



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 465 OF 2013

SOPHY NJIIRI.....PLAINTIFF

VERSUS

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

PETER GICHUKI T/A SPOTLIGHT

INTERCEPTS AUCTIONEERS.....2ND DEFENDANT

AND

JAMES MWANGI NJIIRI.....INTERESTED PARTY

JUDGMENT

1. Sophy Njiiri (the Plaintiff or Sophy), wife of James Mwangi Njiiri (the Interested Party or James) invokes the famous words of Lord Denning in Williams and Glyn's Bank v Boland [1979] 2 ALL E. R 697;

“Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wife may have a share in it. He ought to make sure that the wife agrees to it or to go to the house and make enquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wife’s interest or the possibility of it and afterwards seek to turn her and the family out on the pleas that he did not know she was in actual occupation. If a Bank is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home. It should not destroy it by disregarding the wife’s interest in it, simply to ensure that it is paid the husband’s debt in full, with the high interest rate now prevailing. We shall not give monied might over social justice. We should protect the position of a wife who has a share, just as years ago we protected the deserted wife....”.

2. The Plaintiff who brings this suit as against National Bank of Kenya Limited (the 1st Defendant or NBK) and Peter Gichuki t/a Spotlight Intercepts Auctioneers hinges her claim on section 103(1) (c) of the Land Act 2012. This is not only apparent in her pleadings but also expressly reiterated by her counsel as a prefix to his written submissions. The Court will therefore keep focus that this is a section 103 application.

3. The Plaintiff’s claim which is set out in a lengthy fifty two paragraph Plaintiff can be abridged. James and Sophy are husband and wife having married on 23rd August 1974. While James was in the employment of NBK he was granted a staff house loan which he used to purchase LR. No. 7660/40 (the suit property). Sophy asserts this to be her matrimonial home.

4. Over time, James was advanced more money by NBK and a further charge for Kshs.100,000.00 registered on 20th May 1983 and a second further charge for Kshs.300,000.00 registered on 17th November 1983. Sophy states that the facilities were fully repaid.

5. The services of James were terminated by a letter dated 12th January 1999 and a year later he left the country for the United States of America and has lived there since. Sophy has continued to live on the suit property.

6. So as to protect the suit property against the exercise of the statutory power of sale by NBK, James instituted HCCC 96 of 2000 James Njiiri –vs- National Bank of Kenya (O.S) (re-designated HCCC 1769 of 2000 on transfer to Milimani Law Courts) and HCCC 276 of 2006 James Njiiri –vs- National Bank of Kenya (O.S). The former was dismissed for want of prosecution on 27th April 2004 and the latter was

discontinued vide a Notice of Discontinuance of suit on 23rd February 2007. Sophy, nevertheless, asserts that NBK has failed to address itself to its refusal to discharge the title to the suit property.

7. There was a further attempt to save the property. By virtue of a power of attorney granted to him by James, Anthony Mwangi Njiiri filed HCCC No. 310 of 2007 Anthony Maina Njiiri (Suing as attorney of James Mwangi Njiiri) -vs- National Bank of Kenya Limited. That suit, it is conceded, was dismissed but Sophy avers only on a technicality that it was filed by a person without locus as the suit should have been brought in the name of the holder of the power of attorney.

8. Sophy states, that with her back on the wall, it was agreed in principle, as between her and the Bank, that the suit property be subdivided and a portion sold by way of private treaty to repay the debt then said to be Kshs.18,500,000.00. Sophy avers that this arrangement fell through because of frustration by NBK particularized as follows:-

- i. Failing and/or neglecting to give the necessary consents to enable the sub-division of the Suit Property.
- ii. Failing and/or neglecting to inform the Plaintiff how the sum claimed was made up.

9. This suit was precipitated by an advertisement in the Saturday Nation of 26th October 2013 published by the 2nd Defendant of an intention to sell the suit property by way of public auction on 31st October 2013. Sophy challenged that intention on the following grounds:-

