



**Ibrahim & 2 others v Bonaya & another (Civil Case E003 of 2021)
[2023] KEHC 429 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL CASE E003 OF 2021
DK KEMEL, J
JANUARY 20, 2023**

BETWEEN

**FATUMA IBRAHIM 1ST PLAINTIFF
FAISAL ABDIKADIR 2ND PLAINTIFF
FAROUQ ABDUL 3RD PLAINTIFF**

AND

**ABDIKADIR HUKA BONAYA 1ST DEFENDANT
NATIONAL BANK OF KENYA 2ND DEFENDANT**

JUDGMENT

1. By a further amended plaint dated March 19, 2015, the plaintiffs impleaded the defendants seeking orders;
 - a. The defendants should not sell or in future mortgage or charge the suit property and that he be compelled to pay the outstanding loan due to the 2nd defendant and a declaratory order be issued as against the defendants jointly and severally that they should not sell land parcel number EAST BUKUSU/SOUTH KANDUYI/8334 as it is the only matrimonial home to the children of the marriage between the 1st plaintiff and the 1st defendant and should the same be sold, the 1st defendant be ordered to provide a permanent home for the plaintiffs and their children.
 - b. In the alternative, the plaintiffs be allowed to pay the outstanding loan and the title herein reverts to them.
 - c. Costs of the suit.



2. The defendants filed their statement of defence denying the claim. It is averred that the 1st defendant divorced the 1st plaintiff in the year 2007 and married his second wife in the year 2008 wherein the children from his first marriage are all adults and working in various capacities. He avers that he purchased and built the matrimonial home on the suit property and by bringing the children of the marriage into the suit, the 1st plaintiff is yearning for sympathy from the court.
3. He denies the charge of the suit property to the 2nd defendant but if any was registered, the same was overboard which issue was sorted before the Chief Kadhi at Bungoma law courts on August 9, 2012 rendering the instant suit *res judicata*. The 1st defendant avers that he is the sole registered owner over the suit parcel and that the same was charged to the 2nd defendant over school fees loan. He avers that having divorced the 1st plaintiff, he is at liberty to dispose of any of his properties.
4. The 2nd defendant vide its statement of defence, averred that the 1st defendant was granted banking facilities by the second defendant but that he defaulted in repaying the same forcing it to seek to realize the security. It was also averred that the plaintiffs are strangers to the 2nd defendant who was under no obligation to seek for the consent, permission and or authority of the plaintiffs before entering into transactions with the 1st defendant and hence the suit is incompetent, misconceived, bad in law and an afterthought and ought to be dismissed with costs.
5. In the subsequent oral testimony, Fatuma Nuna Ibrahim testified as PW-1 and stated that she is the 1st defendant's wife having married in 1986 and were blessed with five children. That the 1st defendant is the sole registered owner of the suit property where their matrimonial home is established and having been living thereon with her children since the year 2003. She stated that they stayed peacefully until sometime in 2009 when her husband married a second wife and moved out of the house. In 2011 and 2012, her husband charged the property to the 2nd defendant without informing her and of late, the 1st defendant has come with various people visiting the property with the intention of disposing of the property.
6. She stated that she established that the outstanding loan was kshs 1.38 Million out of which her son secured some loan and paid off kshs 1 million. She stated that they do not have an alternative home.
7. On cross examination, she stated that she got divorced in 2012 and still resides on the suit parcel with her children. She got to know that a loan was taken in 2010 when she conducted a search on the property. She confirmed her apprehension that the bank may sell the property. She confirmed that the property was already registered in her husband's name when they got married. That the 1st defendant threatened to sell the property even after the loan has been cleared. She stated that her children are ready to repay the bank loan.
8. PW-2 Farouq Abdi Kadir stated that the 1st plaintiff and the 1st defendant are his biological parents whose marriage has not been formally dissolved. He stated that the land was acquired in the year 2000 through joint contributions of his parents and that the same registered in the 1st defendant's name in trust for the family as the head. The home was completed in 2003 and that they have lived thereon since then.
9. He stated that in 2010, the 1st defendant expressed intention to sell the property and when they resisted, he clandestinely charged the same to the 2nd defendant without their knowledge and or consent. That his father threatened not to pay off the loan which may ultimately lead to the selling off of the property and are living in fear of the property being sold off.
10. In cross examination, he stated that the kshs 1 million that they paid went into the 1st defendants personal account and are willing to pay up the balance to clear the loan.



