



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL CASE NO. 35 OF 2018

MAGDARINE NJERI KURIA.....PLAINTIFF

VERSUS

1. KENYA COMMERCIAL BANK LTD

2. INTEGRA AUCTIONEERING (K) COMPANY

3. GEORGE NJOROGE MURINGU.....DEFENDANTS

RULING

1. **MAGDARINE NJERI KURIA (Magdalene)**, filed this case seeking declaration that the legal charge over property **THIKA MUNICIPALITY BLOCK 20/182** has no legal effect for lack of spousal consent and for an injunction to restrain **KENYA COMMERCIAL BANK LTD (KCB)** the chargee from disposing the property.

2. There are two applications before court. The first is dated 16th February, 2018. By that application, **Magdarine** seeks the following orders:-

a) *A copy of the purported spousal consent allegedly signed by the plaintiff and which forms the basis of the suit.*

b) *A copy of the alleged application for the consent of the Land Control Board that resulted in the Land Control Board consent issued on 28/12/2015 and annexed to the 1st Defendant's replying affidavit sworn on 13/2/2018 as annexure No. PS7.*

c) *The original of the affidavit allegedly sworn by the plaintiff on 29/1/2016 and annexed to the 1st defendant's said replying affidavit as PS6a.*

d) *The account opening documents of account number 1149844183 operated jointly by the plaintiff and her husband, the alleged borrower at the 1st defendant's Thika branch.*

3. Prayer (a) and (c) relate to the same document. Spousal consent was made by affidavit dated 29th January, 2016.

4. The application is brought under the provisions of **Section 3A and 22** of the **Civil Procedure Act Cap 21**. **Section 3A** of **Cap 21** refers to the Court's inherent power to make such orders as may be necessary for the ends of justice. **Section 22 of Cap 21** provides:-

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either on its own motion or on the application of either party make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery and inspection, production, impounding and return of documents or other material objects producible as evidence

5. KCB filed the list and copies of documents it will rely upon at the trial on 31st October, 2019. One of the documents in that list is the spousal affidavit dated 29th January, 2016. Since those documents were served on Magdarine's advocate, the prayer for a copy of the said spousal affidavit, prayer (a) of the application is overtaken by events. A copy is in the possession of Magdarine's advocate. The same applies to prayer (b) where Magdarine seeks copy of the Land Control Board.

6. It will however be seen that Magdarine by prayer (c) of the application seeks to be supplied with the original of that spousal affidavit. The

court cannot make that order as sought. To make such an order would be to deprive KCB an original of a vital document in its case. That prayer therefore will and does fail.

7. Magdarine's prayer (d) where she seeks account opening documents of account 1149844183 is not supported by the pleadings before court. That account is in the name of Export Import East Africa Ltd. That company is not a party in this case. If discovery is what Magdarine sought of those account opening forms then since that account is not the subject in this case, it becomes clear Magdarine is fishing for evidence which cannot be permitted: See *HALSBURY LAWS OF ENGLAND Volume 13 at Paragraph 38* which provides:-

“Relevance must be tested by the pleadings and particulars and when particulars have been served which limit a particular issue then discovery on that issue is limited to the matter raised in the particulars...”

Discovery will not be ordered in respect of an irrelevant allegation in the pleadings, which, even if substantiated, could not affect the result of the action nor in respect of an allegation not made in the pleadings or particulars nor will discovery be allowed to enable a party to “fish” for witnesses or for a new case, that is to enable him frame a new case. Each case must be considered according to the issues raised; but where there are numerous documents of slight relevance and it would be oppressive to produce them all, some limitation may be imposed.”

8. In view of the above discussion, the Notice of Motion dated 16th February, 2018 is dismissed with costs.

9. The Notice of Motion application dated 13th November, 2020 by Magdarine is for leave to be granted to her to file supplementary list of witness documents. She wishes to file the handwriting expert report. She deponed that this leave is necessary because this suit was certified ready for hearing on 22nd September, 2020.

10. Although the application is opposed by KCB on the ground that Magdarine seeks to file the supplementary documents after pre-trial was undertaken and after the suit was fixed for hearing, I do find the interest of justice require that Magdarine be granted the leave sought. This indeed is in keeping with the holding of Court of Appeal in the case *CHASE BANK (KENYA) LIMITED VS. CANNON ASSURANCE (K) LTD (2019) eKLR* thus:-

“As correctly stated by counsel for the appellant, Order 3, rule 2 of the Civil Procedure Rules, require all suits filed to be accompanied by an affidavit, a list of witnesses to be called at the trial, witness statements and copies of documents to be relied on at the trial including a demand letter before action. However, if documents are not available as at the time of filing pleadings or a party wishes to introduce new or additional evidence, as often happens, the law provides a leeway in such circumstances and allows any party to seek leave of the court at any stage of the proceedings to amend its pleadings and file any relevant supplementary documents even after the close of pleadings. Such direction may be given by a court under the provisions of Order 11 of the Civil Procedure Rules.”

11. The Notice of Motion dated 13th November, 2020 will be allowed in terms of prayer 1 but Magdarine will bear the costs thereof because there is insufficient explanation given by her why the application was filed so late in the day.

DISPOSITION

12. In the end, I grant the following prayers:-

(a) The Notice of Motion dated 16th February, 2018 is dismissed with costs.

(b) In regard to Notice of Motion dated 13th November, 2020, leave is hereby granted to the plaintiff to file and serve her supplementary list of documents within 14 days of this date hereof.

(c) The plaintiff shall bear costs of the Notice of Motion dated 13th November, 2020.

(d) At the reading of this Ruling a hearing date of this case shall be fixed.

RULING DATED, SIGNED and DELIVERED at KIAMBU this 27TH day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant: Ndege

For the plaintiff/Applicant: Miss Kiruthi

For the 1st defendant: Miss Kabata H/B for Njoroge Kugwa

For the 2nd defendant: Miss Kabata H/B for Njoroge Kugwa

For the 3rd defendant: No appearance

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE