



REPUBLIC OF KENYA



**Wamukoya v Mulama & 2 others (Environment and Land Appeal
E21 of 2021) [2023] KEELC 18184 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E21 OF 2021**

**DO OHUNGO, J
JUNE 13, 2023**

BETWEEN

GEORGE MULAMA WAMUKOYA APPELLANT

AND

SIPROSE ATIENO MULAMA 1ST RESPONDENT

MOHAMED CHITUYI SHABAN 2ND RESPONDENT

FAMILY BANK LIMITED 3RD RESPONDENT

(Being an appeal from the judgment and decree of the Senior Principal Magistrate's Court at Mumias (Hon. T. A. Odera, Senior Principal Magistrate) delivered on 25th May 2021 in Mumias MELC No. 37 of 2019 George Mulama Wamukoya v Siprose Atieno Mulama & 2 others)

JUDGMENT

1. This appeal traces its roots to the plaint dated 18th September 2019, which the appellant filed in the Subordinate Court, against the respondents herein. The appellant and the first respondent are husband and wife, and the first respondent is the registered proprietor of the parcel of land known as N/wanga/Matungu/1801 (the suit property). The appellant averred that the suit property was matrimonial property, and that the first respondent charged the suit property without his knowledge or consent in favour of the third respondent to secure a loan advanced to the second respondent. That the second respondent defaulted, and the third respondent advertised the suit property for sale by public auction. He contended that the process of creation of the charge and advertisement was unlawful. He therefore prayed for judgment against the respondents jointly and severally for a declaration that the registration of the charge was illegal and null and void, an order cancelling the charge, release of the title to him and a permanent injunction restraining the respondents and their agents from interfering with the suit property.



2. The first and second respondents did not file any defence. On its part, the third respondent filed a defence in which it admitted that the first respondent is the registered proprietor of the suit property, that the suit property was charged in its favour, that the second respondent defaulted, and that it instructed an auctioneer who advertised the suit property for sale by public auction. It denied the appellant's claims as regards spousal rights and urged the court to dismiss the case.
3. Upon hearing the matter, Hon. T. A. Odera, Senior Principal Magistrate (as she then was) delivered judgment on 25th May 2021 in which she found that the appellant had failed to prove his case. Consequently, the appellant's case was dismissed with costs to the third respondent.
4. Aggrieved with the outcome, the appellant filed this appeal through Memorandum of Appeal dated 21st June 2021. The following grounds are listed on the face of the memorandum:
 1. That the learned magistrate erred in law and fact in failing to appreciate that the suit property having been acquired during the subsistence of marriage, the Appellant had acquired spousal rights under the *Land Registration Act* 2012 which were overriding rights in land and the 1st Respondent could not charge the same without the Appellant's consent.
 2. That the Leamed magistrate misdirected herself in finding that the 3rd Respondent by relying on a false affidavit from the borrower predating the offer letter had discharged its duty to inquire of the borrower on whether her spouse had consented as envisaged under S. 93(3) of *Land Registration Act* No. 3 of 2012.
 3. That the learned magistrate erred in law and fact in relying on her own holding that the 3rd Respondent had discharged its duty to inquire of the borrower on whether her spouse had consented as envisaged under S. 93(3) of *Land Registration Act* No. 3 of 2012 while that line defence had never been raised in its (read 3rd Respondent's) defence.
 4. That learned magistrate erred in law and fact in having found that the 1st Defendant had indeed created the Charge by falsely claiming that she was a widow, failing to hold that the Charge was by dint of Section 93 (4) of the *Land Registration Act*, void at the option of the Appellant.
 5. That the leamed magistrate misdirected herself in failing to consider and evaluate the Appellant's evidence on record or assigning reasons for disregarding the same as well as the Appellant's submissions.
5. The appeal was canvassed through written submissions. The first and second respondents did not file any submissions. They indicated to the court that they do not oppose the appeal.
6. The appellant argued that the suit property was acquired during his marriage to the first respondent and that he acquired spousal rights over it under Sections 28 (a) and 93 of the *Land Registration Act* 2012 and Section 9 of the *Matrimonial Property Act*. That considering that the Further Legal Charge was dated 24th November 2014, the law applicable to it was Section 93 (3) of the *Land Registration Act* 2012 which imposed a duty on the third respondent to enquire from the first respondent whether her spouse had consented to creation of the charge. That in the circumstances, spousal consent was mandatory.
7. The appellant further argued that the third respondent's claim that it relied on an affidavit by the first respondent to the effect that her spouse was deceased is illogical since the first respondent denied signing the affidavit, since the affidavit was sworn almost six months before the loan was applied for and further considering that the appellant is alive. That, consequently, the third respondent failed to discharge its duty under Section 93 (3) of the *Land Registration Act* 2012. That the learned magistrate