11. Abdikadir Huka Bonaya testified as DW-1 by stating that he married the 1st plaintiff in 1986 and divorced her in 2007 before marrying another wife in 2008 under the Sharia law. That he is the sole registered owner over the suit property which he charged to the 2nd defendant for school fees loan to educate their children. He denied his intention to sell the property.
12. On cross examination, he confirmed the suit property was their matrimonial home which the plaintiffs are still residing on. That the suit property has two rental houses from which they share the proceeds. That he involved the 1st plaintiff when taking out the loan and she gave her permission and even handed over the title deed to him. He further stated that he did not have enough money to clear the loan and that the failure is not a deliberate scheme to punish the 1st plaintiff. He intends to clear the loan.
13. Chrispinus Wanyango Ogolla testified as DW-2 and stated that the 1st defendant was advanced the sum of kshs 600,000 as working capital to be paid in 36 equal monthly installments of kshs 16,600/- and secured by charge over the suit property. Another sum of kshs 500,000/- was advanced in 2011. When the borrower defaulted, the 2nd defendant issued a statutory notice of intention to sell the property which the 1st defendant ignored. That at the time of advancing the loan, there was no legal requirement for spousal consent and the bank should therefore be allowed to realize the security.
14. On cross examination, he stated that the security is registered in the 1st defendant's name. That the 1st defendant's proposal was allowed but still defaulted in payment and the bank therefore has the power to sell. He acknowledged the payment of kshs 1 million in 2010.
15. Subsequently, parties filed and exchanged written

Submissions.

16. The plaintiffs' submissions are dated October 19, 2022 and it is their submission that from the evidence on record, they have proved their case on a balance of probability and therefore entitled to the orders sought. It was submitted that the 1st defendant should not sell or in future mortgage or charge the suit property and that he be compelled to pay the outstanding loan due to the 2nd defendant. It was also submitted that the suit property is the only family home for the plaintiffs and in the event the same is sold, then the 1st defendant be ordered to provide a permanent home for them and in the alternative, the plaintiffs be allowed to pay the outstanding loan and the title be given to them. They urge the court to exercise its discretion and grant the prayers sought.
17. On his part, the 1st defendant identified the following issues.
 - a. Whether there existed a valid charge.
 - b. Whether the 1st defendant should be compelled not to sell or charge the suit property; and to pay the outstanding loan amount due to the 2nd defendant.
 - c. Whether the 2nd defendant can sell or dispose of the suit property to realize the loan amount.
 - d. Whether the plaintiffs are entitled to be registered as title owners over the suit property in the event they pay the outstanding loan amount.
18. On the first issue, it is submitted that the charge created over the property was valid since no spousal consent was required at the time. That even if the consent was a requirement, the parties had divorced. That the charges were registered in 2010 and 2011 which time the requirement for spousal consent was not required as the same was introduced by the *Land Registration Act, 2012*. Reliance is sought in the case of rose *Chepkirui Mibei vs Jared Mokuu Nyariki & 2 Others* (2015) eKLR.



