JOHN GITHERE KARANJA.....1ST DEFENDANT

ISAIAH NJAU KAHUKI.....2ND DEFENDANT

JANE WAMBUI KAHUKI.....3RD DEFENDANT

RULING

The Plaintiff filed an application dated **6th May 2014**, seeking an order that pending the hearing and determination of the suit, a temporary Order of injunction be issued restraining the Defendants whether by their agents **M/s Recovery Concepts Auctioneers** or any other agent, servant, and/or employees from evicting the Plaintiff, interfering, transferring, charging, disposing or in any way encumbering the properties referred to **LR Nos. Kiambaa/Kihara/3607, 3608, 3609 and 3610**.

The application is premised on grounds stated on the face of the application and by the Affidavit of the plaintiff/Applicant herein.

It is deposed by the Plaintiff that she and her husband were bequeathed property known as **LR No. Kiambaa/Kihara/2607**, sometime in the year 1998 whereafter they were registered as joint proprietors. The Plaintiff further averred that her husband was arrested in 2001 and charged in **Kiambu Cr. Case No. 2165 of 2001** with several counts including Obtaining by False Pretence money from the 1st Defendant whereof he was convicted to serve a sentence of 2 years. During the arrest and incarceration, she came to learn, was that her husband had entered into a sale agreement with the 1st Defendant to sell to him ¼ acre excised from **LR No. Kiambaa/Kihara/2607** and that he failed to deliver his part of the bargain.

The Plaintiff deposed further that during the period her husband was incarcerated, the 1st Defendant had instituted a suit, **Milimani CMCC No. 9881 of 2002**, wherein Summary Judgment had already been entered against her husband culminating in execution proceedings. She deposed further that she later learnt that the 1st Defendant unlawfully sub-divided **LR No. Kiambaa/Kihara/2607**, into four portions **3607, 3608, 3609 and 3610** and sold the same to the 2nd and 3rd Defendants. The Plaintiff further stated that she has been in possession of the entire property for over 20 years and that one of the

portions is her matrimonial home. That her overriding interests over **LR. No. Kiambaa/Kihara/2607**, which was unlawfully sub-divided into portions were not extinguished and therefore continue to subsist. It is her contention that the Defendants' rights over the portions were acquired through fraud, error, mistake and/or complete disregard of the statutory provisions on transfer of a jointly owned property. The Plaintiff urged the court to allow the application averring that she is facing eviction from her property which was unlawfully alienated and she will suffer loss.

The application was opposed by the 1st Defendant who swore a Replying Affidavit on **11th August, 2014**, wherein he outlined how he acquired the suit property. It was his deposition that he entered into a sale agreement with the Plaintiff's husband sometime in 2000 for the purchase of **LR No. Kiambaa/Kihara/2607** for a consideration of **Ksh.734,000/-** and an additional **Kshs. 50,000/-**, being legal fees. He deposed that the vendor declined to transfer the property leading to his arrest and incarceration for two (2) years following the **Kiambu Cr. Case No. 2165 of 2001**. Subsequently, he filed a civil suit in 2002 **Milimani CMCC No. 9881 of 2002** which was heard and judgment delivered in his favour. It was his deposition that when the vendor failed to settle the decretal sum, he instituted execution proceedings for sale by public auction of **Kiambaa/Kihara/2607**.

The 1st Defendant deposed that this application was *res judicata* since the issues raised herein are substantially the same as that in the objection proceedings filed by the Plaintiff in the execution proceedings in **CMCC No. 9881 of 2002** which were heard and finally determined by a court of competent jurisdiction. Further that the Plaintiff did not appeal against the ruling of the lower court, thus she cannot now file a fresh suit to ventilate issues that had already been determined. The deponent stated further that the Plaintiff was allowed to bid for the property during the sale auction when he was declared the highest bidder. Thereafter, the Plaintiff sought a stay of the confirmation of the sale and issuance of the certificate of sale, which application was dismissed for want of prosecution. It was his deposition that he was issued with the Certificate of Sale on **29th June, 2004** that vested the property in him which he subsequently proceeded to sub-divide and transfer to the 2nd and 3rd Defendant for value.

