



**IN THE COURT OF APPEAL**

**AT ELDORET**

**CIVIL APPEAL NO. 51 OF 2013**

**(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)**

**BETWEEN**

**JOYCE CHEBICHY KIMOSOP.....APPELLANT**

**AND**

**ELIUD KIPCHOGE SUGUT.....1<sup>ST</sup> RESPONDENT**

**BRIMIN KIPRUTO KIPROP.....2<sup>ND</sup> RESPONDENT**

**FELEX KIPCHOGE LANGAT.....3<sup>RD</sup> RESPONDENT**

**PETER KIPSIGEI SANG.....4<sup>TH</sup> RESPONDENT**

**DANIEL KIPNGETICH KOMEN.....5<sup>TH</sup> RESPONDENT**

*(An appeal from the ruling of the High Court of Kenya at Eldoret, (F. Azangalala, J.) dated 14<sup>th</sup> November, 2012*

**in**

**HCCC NO. 69 OF 2012)**

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**JUDGMENT OF THE COURT**

1. This appeal arises from a ruling and order of the High Court at Eldoret, (F. Azangalala, J.) given on 14<sup>th</sup> November 2012 dismissing the appellant's motion for a temporary injunction "to restrain the respondents from entering, dealing or in any other way interfering with that parcel of land known as South East of Eldoret Municipality LR No. 8638/26, LR No. 98675...pending the hearing and determination of the suit..."

**Background**

2. The appellant commenced suit against the respondents before the High Court at Eldoret by way of Originating Summons (OS) dated 12<sup>th</sup> April 2012. Citing Section 17 of the Married Women's Property

Act, Article 45(3) of the Constitution, Section 6(1) of the Land Control Act and the Registration of Titles Act, the appellant sought determination by the court of the questions: whether a transaction involving a property situated in South East of Eldoret Municipality known as LR No. 8638/26 (I.R No. 98675), the property which she described as family property, could be undertaken without her involvement; whether a transaction over the property between her husband, the 5<sup>th</sup> respondent as vendor, and the 1<sup>st</sup> to 4<sup>th</sup> respondents, as purchasers, (the sale transaction) was riddled with fraud and deceit; whether the sale transaction violated the appellant's constitutional rights; whether the sale transaction was a nullity for breach of the provisions of the law; and whether as the 5<sup>th</sup> respondent's spouse she is entitled to an equal share of the property.

3. The appellant swore an affidavit in support of the OS in which she deposed that she got married to the 5<sup>th</sup> respondent (her husband) on 5<sup>th</sup> November 1998; that together with her husband they completed the purchase of the property, measuring 200 acres, (indicated elsewhere as 220 acres) around 2005; that she took loans to fund the purchase and development of the property whose value rose to well over Kshs. 100 million; that without her knowledge or consent, her husband secretly sold the property and was shocked to learn that the 1<sup>st</sup> to 4<sup>th</sup> respondents were in occupation of the property; that land control board consent was not obtained; that her constitutional rights to the property were violated.

4. Alongside the OS, the appellant presented to the High Court a motion, also dated 12<sup>th</sup> April 2012, under Rules 1 and 2 of Order 40 of the Civil Procedure Rules seeking a temporary injunction to restrain the respondents from entering, dealing with or in any way interfering with the property pending the hearing and determination of the OS.

5. In her affidavit in support of that motion, she repeated the contents of her affidavit in support of the OS adding: that she is a lecturer at Moi University; that she had expended her personal resources in the purchase and development of the property including construction of permanent buildings, connecting electricity and water, planting trees; that she was staying on the property and rearing 20 high grade cows; that she had ploughed part of the property in readiness for the planting season when she was confronted by the 1<sup>st</sup> to 4<sup>th</sup> respondents claiming they had bought the property; that she was shocked as her husband had never mentioned anything about the sale to her; and that she conducted a search at the lands office and was shocked to discover that the property had indeed been transferred.

6. The appellant contended that the sale transaction and the transfer is void for want of requisite consent from the land control board; that her consent to the transaction not having been sought, *“the purported transaction is a nullity as it infringes on [her] constitutional rights.”*

7. In opposition to the OS and to the motion, the respondents filed replying affidavits. The 1<sup>st</sup> respondent deposed that together with the 2<sup>nd</sup> respondent, they initially entered into an agreement for sale dated 4<sup>th</sup> October 2011 with the 5<sup>th</sup> respondent to purchase 40 acres of the property and paid the purchase price; thereafter, *“while in the process of finalizing the first agreement”* they entered into another agreement on or about 24<sup>th</sup> January 2012 to purchase an additional 80 acres of the property; that as the 5<sup>th</sup> respondent had entered into other sale agreements with the 3<sup>rd</sup> and 4<sup>th</sup> respondents, they requested the 5<sup>th</sup> respondent to effect the transfer of the property in their names to avoid a multiplicity of transactions.

