



SMM1 & another v Kenya Women Microfinance Bank Limited & another (Civil Case 223 of 2019) [2021] KEHC 171 (KLR) (Commercial and Tax) (28 October 2021) (Ruling)

Neutral citation: [2021] KEHC 171 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 223 OF 2019
WA OKWANY, J
OCTOBER 28, 2021**

BETWEEN

**SMM1 1ST PLAINTIFF
SMM2 2ND PLAINTIFF**

AND

**KENYA WOMEN MICROFINANCE BANK LIMITED 1ST DEFENDANT
VIEWLINE AUCTIONEERS 2ND DEFENDANT**

RULING

1. This ruling determines 2 applications, namely; the defendants’ application dated 31st March 2021 seeking orders, inter alia, for access the plaintiff’s property known as LR No.xxxx (Mississippi Court, Kamiti Ridge Estate) (hereafter “the Suit Property”) in order to carry out a valuation and the plaintiffs’ application dated 19th May 2021 for orders of stay of proceedings pending the hearing and determination of Milimani Matrimonial Cause No. E027 of 2021 between the 1st and 2nd plaintiffs.
Defendant’s application.
2. The plaintiffs opposed the defendants’ application for access to the suit property through the Grounds of Opposition dated 19th May 2021 on the basis that there exists a matrimonial cause wherein the suit property is the subject of distribution.
3. The defendants’ application is supported by the affidavit of the 1st defendant’s Head of Late Recovery and Remedial Services, Bessy Mbora, and is premised on the grounds that: -
 1. The Defendant/Applicant advanced loan facilities to the plaintiff vide facility letter dated 19th June 2017.



2. That a First Legal Charge dated was registered over the property known and registered as LR No. xxxx, MISSISSIPI COURT located at KAMATI RIDGE ESTATE KIAMBU COUNTY as security for the said facility.
3. The charge gave the bank the right to realize the security in case of default in repayment of the sum due.
4. The respondent breached the terms of the agreement by defaulting on its payment obligations despite the applicant's numerous demands to have the account regularized prompting the applicant to initiate the realization process.
5. The respondent in an effort to stop the process filed this suit which was later compromised by the consent of the parties filed on the 17th September 2019 and adopted by court.
6. The consent Clause(G) contained default clause granting the defendant the right to proceed with realization of the security in case of default in payment.
7. That the respondent, in breach of the terms of the consent, defaulted on his repayment obligations thus prompting the applicant to initiate the process of realization of the security.
8. Before an auction can be conducted, it is necessary that valuation in compliance with the provisions of Section 97(2) of the Land Act is conducted to determine the forced sale value of the charged property.
9. That the applicant thereafter instructed a valuer to inspect the premises and prepare a valuation report in compliance with the provisions of Section 97 of the Land Act but the respondent has declined to grant access to the property to date.

Stay of proceedings.

4. The plaintiffs seek to stay these proceedings pending the hearing of the Matrimonial Cause between them.
5. The application is supported by the 1st plaintiff's affidavit and is premised on the grounds that: -
 - a) That the matter herein is scheduled for mention for parties to confirm they have filed their respective responses and submissions to the 1st respondent's application dated 31st March, 2021 on the 20th May, 2021.
 - b) That the 1st respondent's application seeks order of valuation and subsequently auction the applicants' parcel of land known as Land Reference Number xxxx (Mississippi Court, Kamiti Ridge Estate) measuring approximately 0.045 hectares yet this property is under Milimani Matrimonial Cause Number HFCOS/E027/2021, SMM1 vs SMM2.
 - c) That if this Honourable court proceeds and hears the 1st respondent's application without a final determination of Milimani Matrimonial Cause Number HFCOS/E027/2021, SMM1 vs SMM2 is made on who should own the Land Reference Number xxxx (Mississippi Court, Kamiti Ridge Estate) measuring approximately 0.045, the owner of the property will suffer great financial loss and prejudice.
 - d) That due to the emotive nature of the dispute between the parties, the property in question being a matrimonial home, the applicants are of view that this matter be stayed until the hearing and determination of the Matrimonial Cause.



