



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. E 273 OF 2019

CHRISTINE ADHIAMBO ODUOR.....PLAINTIFF

VERSUS

REAL PEOPLE KENYA LTD.....1ST DEFENDANT

JACKSON OCHIENG KANOT.....2ND DEFENDANT

SEPERFEW AUCTIONEERS.....3RD DEFENDANT

RULING

This ruling relates to a Notice of Motion application dated 4th September 2019, pursuant to **Section 3 (A) & 63(E) of the Civil Procedure Act, order 40 rules 1 & 2 of the Civil Procedure Rules** and all other enabling provisions of the law. The Applicant sought orders:

That this Court issues an interim injunctive order against the Respondents by themselves, their agents, servants, auctioneers, assigns their representatives and or any other person whatsoever from selling, offering for sale, interfering, disposing of, alienating, subdividing and or in any way tampering with the land parcel **No. Bukhayo/Bugengi/8136** pending the hearing and determination of this application and the subsequent suit and/or hearing of the suit.

SUPPORTING AFFIDAVIT

The application was supported by an affidavit dated 4th September 2019, sworn by Christine Adhiambo Oduor the Applicant herein. She averred that she was married to the 2nd Respondent in 2010 under the Luhya Customary Law and since then they have been living together happily as husband and wife.

She stated that their union was blessed with two issues namely;

1. VK - 8 years old – son
2. PK - 5 years old – daughter

2ND RESPONDENT'S REPLYING AFIDAVIT

The application was opposed vide an affidavit dated 27th September 2019, sworn by Jackson Ochieng Kanot the 2nd Respondent herein. He stated that he had never known that he needed to inform his wife (herein **“the Applicant”**) of the loan facility that he had taken with the 1st Respondent as the officers of the 1st Respondent always told him that there was no need, they would just give him a loan.

1ST AND 3RD DEFENDANTS' REPLYING AFFIDAVIT

The application was further opposed by an affidavit dated 23rd September 2019, sworn by Elvis Kitaa the Legal Officer of the 1st Defendant.

He deponed that in September 2017, the 2nd Defendant trading as “**Genesis Glassmart**” applied for a loan facility of Ksh. 1,000,000/= from the 1st Defendant to enhance his working capital.

That before the approval of the loan facility, the 1st Defendant’s officials visited the 2nd Defendant’s business and residential premises where it was established, among other things, that the 2nd Defendant was not married.

That the 1st Defendant approved the 2nd Defendant’s application for a loan facility of Ksh 1,000,000/- and communicated the approval to the 2nd Defendant.

That on 28th September 2017, the 2nd Defendant executed a loan agreement in respect to the said loan facility of Ksh 1,000,000/-

Further on 3rd October 2017, the 2nd Defendant executed and registered a charge over his property known as Title Number **Bukhayo/Bugengi/8136** (herein “**the Property**”) and the property became the 1st Defendant’s security for repayment of the loan facility advanced to the 2nd Defendant.

That on 12th February 2019 and due to the 2nd Defendant’s default in repaying the loan facility as and when required, the 1st Defendant through its advocates, Ms Omulele & Tollo Advocates, issued the 2nd Defendant with a 90 days’ notice of its intention to exercise its statutory power of sale.

That on 14th May 2019, the 1st Defendant through its advocates Ms. Omulele & Tollo Advocates also issued the 2nd Defendant with a 40 days’ statutory notice of its intention to exercise its statutory power of sale.

That on 21st May 2019, the 1st Defendant instructed Cambrian Valuers Limited to carry out a current market and forced sale valuation of the property.

That he was advised by the 1st and 3rd Defendants’ advocates on record, Ms Kiruki & Kayika Advocates that;

- a) The 1st Defendant has a right to exercise its statutory power of sale over the property pursuant to **Section 90 (3)(e) and 96 (1) of the Land Act, 2012.**
- b) The 1st Defendant issued the 2nd Defendant with a 90 days’ statutory notice to settle the outstanding loan facility pursuant to **section 90(1) of the Land Act, 2012.**
- c) The 1st Defendant issued the 2nd Defendant with a 40 days’ statutory notice to settle the outstanding loan facility pursuant to **Section 96 (2) of the Land Act, 2012.**
- d) The 1st Defendant has caused the property to be valued with a view of determining the current market and forced sale values pursuant to **section 97 (1) & (2) of the Land Act, 2012.**
- e) The 3rd Defendant has caused the intended public auction of the property to be advertised in the newspaper pursuant to **section 98 (2) of the Land Act, 2012.**
- f) The 2nd Defendant having executed an affidavit of non-marriage while registering a charge over the property and the Plaintiff having failed to present a certificate of marriage as per the provisions of the **Marriage Act, 2014**, the Plaintiff has no overriding interest over the property as envisioned under **section 28(a) of the Land Registration Act, 2012.**

DETERMINATION

After consideration of the pleadings and submissions by parties, the issue is whether the realization of security lodged by 1st Defendant to secure the loan can be realized in the absence of spousal consent by the Plaintiff.