8. The 1<sup>st</sup> respondent went on to say that the respondents jointly applied for land control board consent which was granted on 2<sup>nd</sup> February 2012 and that the 1<sup>st</sup> to 4<sup>th</sup> respondents were registered as owners of the property on 2<sup>nd</sup> March 2012. Thereafter, the 1<sup>st</sup> to 4<sup>th</sup> respondents asserted, they took possession of the property and carried out developments.

9. According to the 1<sup>st</sup> to 4<sup>th</sup> respondents, they are innocent purchasers of the property without notice of any dispute between the appellant and her husband the 5<sup>th</sup> respondent. The 2<sup>nd</sup> respondent also swore a replying affidavit to the same effect.

10. In a supplementary affidavit sworn on 9<sup>th</sup> May 2012, the appellant contested that land control board consent was granted and produced minutes of Moiben/Ainabkoi Land Control Board of 2<sup>nd</sup> February 2012 to demonstrate that the transaction was not part of the agenda of the board meeting of that day.

11. The 3<sup>rd</sup> respondent also swore a further replying affidavit explaining the circumstances under which he entered into an agreement for the purchase 50 acres of the property under an arrangement where he agreed to convert a debt owed to him by 5<sup>th</sup> respondent as part payment of the purchase price.

12. In his replying affidavit, the appellant's husband, the 5<sup>th</sup> respondent, confirmed that jointly with his wife, the appellant, they applied for a loan to pay the outstanding balance of the purchase price on the property; that he was the sole registered owner of the property; that without the appellant's consent, he sold 120 acres of the property to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and 50 acres to the 3<sup>rd</sup> respondent and 20 acres to the 4<sup>th</sup> respondent; that the purchasers advocates would deposit money into his account without his consent and knowledge which led him "*not to appear in the Land Control Board.*"

13. After considering the application, the learned Judge was not satisfied that the appellant had made out a case for a temporary injunction and dismissed the application in his ruling dated 14/11/2012, the subject of this appeal.

### **The appeal and submissions by counsel**

14. The appellant complains that in refusing to grant her the temporary injunction, the learned Judge misdirected himself by: failing to address the issues raised; failing to consider the provisions of the Land Control Act; failing to uphold her constitutional rights to matrimonial property; misapprehending that the proceedings before the court were founded entirely on Section 17 of the Married Women Property Act; failing to consider the claims of fraud allegedly perpetuated by the 5<sup>th</sup> respondent; and failing to properly apply the legal principles governing applications for temporary injunctions.

15. Learned counsel for the appellant, Mr. P. K. Kibii, submitted that it is not contested that the 5<sup>th</sup> respondent and the appellant are husband and wife; that together the appellant and the 5<sup>th</sup> respondent bought and developed the property comprising of 220 acres; that without the appellant's knowledge or consent, the 5<sup>th</sup> respondent secretly sold the property to the 1<sup>st</sup> to 4<sup>th</sup> respondents; that the property comprises matrimonial property within the meaning of Section 6 of the Matrimonial Property Act and her consent to the sale and transfer of the property to the 1<sup>st</sup> to 4<sup>th</sup> respondents is a mandatory requirement; that in any event, land control board consent was not obtained and the transaction is therefore void; that in those circumstances, the conclusion reached by the Judge that the appellant did not establish a prima facie case with a probability of success is clearly wrong and the appeal should therefore be allowed.

16. Supporting the appeal, learned counsel for the 5<sup>th</sup> respondent, Mr. Mitei Christopher, submitted that the learned Judge should have granted the injunction so as to maintain the status quo, as there were outstanding issues that required resolution.

17. Opposing the appeal, learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents, Mr. Othuro, submitted that the conditions for the grant of an interlocutory injunction as spelt out in **Giella vs. Cassman Brown & Co. Ltd and another [1973] EA 358** had not been met and the learned Judge correctly declined to grant the interim injunction.