19. On the 2nd issue, it is submitted that the court lacks the jurisdiction to dictate the exercise of privileges by a registered owner over his parcel of land. Reliance is placed on section 24 and 25 of the [Land Registration Act](#).
20. On the third issue, it is his submission that since he entered into agreement with the 2nd defendant over the loan which he is unable to pay, he is not opposed to the bank selling the property under section 90 of the [Land Act](#).
21. On the 4th issue, it is argued that the court has no power to make such orders as the same is governed by section 36-40 of the [Land Registration Act](#). That the same falls within the ambit of section 13 of the [Environment and Land Court Act](#). It was finally submitted that if the plaintiffs who are children of the 1st defendant are willing to support him then it should not be conditional but a gesture.
22. For the 2nd defendant, it is argued that it cannot be stopped from selling the suit property on the grounds of being matrimonial property yet spousal consent was not required at the time. Reliance has been sought in section 23(3) of the [Interpretations and General Provisions Act](#) and the case of [Elizabeth Nthenya Wambua vs Philip Wambua Musila & 3 Others](#) (2013) eKLR.
23. On the issue that the 1st defendant has admitted being unable to pay the decretal sum, it is argued on the authority in [Tanadad Transporters Vs Kenya Shell Limited](#) that the suit property ought to be sold and that where the default has been admitted, an injunction cannot issue to prevent the demand or enforcement by the 2nd defendant. It was argued that the suit is lacking in merit and should be dismissed.

Analysis and determination.

24. I have considered the evidence of the plaintiffs and the defendants as well as the submissions filed. I find the following issues necessary for determination;
 - a. The validity of the charge.
 - b. Whether the suit property was matrimonial property.
 - c. Whether a spousal consent was required before registering the charge.
 - d. Whether the court can grant the orders sought.
25. On the first issue, both defendants admit that they indeed entered into an agreement for a financial facility from the 2nd defendant in favour of the 1st defendant. The charges were registered over the suit parcel of land and entries were registered on November 8, 2010 and November 25, 2011. The letters of offer and charges have been availed as well as demand notices issued by the 2nd defendant.
26. Case law has established that any challenge on the validity of a charge places a heavy duty on the plaintiff to bring forth any such evidence that may displace the presumption that a charge is valid once the statutory requirements have been complied with. This was stated in [Equip Agencies Ltd v I & M Bank Ltd](#) [2017] eKLR where it was held:

" That section 56 of the [Land Registration Act](#), deals with the form and effect of registration of a charge and no legal charge can be registered unless the Registrar is satisfied that all the necessary consents and requirements have been fulfilled. Registration therefore automatically confers statutory compliance."



27. The court in that case relied on earlier sentiments expressed in *Coast Brick Tiles & Tiles v Premchand Raichand & Another* [1964] EA 187 where it was held;

" By section 32 upon registration the land specified becomes liable as security. In view of these provisions, I think that anyone who challenges the validity of a duly registered instrument (if he can do so at all) must discharge a substantial onus...."

28. The plaintiffs contend that the charge was invalid for failure to obtain spousal consent. However, both defendants maintain that at the time there was no requirement for spousal consent since the Land Registration Act came into force in the year 2012 and that the legal requirement could not operate retrospectively. Indeed, the 1st plaintiff admitted that she got married to the 1st defendant when he was already registered as proprietor of the suit property. The charge was registered prior to coming into force of the Land Registration Act 2012 and thus the spousal consent was not a requirement prior to the new law. That being the position, the 1st plaintiff's reliance on the absence of spousal consent is misplaced in view of the provisions of section 23 (3) of the Interpretation and General Provision Act which is to the effect that a repeal shall not affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed. I am in agreement with the holding of the court in the case of *Elizabeth Nthenya Wambua v Philip Wambua Musila & 3 Others* [2013] Eklr when it held thus:

" As regards the operation of section 93(2) and (3) of the Land Registration Act 2012, I observe that the Act came into operation in 2012 and it was not intended to have a retrospective operation. The transaction between the 1st and 2nd defendants was executed in 2005, when there was no requirement for spousal consent to be obtained before a spouse could deal with any asset registered in their sole name. In the premises, the 1st defendant could properly deal and transact with third parties without necessarily consulting and/ or obtaining the consent of the spouse as he was the sole registered proprietor of the suit property.

Charges taken before the enactment of Land Registration Act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the new Land Registration Act and therefore the plaintiff in the present case cannot take refuge under the new Act."