- a) *Failing and/or neglecting to inform us how the debt claimed was built up.*
- b) *Sending Antony Maina Njiiri a notice purporting it to expire on 12th September 2013 yet it had issued a public notice of intended auction on 24th June 2013 on the website of M/s Garam Investments.*
- c) *Purporting to send a Notification of Sale via Registered Post dated 25th August 2013 well before the expiry of the Notice issued to Anthony Maina Njiiri.*
- d) *Purporting to say that it had issued a notice in the newspaper of 11th October 2013 yet no such notice exists.*
- e) *Purporting to say that it had served the notice upon James Mwangi Njiiri yet it knows full well that he is not resident of Kenya.*
- f) *Failing to serve the Plaintiff with the Notice as by Law required.*
- g) *Failing to provide Anthony Mwangi Njiiri with the Statement of the accounts in respect of which a Debt is claimed from James Mwangi Njiiri leading to the intended sale of the Suit Property as per his request.*

10. Sophy argues that an objective review of the charges will show that it was invalid and unenforceable for, *inter alia*, lack of spousal consent and consent under the Land Contract Act. Second, that James paid off his entire debt and is entitled to have the suit property discharged in any event. Further, that the interest levied by the 1st Defendant is usurious and grossly unjust. Lastly, that the Defendants have failed and/or neglected to comply with the mandatory provisions of the Land Act.

11. On the overall, Sophy's case is that by virtue of the suit property being matrimonial property she has a platform to be heard on the matters raised including its redemption from encumbrance. Ultimately the following orders are sought :-

1. *That this Honourable Court be pleased to re-open the charges registered against the title to L. R. 7660/40 Tigoni, Kiambu District declares the same invalid and enforceable.*
2. *A declaration that the monies advanced pursuant to the charges registered against the title to L. R. 7660/40 have been repaid in full.*
3. *An order do issue directed at the 1st Defendant to forthwith discharge the title to L.R 7660/40 and release the same to the Plaintiff.*
4. *A declaration that in purporting to exercise its remedy under the Charge registered against the title to L. R 7660/40 the 1st Defendant on its own or through the 2nd Defendant did not comply with the provisions of the Law and the exercise of such remedy is void.*
5. *A permanent injunction do issue restraining the Defendants jointly and severally whether by themselves, their agents, employees or otherwise howsoever, from selling or advertising for sale by way of private treaty or by public auction the property comprised in L. R. 7660/40 Tigoni Kiambu District or interfering in any way whatsoever with the Plaintiff's quiet enjoyment thereof.*
6. *Such further order as this Honourable Court shall deem mete and just.*
7. *The Costs of the Suit be awarded to the Plaintiff.*

12. In a Defence dated 20th January 2014, NBK resists the claim and asserts that Sophy's case is not only an abuse of Court process but that she lacks locus standi to commence, maintain and prosecute the suit. NBK's defence is that the suit property which is the subject of these proceedings is registered in the sole name of James.

13. The Bank avers that Sophy's consent was required to create the said charges and in any event the charge (this would be the first charge) was primarily created to purchase the suit property which was registered in the sole name of James.

14. As to whether consent of the Land Control Board was obtained for purposes of registering the charges, the answer by the Bank is that the creation of the charges were perfected and James took a benefit under the them and the Plaintiff who is not a party to the charge nor registered as an owner of the suit property has no locus standi to enquire or challenge the creation of the said charges.

15. In respect to the suits referred to in the Complaint, the Bank argues that they are a confirmation that the present suit is an abuse of the process of the Court. And it matters not that the suits were determined without going into their merits as they were in any event dismissed.

16. NBK admits the attempts to have the matter amicably settled but asserts that it was proposed by the Plaintiff's family.

17. As to the indebtedness of James, NBK argues that it is a matter of confidence between it and James as customer and itself as Banker and the particulars of indebtedness are matters which can only be discussed between itself and James.

18. As regards statutory notices, NBK's position is that they were sent to both Anthony and James and that in any event James is the only person who can raise issues of service upon him and not the Plaintiff.

19. James joined the fray as an Interested Party and in its pleadings of 30th October 2017 generally adopts the Plaintiff's case and seeks the following orders:-

i. A declaration that the Interested Party does not owe the 1st Defendant any monies.

ii. A declaration that the purported charge registered by the 1st Defendant over the Interested Party's property No. L.R. 7660/40 Tigoni in Kiambu County is unlawful, null and void and the same should be lifted forthwith unconditionally.

iii. A permanent injunction restraining the Defendants jointly and/or severally by themselves, their servants or agents from selling advertising and/or in any other way disposing of the property known as L.R. No. 7660/40 Tigoni, Kiambu County or interfering with the Interested Party's quiet enjoyment thereof whatsoever.