- e) That otherwise the applicants are at risk of being condemned unheard in violation of their rights to a fair hearing and all the known principles of natural justice.
 - f) That the applicants will suffer great prejudice if the court proceeds to hear the 1st respondent application dated 31st May 2021 and take further steps in this suit without awaiting the determination of the Matrimonial Cause.
 - g) That the applicants will therefore suffer irreparable harm and damage if the 1st respondent is allowed to go ahead with the intended sale of the property in violation of the law.
 - h) That the interest of justice therefore tilts of allowing the applicants application herein.
6. The 1st defendant opposed the plaintiffs' application through the replying affidavit of its Debt Recovery Supervisor Mr. John Kizito who states that the application is absurd and is merely intended to frustrate the rights of the Bank in exercising its statutory power of sale. He explains that immediately the Defendant filed the application for access to the charged property for purposes of carrying out a valuation, the plaintiffs rushed to institute the proceedings before the Family Division claiming a supposed matrimonial dispute and thereafter filed grounds in opposition to their application alleging that the Bank wants to value the property yet the same is the subject of the alleged Matrimonial Cause. The defendant's deponent states that the application is a well-planned scheme to hide behind a divorce case filed way after the Defendant's application in order to justify the many attempts to frustrate the Bank's exercise of its statutory power of sale. He states that following the filing of this suit, parties recorded a consent in which it was agreed that the Plaintiff repays the loan by instalments which agreement the Plaintiff did not honor thus precipitating the Banks action to realize the debt.
7. According to the defendant, the application for stay of proceedings is one among the many tricks that have been employed by the Plaintiffs to frustrate the defendant's right to recover the debt.
8. The applications were canvassed by way of written submissions which I have considered. The main issues for determination are whether the court should grant the 1st defendant an order to access to the suit property for purposes of carrying out a valuation and whether the plaintiffs have made out a case for the granting of orders for stay of proceedings.
- Access to the suit property.
9. The 1st defendant seeks orders to enable its valuers to access to the suit property for purposes of carrying out a valuation of the said property before it can be sold in order to realize the security.
10. Section 97(2) of the Land Act stipulates as follows: -
- A chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer.
11. Clause 6.5 of the parties' charge document states as follows: -
- “Permit the bank at any time should the bank so require to instruct a surveyor or valuer to inspect and report on the charged property....”
12. It was not disputed that the 1st defendant advanced a loan facility to the plaintiffs for which the suit property was offered as security. It was also not disputed that the plaintiffs defaulted in the loan repayments thereby precipitating the filing of this suit wherein the parties recorded a consent containing default clause allowing the 1st defendant to go ahead with the realization of the security in default of payment. The plaintiffs did not comply with the terms of the consent thereby leaving the



1st defendant with no option but to proceed with the exercise of its statutory power of sale which it can only undertake after carrying out the valuation of the suit property in line with the Section 97(2) of the Land Act.

13. Having regard to the above analysis, I am satisfied that the 1st defendant has made out a case for the granting of orders to allow it to access the property for purpose of carrying out the valuation.

Stay of proceedings

14. *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, states as follows on the threshold to be met for stay of proceedings: -

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

“This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.”

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

15. The plaintiffs seek to these proceedings on the basis that they have a Matrimonial Cause that is pending determination. My finding is that the reasons advanced by the plaintiffs for seeking to stay of proceedings are not plausible for the following reasons; firstly, both the plaintiffs executed the charge document in pursuit of a loan facility from the 1st defendant and they are therefore expected to have been aware of the consequences of their default on suit property; secondly, upon filing this suit and seeking orders of injunction, a consent was recorded wherein the plaintiffs agreed to repay the loan with a rider that the 1st defendant will be at liberty to continue with the exercise of its statutory power of sale in the event of a default. Needless to say, the plaintiffs defaulted in the said repayments thus necessitating the 1st defendant's actions which the plaintiffs now seek to stay.

16. From the above background of the case, I find that, in the circumstances of this case, allowing the stay of proceedings will be tantamount to indirectly granting the plaintiffs orders of injunction when they have clearly defaulted in their obligations under the aforementioned consent order and the terms of the charge.

17. Moreover, courts have taken the position that the mere fact that the charged property is a matrimonial home alone will not suffice as a ground for granting an injunction as long as the chargee has fully adhered to the law. This is the finding that was made in the case of *Julius Mainye Anyega vs Eco Bank Limited [2014] eKLR* where the court expressed itself as follows: -

“Property is matrimonial home

The suit property may be a matrimonial home. But what is startling is the Applicant's argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee's Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory



power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation) that;

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

18. In the case of *Maithya vs Housing Finance co. of Kenya & Another [2003] 1 EA 133 at 139* the court stated as follows:

“Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities...loss of the properties by sale is clearly contemplated by the parties even before the security is formalized”.

19. The court in *Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR* held as follows regarding matrimonial property:

“It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee’s statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the [Land Act](#) is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the [Land Act](#). The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.

The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee’s statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home.”



20. For the above reasons, I am not satisfied that the plaintiffs are entitled to the prayers sought in the application dated 19th May 2021 which I hereby dismiss with costs to the defendant. I allow the defendant's application dated 31st March 2021 as prayed.

Dated, signed and delivered via Microsoft Teams at Nairobi this 28th day of October 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Maondo for the Defendant.

Ms Wambua for the Plaintiffs.

Court Assistant: Sylvia.

