



**PA v Stima Sacco Society Limited & 2 others (Civil Case 199 of 2018)
[2022] KEHC 294 (KLR) (Commercial and Tax) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 294 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 199 OF 2018
WA OKWANY, J
APRIL 28, 2022**

BETWEEN

PA PLAINTIFF

AND

STIMA SACCO SOCIETY LIMITED 1ST DEFENDANT

LEGACY AUCTIONNERING SERVICES 2ND DEFENDANT

DOO 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein, who describes herself as a female adult of sound mind residing in Nairobi, sued the defendants through the plaint dated 17th May 2018 for judgement against them jointly and severally following orders: -
 - a. A permanent injunction restraining the defendants whether by itself, its agents and its servants from selling, dealing, interfering, alienating or disposing or in any way interfering with the plaintiff's quiet possession of the property known as Nairobi/Block xx/xxx ("the suit property") pending the hearing and determination of the suit.
 - b. A declaration that the charge/mortgage instrument registered against the suit property is null and void.
 - c. An order for the cancellation of any entry of a charge/ mortgage on the title to the suit property.
 - d. General damages.
 - e. Cost of this suit.



f. Any other relief that this honourable court deems fit to grant.

The Plaintiff's case

2. The plaintiff's case is that 3rd defendant is her ex-husband and that pursuant to a mediation agreement adopted as a consent court order on 20th April 2018, it was agreed that the suit property is matrimonial property. The plaintiff avers that she learnt of the 1st and 2nd defendants' intention to sale the suit property upon being served with the 45 days Redemption notice and notification of sale. She states that a search conducted by her advocates revealed that the suit property had been charged in favour of Stima Sacco Society Limited without her consent.
3. The plaintiff further states that the 1st and 3rd defendants did not seek or obtain her consent before registering a charge over the suit property contrary to the provisions of Section 28(a) of the Land Registration Act 2012 and Section 79(3) of the Land Act 2012. She further faults the 1st defendant for failing to serve her with Statutory Notices and notification of sale. She contends that the charge is unlawful and does not give the defendants the right to sell the suit property in which the plaintiff has an overriding interest.
4. At the hearing, the plaintiff adopted her witness statement as her evidence in chief and produced the filed bundle of documents as exhibits. She testified that she was previously married to the 3rd defendant and that upon their divorce; the suit property was apportioned to their son in line with their mediation agreement. She stated that she receives rent from the suit property for their children's upkeep. She maintained that the 3rd defendant used the suit property as security to obtain a loan facility from the 3rd defendant without consulting her yet they were still legally married as at the time the charge was created.

The Defendants' Case

5. The first defendant, a licensed deposit-taking organization and the 2nd defendant, a licensed auctioneering firm filed a joint statement of defence wherein they deny the plaintiffs claim in entirety. They state that pursuant to a letter of offer dated 18th June 2015 the 1st defendant offered financial facilities to the 3rd defendant after which a charge was registered over the suit property. They state that the spousal consent dated 8th July 2015 was executed by one LAO who presented herself as the 3rd defendant's wife.
6. The defendants state that as at the time the charge was registered in 2015, the matrimonial cause between the plaintiff and the 3rd defendant had not commenced. It is the 1st defendant's case that the 3rd defendant defaulted on the payment thus precipitating the exercise of its statutory power of sale. The 1st defendant concedes that it did not deem it necessary to interrogate the veracity of the affidavit of spousal consent presented to it by the 3rd defendant.
7. At the hearing of the case, the 1st defendant presented the evidence of it Debt Collector Mr. Andrew Chege (PW1) who adopted his witness statement as his evidence in chief and produced the defendant's bundle of documents. He testified that the 3rd defendant was granted a loan facility of Kshs 10,000,000 in exchange of the suit property as security. He further testified that the 3rd defendant defaulted in the loan repayments thus prompting the 1st defendant to initiate the loan recovery process before it was stopped by a court order. He noted that the plaintiff was not known to the 1st defendant as the 3rd defendant introduced one L as his wife, who in turn gave the spousal consent.
8. On cross-examination, he testified that the 3rd defendant was a member of 1st defendant and that his official documents indicated that L is his wife. He explained that the on discovering that the