The 2nd Defendant swore a Replying Affidavit on 19th June, 2014 wherein he deposed that he entered into a sale agreement dated 13th October, 2004 with the 1st Defendant for purchase of portions 3609 and 3610 at a consideration of Kshs. 1.7 Million which they settled fully in accordance with the agreement. Subsequently, that they obtained consent from Kiambu **Land Control Board**, whereafter the title was transferred and registered jointly in their names on 23rd May, 2005. The 2nd Defendant deposed that later on **3rd April, 2006** they purchased portions 3607 and 3608 from the 1st Defendant for a sum of Kshs. 1.675 Million which was transferred to them on full payment of the purchase price and after obtaining the relevant consents.

These properties, the deponent states, they purchased from the 1st Defendant after he acquired them through a public auction in an execution of a decree in **Milimani CMCC No. 9881 of 2002**. In urging the court to dismiss the application the 2nd Defendant deposed that the suit has no basis in law, is an abuse of the court process and is only meant to delay the execution of the eviction order issued against her. Further that it was evident that the Plaintiff does not have any claim over the properties.

Preliminary Objection

The 2nd and 3rd Defendants also filed a Preliminary Objection dated **6th June, 2014** wherein they stated that the suit offends the express provisions of Section 7 of the Civil Procedure Act as the same is *res judicata* and should be struck off. Secondly that the issues raised in the suit are the same issues directly and substantially raised by the Plaintiff in her objection proceedings in **Nairobi CMCC No. 9881 of 2002**, which were heard and finally determined by a court of competent jurisdiction.

The Plaintiff's application together with the 2nd and 3rd Defendants' Preliminary Objection were canvassed by way of written submissions which I have carefully perused and considered. I have also considered the authorities cited, to which I render my decision as thus:-

The first issue to be determined is **whether the suit is res judicata**. It is the Defendants' averments that the issues raised in the present suit, that is, joint ownership of the property, was substantially in issue in the objection proceedings filed by the Plaintiff in **Milimani CMCC No. 9881 of 2002**, thereby offending Section 7 of the Civil Procedure Rules. It was submitted by the Defendant that the objection application was heard and a ruling delivered on 31st October 2003, dismissing the objection thus the issue of joint ownership was heard and determined by a court of competent jurisdiction. On behalf of the Plaintiff, counsel invited the court to read the decision by Hon. Nyakundi. It was his submission that the objection proceedings were not dismissed on its merits but on the technical grounds that the Plaintiff did not adhere to the procedure set out under Order 21 of the Civil Procedure Rules.

In the case of **Abok James Odera Vs John Patrick Machira Civil Application No. 49 of 2001, Justice Ole Keiwua (as he then was)**, held that to rely on a Defence of res-judicata, there must be,

- i. ***A previous suit in which the matter was in issue.***
- ii. ***The parties were the same or litigating under the same title.***
- iii. ***A competent court heard the matter in issue.***
- iv. ***The issue has been raised again in a fresh suit.***

On perusal of the annexures availed by both parties, I do take note that the genesis of the present suit is the sale transaction entered into between the Plaintiff's husband and the 1st Defendant in the year 2000. The chronology of events leading to the disposition of the property and subsequent sub-division and transfer of the 4 portions to the 2nd and 3rd Defendants has been captured hereinabove. This court finds that the suit herein is not res judicata, for the following reasons.

First, there has been additional parties to this suit, that is the 2nd and 3rd Defendants who did not feature in the suit at the Chief Magistrates' Court. This is obviously the case because at the time, the property had not been sub-divided and disposed of to the said Defendants.

Secondly, I have read through the Learned Magistrate's ruling to the Plaintiff's objection proceedings. I agree with submissions by Learned Counsel for the Plaintiff that the objection was not determined on merit but dismissed on technical grounds. The Learned Magistrate despite noting that the Plaintiff was not a party to the suit found that: the Plaintiff had only annexed a search but not the title to show that she is registered as a joint owner thus showing her equitable or legal interest over the property thus failing to comply with Rule 53; and the Plaintiff failed to comply with Order 21 Rule 57 which was couched in mandatory terms, required service to be effected to the judgment creditor. On those grounds, the Learned Magistrate dismissed the objection application. On the foregoing, the Defendant's Preliminary Objection is dismissed.