- having found that the first respondent created the charge by falsely claiming that she was a widow ought to have held that the charge was void in view of Section 93 (4) of the [Land Registration Act](#) 2012. The appellant therefore urged the court to allow the appeal.
8. In response, the third respondent argued that it conducted due diligence as required by law and that since the first respondent provided an affidavit stating that her spouse was deceased, it did enough and should not be punished for wrongdoings committed by the first respondent. That commercial transactions are conducted on the basis of principles of *uberrimae fidei* and trust and that the first respondent was obligated to give true and correct information. That during her testimony, the first respondent confirmed that she voluntarily offered the suit property as security and that she signed the affidavit.
 9. The third respondent further argued that the litigation was in respect of the loan which was restructured through letter of offer dated 16th May 2017 which was after repeal of Section 28 (a) of the [Land Registration Act](#) 2012. That, consequently, spousal consent was not required, and that the affidavit cannot be challenged merely because it predated the loan application. It further argued that it cannot be made to bear the burden of the first respondent's lies in the affidavit and that the circumstances show connivance between the appellant and the first respondent. It therefore urged the court to dismiss the appeal.
 10. This being a first appeal, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [Abok James Odera & Associates v John Patrick Machira t/ a Machira & Co. Advocates](#) [2013] eKLR.
 11. I have considered the grounds of appeal, the pleadings, the evidence, the parties' submissions, and the authorities cited. The issues that arise for determination in this appeal are whether spousal consent was required, whether the third respondent discharged its obligations in creating the charge and whether the reliefs sought were available.
 12. There is no dispute that following an offer letter dated 29th October 2014, the third respondent advanced a finance facility of KShs 1,500,000 to the second respondent which facility was secured by a First Legal Charge dated 24th November 2014 and a Further Charge dated 18th November 2014 over the suit property. The first respondent, being the registered proprietor, does not deny signing the First Legal Charge and the Further Charge. It is further not in dispute the second respondent defaulted in February 2016, because of which the third respondent started the process of exercising chargee's power of sale.
 13. At the time the first respondent executed the First Legal Charge and the Further Charge, Section 28 (a) of the [Land Registration Act](#) 2012 provided that unless the contrary was expressed in the register, all registered land was subject to spousal rights over matrimonial property as an overriding interest. It is not disputed that the suit property is matrimonial property which is defined at Section 2 of the [Land Registration Act](#) 2012 to mean any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage.
 14. Section 93 (3) (a) of the [Land Registration Act](#) 2012 provided that where a spouse who held land or a dwelling house in his or her name individually undertook a disposition of that land or dwelling house the chargee was under a duty to inquire of the borrower on whether the spouse had consented to the



charge. Thus, spousal consent was required at the time the first respondent executed the First Legal Charge and the Further Charge.

15. The question that follows is whether the third respondent discharged its obligations in creating the First Legal Charge and the Further Charge. At the trial, the first respondent stated in her testimony that:

The borrower approached me for security as he needed capital input to buy a machine. I agreed to charge the property in good faith. The forms were brought to me marked by yellow stickers. We had talked about it for a while. It is possible that [the spousal affidavit] was among the documents I signed.

16. I am persuaded that just like she did to the First Legal Charge and the Further Charge, the first respondent signed and swore the spousal affidavit on 9th April 2014. She stated in the affidavit as follows:

2. That I have agreed to charge my title for a loan facility as security to Mohammed Chituyi Shabban on land title deed number N. Wangamungu/1801 registered in my name.
3. That my Husband is deceased and I am not married to any other husband hence the issue of spousal consent and execution is not applicable to me.
4. That I swear this affidavit to confirm and verify that I am a widow and have no other spouse.
5. That the facts deponed to herein are all true and correct to the best of my knowledge, information and belief.

17. As is now manifest, the first respondent lied on oath when she stated that she was a widow without a spouse. Based on her said statement, which she made to facilitate the second respondent's loan application, the third respondent proceeded to advance the facility to the second respondent and to use the suit property as security. In terms of Section 93 (3) (a) of the *Land Registration Act* 2012, all that the third respondent was required to do was to inquire of the first respondent whether her spouse had consented to the charge. Since the first respondent deliberately lied on oath and of all things claimed that the appellant was deceased, the third respondent could not be expected to do more. I am hardly surprised that the first and second respondents did not file any defence before the Subordinate Court and further told this court that they do not oppose this appeal. I am also not surprised that the appellant has not done anything to make the first respondent to account for her lie on oath that led to the property being charged without his consent.

18. The appellant argued that the charge was void in view of Section 93 (4) of the *Land Registration Act* 2012. However, as correctly pointed out by the third respondent, the default that led to the litigation herein occurred after the loan was restructured through letter of offer dated 16th May 2017. By then, Section 28 (a) of the *Land Registration Act* 2012 had been repealed through Land Laws (Amendment) Act 2016 which came into operation on 21st September 2016.

19. Courts in this country have repeatedly stated that once a property is charged, it becomes a commodity for sale. In *Joseph Gitau Gachau & Anor v Pioneer Holdings (A) Limited & 2 others* [2009] eKLR the Court of Appeal encountered a couple who argued that their matrimonial property should not be sold since they would thereby be robbed of a matrimonial property to which they had sentimental value in their sunset years. The court stated:

... we recognize the argument put forward by the applicants that the suit property is a matrimonial home in which they occupy in their now sunset years. But we would like to



point out that couples such as the one now before us must realize that when they charge their matrimonial property to secure a loan, they are in fact converting that property into a commodity for sale available for purchase by all and sundry, if they fail to pay the charge debts or the loans and that no sentimental value or attachment to the mortgaged property, however great, per se, would operate against the exercise of statutory power of sale by the mortgagee....

20. The appellant herein should pursue the first respondent for any loss that he may suffer out of her dishonesty in the manner in which she charged the suit property. If he is happy to make the first respondent his ally in attempting to defeat the rights of the third respondent bank which advanced a loan based on his spouse's perjury then he should be content to behold the suit property being sold to recover what is due to the third respondent. I am satisfied that the third respondent discharged its obligations in creating the charge based on the information that the first respondent provided. In the circumstances, the reliefs that the appellant had sought were not available.
21. In view of the foregoing, I find no merit in this appeal. I dismiss it with costs to the third respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 13TH DAY OF JUNE 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Kisaka for the Appellant

No appearance for the 1st Respondent

No appearance for the 2nd Respondent

Ms Kihima holding brief for Mr Mbogo for the 3rd Respondent

Court Assistant: E. Juma