Going by the above observation, the 1st defendant was validly in order to charge the suit property without obtaining the spousal consent from the 1st plaintiff as it was not a requirement at the time. The 1st defendant being the registered proprietor of the suit land is at liberty to use it the way he desires. Under section 24 and 25 of the Land Registration Act, a person registered as proprietor has all the rights and privileges free from all other interests whatsoever subject to any other encumbrances as are shown on the register. Hence the charge created over the suit property in favour of the 2nd defendant was valid in all respects.

29. Regarding the second issue, section 2 of the [Land Act](#) No 6 of 2012 defines "matrimonial home" as

" ...any property that is owned or leased by one or both spouses and occupied by the spouses as their family home;



Matrimonial Property Act, 2013 defines matrimonial property as matrimonial home or homes. A further definition is provided under section 14 of the Act which provide that:

Where matrimonial property is acquired during marriage-

- a. In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- b. In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

30. The 1st plaintiff testified that the property was acquired jointly through their efforts and that they are still occupying the property with her children though registered in the 1st defendant's name. The 1st plaintiff confirmed in her evidence that the property was already registered in the name of the 1st defendant when they got married. As the 1st plaintiff has been residing on the suit property all this time then the property is for all intents and purposes a matrimonial property but the same claim will not supersede the rights of the 2nd defendant which has a charge over the suit property. Based on the evidence on record, I find that the suit property is matrimonial property but that the 1st plaintiff must bear in mind the interests of the 2nd defendant whose rights override hers. It is only until the 1st defendant clears the loan that the plaintiffs might make a move over the property either via a matrimonial property claim in the family division under the Matrimonial Property Act 2013 or approach the Environment and Land Court for redress if any. As it is, it is clear that the plaintiffs' options are limited. Even if the plaintiffs, as a family, opt to clear the loan, the title will still be in name of the 1st defendant unless they place a restriction on the register once the loan belonging to the 2nd defendant has been cleared or move to the Environment and Land Court for redress if any.
30. On the issue of whether this court has jurisdiction to compel thee the 1st defendant to provide a permanent home and or pay the outstanding loan and revert the title to the plaintiffs, the parties' respective arguments on the issue has been captured in the preceding paragraphs.
31. It is not in dispute that the 1st defendant is the registered owner of the suit parcel of land which he charged in favour of the 2nd defendant. In essence, the plaintiffs pray this court to order a transfer of the parcel of land in their favour once the loan facility is fully paid.
32. Section 13 of the Environment and Land Court Act determines the jurisdiction of the Environment and Land Court as follows'
 1. The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 2. In exercise of this jurisdiction under article 162 (2) (b) of the constitution, the court shall have power to hear and determine disputes-
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, land rates, rents, valuations, mining, mineral and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c) Relating to land administration and management;



- d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. Any other dispute relating to environment and land.

34. From the foregoing paragraph, it is clear that this court lacks jurisdiction to grant the order sought by the plaintiffs regarding the eversion of the ownership of the suit land from the 1st defendant to themselves and that the relevant forum is the Environment and Land Court. In the classic authority of *Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* [1969] KLR 1 the Court of Appeal held:

"Jurisdiction is everything. Without it, a court of law has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

34. Having examined the pleadings, the oral testimonies of the parties as well as the submissions, I find that an order for the provision of a permanent home and or transfer of the suit property to the plaintiffs is a matter which involves title to land. In light of the provisions of article 162 (2) (b) of the *constitution* and section 13 of the *Environment and Land Court Act*, this court lacks the requisite jurisdiction to grant the orders sought.

35. In view of the foregoing observations, it is my finding that the plaintiffs have not proved their case on balance of probabilities. Consequently, I find the suit lacks merit. The same is dismissed with costs to the defendants.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JANUARY, 2023

D KEMEI

JUDGE

In the presence of :

Mrs Chungu for plaintiffs

Were for Masiga for 1st defendant

No appearance for Bogonko for 2nd defendant

Kizito Court assistant