Moving on to whether the Plaintiff has met the threshold to warrant the grant of injunction orders as stated in **Giella v Cassman Brown Case**. It is submitted for the Plaintiff that by virtue of **Section 102 and 27 of the Registered Land Act** (repealed), the Plaintiff being a joint registered owner has overriding interests over the property which ought to have been considered prior to any disposition. Counsel submitted that the Plaintiff has made allegations of fraud against the Defendants and extensively particularized the fraudulent acts in the Plaint. Counsel submitted that the property is her matrimonial home where she has been living with her family for over 20 years and therefore, that damages would not be an adequate remedy. It was also submitted that the balance of convenience tilts in her favour.

On behalf of the Defendants, Counsel submitted that the sale auction was confirmed by the Lower Court and a vesting Order issued, which the Plaintiff did not challenge on appeal. Further that the auction was conducted and finalized in 2004 whereas the application herein has been brought 10 years purposely to defeat the ends of justice from being realized. Counsel submitted that the Plaintiff had failed to establish any claim in the suit properties neither a cause of action against the Defendants. It was further submitted that the property had changed hands through a court sanctioned process and the property vested in the 1st Defendant, therefore it was inconceivable to allege that the court process was fraudulent. Counsel urged the court to dismiss the application with costs to the Defendants on the basis that the Plaintiff had failed to

establish a prima facie case with chances of success.

The Defendants have averred and this court acknowledges that neither the Plaintiff nor her husband appealed against the rulings and judgment entered by the Lower Court against them. It is also apparent that there was an eviction order issued against the Plaintiff and her husband (as the Objector and Defendant, respectively) on 5th February, 2008. It seems that the Defendants herein did not execute the eviction order leading to the said orders being renewed and/or reinstated by an order in the lower court on 7th March, 2014. Perhaps the eviction order prompted the filing of this suit. Whatever the case, the Plaintiff has approached this court to save her from the impending eviction. It is her claim that being a joint owner of the property, her interests thereon had to be taken into account.

Section 102 (1) of the Registered Land Act, in part, provides:-

Where the land, lease or charge is owned jointly, no proprietor is entitled to any separate share in the land, and consequently –

a. dispositions may be made only by all the joint proprietors; and

This court must bear in mind that the overriding objective, in the administration of justice is to do substantive justice. It cannot therefore close its eyes to the Plaintiff's claim. It is at times such as this that the court invokes its inherent power under **Sections 3A and 63(e) of the Civil Procedure Act** to make orders as may be necessary for the ends of justice. Invoking the inherent power of the court is informed by the circumstances of this case. First, as stated hereinabove, the Plaintiff was a jointly registered as proprietor of the property and thus her involvement in the disposition of the property was mandatory as expressed in **Section 102 of the RLA, Cap 300 Laws of Kenya**.

Secondly, from the documents availed by both parties, I do note that the entire suit at the Lower Court against the Plaintiff's husband proceeded *ex-parte* where summary judgment was entered whilst the Plaintiff's husband was in prison. As stated, this Court needs to dispense substantive and not technical justice. I am bound by **Article 159(2) (d) of the Constitution** to deliver substantive rather than technical and procedural justice.

The essence of this narrative is that this court is prepared to dispose off the matter on its merits. It is very much aware that the property has since been sub-divided into four portions transferred to the 2nd and 3rd Defendants who are now the registered proprietors thereof. In that regard, there is no doubt that all the parties herein have an interest on the property which this court has a mandate to safeguard pending the outcome of the suit.

Having considered the pleadings, annexures thereto the written submissions and the overring objectives, the court find as follows: -

- 1. An order of status quo is hereby entered to the effect that the Plaintiff shall continue in possession of the property without interference from the Defendants and/or any of their agents until the suit is heard and determined, or until further orders.***
- 2. An inhibition order shall issue forthwith prohibiting the registration of any dealing with the portions, namely LR Nos. Kiambaa/ Kihara/3607, 3608, 3609 and 3610, until the suit is heard and determined, or until further orders.***
- 3. Costs of the application shall be in the cause.***

Dated, Signed and Delivered this 9th day of December, 2014

L.GACHERU

JUDGE

In the Presence of:-

Mr Gatumuta holding brief for Mr Maingi for the Plaintiff/Applicant

Mr Busige holding brief for M/s Kangethe for the Defendants/Respondents

Kamau: Court Clerk

Court:

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

L. GACHERU

JUDGE