20. The response by NBK to the case by the Interested Party is that the same is unsustainable as it is *res judicata* suit No.s 96 of 2000, 276 of 2006 and 310 of 2007. NBK sees the entrance of James into this suit as calculated to breathe life into the main suit which it avers is fatally defective and devoid of merit.

21. Five witnesses gave evidence in these proceedings; Sophy for herself, James, Paul Mwangi and Joseph Njuguna Njagi for the Interested Party's case. Morris Tiema gave evidence for the Bank. The evidence of these witnesses shall be considered only in so far as they are relevant in resolving the issues herein.

22. But first, I need to start with a matter raised by the Bank as it may delineate the real controversy that this Court must determine. It is submitted that the James cannot seek substantive reliefs in these proceedings. The Interested Party does not provide an answer to this argument.

23. In Black's Law Dictionary 10th Edition an Interested Party is defined as:-

“A party who has a recognizable stake (and therefore standing) in a matter”

24. Although dealing with a constitutional petition the Supreme Court render itself as regards the scope of an Interested Party's participation in proceedings. In Francis Kariuki Muruatetu & Another v Republic & 5 Others [2016]eKLR the Supreme Court held:-

[41] Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court.* One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[43] Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this Court. Any interested party or *amicus curiae* who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions (See *Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*, Supreme Court Petition No. 2 of 2012, [2012] eKLR).

25. It appears to me that, ordinarily, a party cannot join a suit as an interested party and seek substantive orders as though it was a principal participant. If a party takes the position that its presence is necessary not only for the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, but so as also seeks substantive reliefs/orders then it can apply to be joined to the suit as either a Plaintiff or Defendant.

26. Indeed, as pointed out by counsel for the Bank James applied to be joined to the proceedings under the provisions of Order 1 Rule 10(2). The Rule reads;

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

I have looked at that application. The relevant prayer is (2) which reads:-

“That this Honourable Court be pleased to add the applicant as a party/Plaintiff to this suit and its proceedings.”

27. When allowed to join, James choose not to be a co-plaintiff but an interested party. He did not choose to be a principal party in the suit and he cannot seek reliefs or substantive prayers.

28. This Court can now turn to frame the issues for determination as between Sophy and NBK as each side proposed separate issues. In doing so the Court gives regard to the pleadings and those proposals;

- i. Does the Plaintiff have locus standi to commence, maintain and sustain this suit under the provisions of section 103 of the Land Act?
- ii. If so, are the charges registered upon the suit property invalid?
- iii. If, again, the answer to (i) above is in the affirmative, have the advances made pursuant to the aforesaid charges been settled?
- iv. Is the Plaintiff entitled to the prayers sought?

29. It is common cause that Sophy and James are husband and wife. There is also evidence that the Kshs.700,000.00 advanced by the Bank to James was for purposes of purchasing a house. See the concession of Morris Tiema in Paragraph 5 of his witness statement. That facility was secured by a charge over the suit property. The further evidence was that the couple lived in that house as a matrimonial home.

30. The Plaintiff submits she brings these proceedings by virtue of section 103 (1) (c) of the Land Act. That provision of statute was amended by Act No. 28 of 2016. But at the time of filing this suit section 103 (1) read:-

“An application for relief against the exercise by the chargee of any of the remedies referred to in section 85 (3) (a) and (b) may be made by—

- (a) the chargor;
- (b) if two or more persons are joint chargors, by one or more of them on their own behalf;
- (c) a spouse of the chargor;
- (d) a lessee of the chargor; or
- (e) the trustee in bankruptcy of the chargor.”

31. Prior to the 2016 amendment, section 103 provided for relief against the exercise by the chargee of any remedies referred to in section 85 (3) (a) and (b). Now, section 85(3) of the Act read and still reads:-

“A chargee may provide, in a charge instrument, that a chargor who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge—

(a) shall give one month's notice of the intention to discharge; or

(b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge."

32. Without doubt there was an error in the previous section 103 because section 85(3) (a) and (b) is not in respect to the chargee's remedies but in regard to the right of a chargee to include, in a charge instrument, certain conditions in the event the chargor wishes to exercise the right to discharge before the expiry of the term of the charge. The Court's view that there was an error in the previous section 103 (1) is fortified by reference to section 90 in sub-section 3 of section 103. Sub-section 3 reads:-

"An application for relief may be made at any time after the service of a notice under section 90(1), section 91(2), section 94(1), section 95(1), or during the exercise of any of the remedies contemplated in those sections."