The Plaintiff’s claim is that she is married to the 2nd Defendant and they have 2 children since 2010 under Luhya customary law and attached the Affidavit of marriage to the application.

They developed the suit property **L.R.BUKHAYO/BUGENGI/8136** and she lives there with the 2 children. On 23rd August 2019, the Plaintiff was informed by a neighbor that the land was advertised in the newspaper.

She learnt from her husband the 2nd Defendant that he obtained Ksh 1million and used the property as security. The law requires spousal consent for matrimonial property to be sold.

The 2nd Respondent informed the Court that the Respondent Bank Real People Kenya Limited did not inform him that a spousal consent was/is required in order to secure a loan by matrimonial property.

He stated he did not know of the requirement of declaring his marriage status and failure to disclose he is married was inadvertent. He is a Jua Kali Artisan who took a loan to help his business grow. He has repaid Ksh 800,000/- more than ½ of the Ksh 1million loan.

This Court confirms that the law requires by virtue of **Section 12(1) of Matrimonial Property Act, Article 45 (3) of COK 2010 & Section 93 of Land Registration Act,**

Section 12(1) of Matrimonial Property Act provides;

“1) 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”

Article 45(3) of Constitution of Kenya 2010 provides;

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

Section 93 of Land Registration Act;

“(1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses;

(a) there shall be a presumption that the spouses shall hold the land as joint tenants unless;

(i) a provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

(ii) the presumption is rebutted in the manner stated in this subsection; and

(b) the Registrar shall register the spouses as joint tenants.

(2) If land is held in the name of one spouse only but the other spouse or spouses contribute by their labour or other means to the productivity, upkeep and improvement of the land, that spouse or those spouses shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common of that land with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by contribution of the spouse or spouses shall be recognized in all cases as if they were registered.

(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.

That matrimonial property requires consents of both spouses when each party is dealing with the said property.

Counsel for the Plaintiff submitted that the Respondent Bank erred by not conducting due diligence on who resides /owns the property and on obtaining spousal consent. The Respondent Bank confirmed its officials visited Plaintiff’s business and residential places as declared in the loan Application Form.

This Court finds the Respondent bank conducted due diligence and no one resided on the suit property at the time. Secondly, the 2nd Respondent filled in the Loan Documents as shown in attached documents of the 1st & 3rd Respondents’ Replying Affidavit; At Pg 8 the 2nd Respondent stated that his marital status was/is Single, and he resides a Zimmermann near Roysambu 1st Floor No 36.

The Court finds that there was material non disclosure by the 2nd Defendant that he is married. Therefore, the Respondent Bank could not advise further on requirement of spousal consent in light of the Plaintiffs declaration and filled Form that he was/is single.

Secondly, I find that the 2nd Respondent made concerted effort to reduce the loan account and had paid almost half the amount. The non disclosure was in advertent and cannot be visited on his family.

Therefore, this Court shall set aside all processes of realizing the loan facility by exercising statutory power of sale on the suit property.

The 2nd Respondent shall approach the Respondent Bank on restructuring the loan repayment within 60 days from today and offer another viable security or the same security with spousal consent. In default any of the conditions; the 1st Respondent shall be at liberty to carry out the statutory power of sale in terms of the time lines set below.

DISPOSITION

- 1. The Plaintiff's application is upheld and granted with costs.**
- 2. The process of statutory power of sale on the suit property is halted due to lack of spousal consent**
- 3. The 2nd Defendant shall pursue negotiations and provide alternative security within 60 days**
- 4. No execution shall take place during the Corona virus pandemic lockdown unless or until official announcement on return to normalcy and/or 90 days from today.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND MAY 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Ndemo Mokaya Advocatefor Plaintiffs

Kiruki Kayika Advocates For 1st & 3rd Defendants