- plaintiff was the 3rd defendant's wife, the 1st defendant reported the matter to the Director of Criminal Investigations but that they did not follow up on the issue. He confirmed that the plaintiff was not involved in the loan acquisition process and that the 1st defendant did not know about her.
9. Parties summarized their respective cases by way of written submissions at the close of the hearing. I have carefully considered the pleadings, the evidence adduced during the hearing and the submissions made by the parties herein. I find that the main issues for determination are: -
 - a. Whether the plaintiff has overriding and beneficial interest.
 - b. Whether the charge over the suit property was lawfully registered in favour of the 1st defendant.
 10. It was not disputed that the plaintiff and the 3rd defendant were legally married and lived together as husband and wife. I note that among the documents produced by the plaintiff in her bundle of documents was a marriage certificate that signifies proof of her marriage to the 3rd defendant. The plaintiff testified that the suit property was acquired during the subsistence of their marriage and was therefore their matrimonial property.
 11. It was the plaintiff's case that she identified the suit property before its purchase and had been in its possession and control thus establishing overriding and beneficial interest in it.
 12. In *Kadzo Mkutano vs Mukutano Mwamboje Kadosho & 2 others* [2016] eKLR, it was held that; -

“Section 28 of the *Land Registration Act* recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent, is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void”.
 13. In *Mugo Muiru Investments Limited vs EWB & 2 others* [2017] eKLR the Court held that: -

“Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest. The evidence in this appeal shows that the Appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The Appellant took the property subject to Elizabeth's overriding interest in it and Elizabeth being a part owner could not be removed from the property. Even before the *Land Registration Act* came into force on 2nd May 2012, the equitable beneficial interest of spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the Appellant acquired the title registered in the name of S.B subject to the interest of Elizabeth. In effect, the Appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth's overriding interest nor was the Appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth's unregistered overriding encumbrance”.
 14. Guided by the decision in the above-cited cases, I find that the plaintiff had an overriding interest of the property even though she was its registered owner.



15. On whether the charge over the suit property was lawfully registered in favour of the 1st defendant, the plaintiff submitted that by registering a charge over the suit property without her consent, the 1st and 3rd defendants violated the her unregistered equitable overriding interest in the said property. It was the plaintiff's case that the charge is a nullity as the 1st and 3rd defendant did not obtain her spousal consent.
16. On its part, the 1st defendant maintained that it complied with the provisions of Section 79(3) of the [Land Act](#) 2012 when it obtained the spousal consent that was executed by one Ms. LAO. DW1 testified that the 3rd defendant introduced the said L as his wife. It was the 1st defendant's case that it did not have any reason to doubt the spousal consent given by the said LAO.
17. Section 79 (3) of the [Land Act](#) states as follows: -

“ A charge of a matrimonial home, shall be valid if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.”
18. Further Section 28 (a) of the [Land Registration Act](#) stipulates that: -

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
19. Having established that the suit property was matrimonial property and that the plaintiff had overriding interest in it, I find that the plaintiff's consent was required prior to the creation of the charge over it. Section 12 of the [Matrimonial Property Act](#) provides that: -

“An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.”
20. The 1st defendant's case was that it relied on the affidavit sworn by one L as proof of her marriage to the 3rd defendant. My humble view is that an affidavit per se, cannot be construed as proof of marriage (See [Elizabeth Gachambi vs Grace Nduta Kinuthia & another](#) [2017] eKLR). I find that in view of the centrality of spousal consent in the loan transaction, the 1st defendant should have conducted due diligence by going an extra mile to verify the relationship between the chargor and the said L before accepting the loan application. It did not escape the attention of this court that by reporting the matter to the investigative bodies, the 1st defendant realized that he had been duped 3rd defendant into believing that the said Linda was his wife.
21. I further find that the plaintiff provided uncontroverted proof that she was the 3rd defendant's legal wife as at the time the suit property was charged to the 1st defendant and that under Section 79(3) of the [Land Act](#) her consent was required in order to validate the charge.
22. In the present case, it is apparent that the 3rd defendant did not involve his wife in the loan transaction thus contravening the law with the net effect of making the said charge defective/null and void and therefore incapable of enforcement.



23. The applicant sought a permanent injunction to restrain the defendants from disposing of or dealing in any manner whatsoever with the suit property. In *Kenya Power & Lighting Co. Limited vs Sheriff Molana Habib* [2018] eKLR the Court defined a permanent injunction as; -

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

24. In a nutshell I find that the plaintiff has proved her case against the defendants on a balance of probabilities and I therefore make the following final orders: -

- a. A permanent injunction do issue restraining the defendants whether by itself, its agents and its servants from selling, dealing, interfering, alienating or disposing or in any way interfering with the plaintiff's quiet possession of the property known as Nairobi/Block xx/xxx
- b. The legal charge created over the property known as Nairobi/Block xx/xxx is null and void.
- c. General damages.
- d. Cost of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Kamunya for Plaintiff.

Mr. Farah for 1st and 2nd Defendants.

Court Assistant- Sylvia

