



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 352 OF 2018

RNKPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS.....2ND DEFENDANT

J U D G M E N T

1. RNK(R) is the wife of AKK(A). AKK has an account with Barclays Bank of Kenya Limited (the Bank). The bank afforded AKK some banking facilities which facilities were secured by a charge over property No. L.R. [...] House No. [...] (the suit property). AKK defaulted in his repayments of those facilities. The bank in exercise of its statutory powers scheduled a sale of the charged property by public auction. The auction was due to take place on 4th September 2018. RNK filed this case alleging that the suit property was her matrimonial house where she resides with AKK and their two children aged 14 years and 8 years. RNK sought by an interlocutory application, dated 28th August, 2018, interlocutory injunction to restrain the Bank from selling by public auction the suit property. RNK sought that interlocutory injunction on the ground that she had not given her spousal consent to the charging of the suit property. It is also on that ground that RNK seeks by this suit a declaration that the charge registered over the suit property is null and void and therefore also seeks a permanent order of injunction restraining the bank from realizing its security by auctioning the suit property.

2. When the interlocutory injunction application came up for interpartes hearing parties consented to an interlocutory injunction being issued on condition that this suit be fast tracked for hearing.

3. The hearing of this case was on 16th September 2019.

4. RNK stated in her evidence in chief that AKK is the registered owner of the suit property, their matrimonial home. That they had been in occupation of the suit property for 12 years. She stated that AKK obtain loans from the bank without her knowledge or consent. She stated that AKK had failed to service the loan and the suit property was in danger of being auctioned by the bank. That although she resides in the suit property with their young children the bank failed to give her notice of the impending auction of the suit property. She therefore termed that auction as illegal and if it did proceed it would affect her and their children.

5. The bank filed a defence, in this matter, on 1st March 2019. In that defence the bank stated that RNK was all along aware that AKK had obtained loans from the bank. That RNK had, by an affidavit dated

27th March 2014, given her spousal consent to AKK using the suit property as security for the loan.

6. The evidence on behalf of the bank was led by Joseph Muli. Muli is the bank's Corporate Recoveries Officer. He led evidence to the effect that AKK had secured by charging the suit property for loan facilities granted by the bank on 25th February 2008, 31st December 2010 and 27th March 2014. That at the time of executing the charge of 27th March 2014 RNK gave her spousal consent to the charge, as required under the law. That AKK subsequently defaulted in his repayment of his loan which led the bank to issuing him with requisite statutory notices of sale. AKK on failing to regularize his loan repayments the bank instructed the 2nd Defendant, the auctioneer, to issue the 45 days' redemption notice and notification of sale. Muli therefore stated that bank had followed due process before scheduling the sale by public auction of the suit property. It is because of that, that Muli stated that RNK's suit was on abuse of the court process. Muli relied on bundle of documents which included statutory demands sent to AKK and copied to RNK and the auctioneer's redemption Notice and notification of sale. Muli also produced the affidavit of RNK, whereby RNK gave her spousal consent to charging of the suit property. That affidavit was sworn by RNK before an Advocate called Fresiah Githinji who is a Commissioner of Oaths.

7. Despite the documents produced by Muli on behalf of the Bank being in the possession of the Learned Advocate for RNK those documents were not referred to, by RNK, while RNK testified in chief. It was not until RNK was cross-examined, by the Learned Advocate for the bank, that RNK testified on those documents.

8. RNK was cross-examined on the bank's Letter of Offer dated 26th November 2010 to AKK for a banking facility. In that letter AKK's signature is witnessed on 30th November 2010 by RNK. This is how RNK responded to being questioned about her said signature:

“No I don't remember because I have actually not seen any documents because when the house was purchased (the suit property) the only thing I know is we got a Letter of Offer from Barclays and that was it.”

9. When RNK was informed that she wrote her full name and signed that Letter of Offer she responded:

“I see this here but this is not me. Actually even the handwriting is not mine.”

10. RNK termed that signature as a forgery but when she was asked whether she reported that forgery to the police she responded:

“No, I didn't because I didn't pay much attention to it.”

11. When RNK was informed that there is an affidavit sworn by her dated 27th March 2014 sworn before a commissioner of Oaths, Frasih M. Githinji, where she gave her spousal consent to AKK charging the suit property. RNK retorted:

“No its not mine.”

12. After RNK was referred to different documents before court where she had appended differing signature and after she was asked if she had multiple signatures – she responded:

“He (AKK) is the one who owes Barclays money and in this suit my interest is to salvage the house for the sake of myself and the children and the money he took was not for us. It was for his business.”

ANALYSIS AND DETERMINATION

13. The two issues before me are; did RNK prove that the suit property was her matrimonial home and if

so did she give her spousal consent for the loan given to AKK by the bank.