18. Counsel argued that the property was not matrimonial property; that there was evidence that the appellant was feigning ignorance of the transaction as part of the purchase price was paid to her; that the learned Judge rightly concluded that a prima facie case with a probability of success had not been demonstrated; that in any event damages would be an adequate remedy to compensate the appellant for the property; that the 1<sup>st</sup> to 4<sup>th</sup> respondents are international athletes and have the means to pay damages should an award ultimately be made against them; and that the balance of convenience favored the refusal of the interlocutory injunction as the 1<sup>st</sup> to 4<sup>th</sup> respondents, who are innocent purchasers for value, are in

occupation of the property undertaking farming with many employees.

### **Determination**

19. We have considered the appeal and the submissions. The grant or refusal of an interlocutory injunction involves the exercise of judicial discretion exercisable by the court based on the legal principles set out by the Court in **Giella vs. Cassman Brown & Co. Ltd and another** (above). The learned Judge applied those principles and reached the conclusion that the appellant had not demonstrated a prima facie case with a probability of success; that the injury the appellant would suffer, if any, “*is quite capable of being quantified and damages would furnish adequate compensation*” as the appellant “*has no sentimental attachment to the suit land*”; and that the balance of convenience tilted in favour of declining the temporary injunction sought.

20. The circumstances in which this Court can interfere with the exercise of judicial discretion by the lower court are limited. It is not for this Court to substitute the lower court’s discretion with its own discretion. In order to justify interference by this Court, it has to be shown that the lower court was clearly wrong because of misdirection or for failing to take into account matters that should have been taken into account or for taking into account matters that should not have been taken into account. As stated by Sir Charles Newbold P. in **Mbogo & Another V Shah [1968] EA 93** at page 95:

**“...a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”**

21. Can it then be said in the circumstance of this case that the learned judge of the High Court misdirected himself in some matter with the result that he arrived at a wrong decision or that it is manifest that the learned judge’s decision is clearly wrong?

22. In arriving at the decision that the appellant did not establish a prima facie case, the learned Judge gave considerable weight to the fact that the appellant commenced the proceedings in the High Court by way of an Originating Summons, “*primarily under the Married Women’s Property Act Section 17*” before concluding that the proceedings could not be competent against the 1<sup>st</sup> to 4<sup>th</sup> respondents. In his words:

**“it would, prima facie, appear that under the said section, these proceedings are competent against the 5<sup>th</sup> defendant who is the plaintiff’s husband, but not against the other defendants. The plaintiff has therefore not demonstrated, on prima facie basis, that she will maintain this action under Married Women’s Property Act against the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.”**

23. It seems to have escaped the attention of the learned Judge that in addition to Section 17 of the Married Women’s Property Act, the appellant was also claiming that the entire transaction was void for want of consent under Section 6 of the Land Control Act.

24. Based on the documents placed before the Judge, the question whether land control board consent in respect of the transaction was obtained was moot. Although the respondents exhibited a copy of land control board consent, the copy of minutes of the land control board that were produced do not appear to reflect that transaction. When that is considered alongside the statement by the 5<sup>th</sup> respondent that he was led “*not to appear in the Land Control Board*”, it becomes clear that the question whether land control board consent in respect of the transaction was obtained is a live issue for the trial Court. Having regard to gravity of that issue in light of section 6 of the Land Control Act, we think that had the Judge properly directed his mind to that question, he would have come to a different conclusion. We say no more.

25. On that basis alone, the decision by the learned Judge that the appellant did not establish a prima facie case with a probability of success is wrong. We need not consider the other limbs of the principles in

**Giella Vs. Cassman Brown & Co. Ltd and another** if absence of consent of the Land Control Board would have the effect of rendering the transaction void “for all purposes”. It would be necessary for the trial Court to consider and interrogate the plea by the 1<sup>st</sup> – 4<sup>th</sup> respondents that they are innocent purchasers for value. We must therefore interfere with the decision of the learned Judge. We accordingly allow the appeal and set aside the ruling and order of the High Court given on 14<sup>th</sup> November 2012. We substitute therewith an order restraining the respondents from disposing the property situated in South East of Eldoret Municipality known as LR No. 8638/26 (I.R No. 98675) pending the hearing and determination of Eldoret High Court Civil Suit No. 69 of 2012 (OS).

26. We make no orders as to costs.

Orders accordingly.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of May, 2017.**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

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**DEPUTY REGISTRAR**