14. On the first issue I find that RNK did not prove that the suit property was her matrimonial home. Other than saying that it is the house where she resides with AKK and their two children there was nothing before court to indeed prove it was their matrimonial home. It was not enough, in my view, to present a photograph of the exterior of the suit property, as RNK did. For all I know that property could be for use as an office and not a home. In this regard I rely on the case **ESTHER NJERI MWANGI V EQUITY BANK LTD & ANOTHER (2017) eKLR** where Justice J. G. Kemei made a similar finding thus:

It is the Plaintiff's assertion that the charges are invalid due to absence of her consent as the spouse of the borrower..... She also urged that the suit property is her matrimonial home; that she resides there with her children and stands to be rendered destitute if the suit property is sold. The Plaintiff has led no evidence to prove that her matrimonial home is situated on the said property. It is her duty and responsibility to bring herself under the armpit(sic) of Section 2 of the Matrimonial Act which defines a Matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property. It was her duty to lay evidence before the Court that the Plaintiff and 2nd Defendant occupy the suit property as their family house and that there is a home on the suit property and that the Plaintiff and 1st Defendant occupy the home as their formerly home/matrimonial home. I hold and find that the Plaintiff has not established that she is a spouse for which consent was required and secondly that the suit property is a matrimonial property.

15. It follows that in respect to the first issue identified above I find that there is no proof, on a balance of probability that the suit property is a matrimonial home of RNK and AKK.

16. There are various statutory provisions which require a spousal consent be given when matrimonial home is used as security for a loan.

17. **Section 79 (3) of the Land Act** provides:

(3) A charge of a matrimonial home, shall be valid only 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. Similarly, **Section 12(5) of the Matrimonial Property Act** provides:

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

Section 93 (3) and 4 of the Land Registration Act provides:

(3) Where a spouse who holds land or a dwelling house in his or her name individually undertakes a disposition of that land or dwelling house—

(a) the lender shall, if that disposition is a charge, be under a duty to inquire of the borrower on whether the spouse has or spouses have, as the case may be, have consented to that charge; or

(b) the assignee or transferee shall, if that disposition is an assignment or a transfer of land, be under a duty to inquire of the assignor or transferor on whether the spouse or spouses have consented to that assignment.

(4) If the spouse undertaking the disposition deliberately misleads the lender or, the assignee or transferee by the answers to the inquiries made in accordance with subsection (3)(a) or (3)(b),

the disposition shall be void at the option of the spouse or spouses who have not consented to the disposition.

19. It is clear that there was statutory requirement for the bank to ensure that the facility given to AKK had spousal consent, if the property is matrimonial property.

20. RNK it will be recalled confirmed under oath that she had multiple signatures. That then can support the bank's contention that RNK did indeed, by her affidavit of 27th March 2014 give her spousal consent.

21. I have noted one of RNK's exhibits before court (marked as RNKI) is RNK's National Identity Card. That National Identity Card has RNK's signature. That signature is the same as appears on RNK's witness statement; in this case, dated 28th August 2018; also as the signature to RNK's verifying affidavit in support of her Complaint herein; is similar to the signature appearing at page 4D of the Bank's exhibits, that is RNK's witness of AKK's signature on the Letter of Offer of the bank dated 26th November 2010; and most importantly it is the signature on the affidavit of RNK of 27th March 2014 whereby she gave her spousal consent.

22. RNK has another differing signature on her affidavit in this matter dated 28th November 2018.

23. RNK stated, while being cross-examined, that the signature in her affidavit of spousal consent and on her witness of AKK signature were forgeries. RNK had a burden to prove that indeed those signatures were forgeries. The documents containing those signatures, she alleges were forgeries, were served on RNK Learned Advocate before the pre-trial conference was undertaken in this case. RNK ought to have sought the help of a handwriting expert to prove indeed that these signatures were forgeries. Contrary to the submissions of RNK's Learned Advocate the burden of proof that those signatures were forgeries lay at the doorstep of RNK. That is what section 107 and 109 of the Evidence Act provides. It was the case of RNK that she did not give spousal consent. On being served with the spousal consent, by the bank, it was incumbent upon RNK to prove that spousal consent was a forgery.

24. **Section 107 of Evidence Act** provides:

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

25. **Section 109 of Evidence Act** provides:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

26. RNK desired this court to find she did not give spousal consent. The burden to prove that she did not give a spousal consent lay on RNK. That is what section 107 and 109 of the Evidence Act provide. In this regard I rely on the case **ROBERT OUMA NJOGA V BENJAMIN OSANO ONDORO (2016) eKLR** thus:

“The well-known aphorism, “he who asserts must prove” was augmented by the Court of Appeal in Jennifer Nyambura Kamau v Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010[2013]eKLR as follows

We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an

expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.....

*Since the defendant raised the issue of forgery it was incumbent upon him to prove it as required by **section 107** of the **Evidence Act**. It was his burden to call the expert witness to prove the fact that the signature on the voucher was not his. On that issue the case of **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi (Supra)** is on fours with this case.”*

27. The second issue is found in the positive, that is there was spousal consent given by RNK.

28. In the end the Plaintiff’s case fails and this case is accordingly dismissed with costs to the Defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **27th day of April, 2020.**

MARY KASANGO

JUDGE