33. Reference to section 90 in sub-section 3 is important because section 90 is the provision that grants the chargor certain remedies in the event of default or breach of the term of the charge by the chargor. These remedies include the right to sell the charged land or to sue the chargor for any money due and owing under the charge (See section 90(3)).

34. After the amendment, section 103(1) now reads:-

"Application for relief by chargor

(1) An application for relief against the exercise by the chargee of any of the remedies referred to in section 90 (3) may be made by

—
(a) the chargor;

(b) if two or more persons are joint chargors, by one or more of them on their own behalf;

(c) a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent;

(d)

(e) if the chargor has been adjudged bankrupt, the bankruptcy trustee of the estate of the charger.

of the charge by the chargor;

35. Noticing the apparent error in the previous version of section 103 (1), this Court invited counsel to make further submissions on how that error (if accepted to be an error at all) and the amendment that followed impacts on the matter at hand.

36. Counsel for the Plaintiff did not address the referencing of section 85 in section 103 (1). Instead, he made the point that prior to the amendment, there was no qualification to the right of a spouse to seek relief against the exercise of rights under a charge. He stressed that had the intention of the legislative been to qualify the right then nothing would have been easier than to state as much. In counsel's view the mischief sought to be cured by legislation is crystal clear and that was to protect spouses from the unlawful sale of their matrimonial homes.

37. Counsel nevertheless conceded that the amendment to section 103 (1) (c) sought to limit the scope under which a spouse could move Court. Even then, counsel argues, the new provision did specify the kind of consent and the type of consent required would have to be determined on a case to case basis. In respect to this matter, counsel submits that the charge was on agricultural land and the consent of the Land Control Board was also required.

38. I have given due consideration to the arguments made by counsel and reflected on the matter.

39. There is no doubt in the mind of this Court that reference to section 85 in the pre-amendment legislation was an error and insisting that it was correctly worded makes nonsense of the entire provision and results in an absurdity (see discussion in paragraphs 31 through 33 of this decision). One intention of the amendment must have been to right the error.

40. Another intention, and this is in regard to section 103 (1) (c), was to align the words of the provisions to the intention of parliament even prior to the amendment. Prior to the amendment, the provision appeared to give a spouse of the chargor an open and wide right to apply for relief. The amendment makes the following limit:-

"a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent."

41. The provisions of section 103 follows under part VII of the Land Act, 2012 on the general provisions on charges. It is also under this part that spousal consent is required in certain circumstances before a charge is recognized as valid. Section 79 (3) of the Act reads:-

“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.”

42. In my estimation, the right given to a spouse of a chargor under section 103(1), even before the amendment, was limited to a spouse who had a right to give spousal consent under section 79(3). What the amendment did was to limit the scope of section 103 (1) (c) further by giving such a spouse the right to apply but only to the extent that the spouse did not give the consent. In other words, the amendment clarifies that the spouse who can invoke this right is one who was entitled to give spousal consent under section 79(3) but did not give it.

43. The charge over LR 7660/40(the suit property) was created under the provisions of the repealed Registration of Titles Act and Transfer of Property Act. Neither of the statutes required spousal consent before the creation of a charge. Given my appreciation of the effect of the provisions of section 103(1) (even before the 2016 amendment), the Plaintiff who did not have a right to give spousal consent to the creation of the charge cannot invoke the provisions of section 103.

44. If, nevertheless, the Plaintiff was to insist that the Court construes the provisions of the previous section 103 in their plain and literal meaning, still the suit cannot go any further. This is because that provisions as then worded were for an application for relief against the right of a chargee provided by section 85 (3) (a) and (b). Just to make the point that this approach is unhelpful to the Plaintiff, it bears reproducing the provisions of section 85 (3) (a) and (b);

(3) A chargee may provide, in a charge instrument, that a charger who wishes to exercise the right to discharge the charge at any time before the expiry of the term of the charge—

(a) shall give one month's notice of the intention to discharge; or

(b) shall pay not more than one month's interest at the rate at which interest is payable on the principal sum secured by the charge or at any lesser rate which may be agreed, as well as paying all other money secured by the charge.

45. The Plaintiff cannot invoke those provisions to invalidate the charge document.

46. As I turn to consider the other issues raised by the Plaintiff, it has to be emphasized that she has built her entire case around the provisions of section 103 (1) (c). Pages 11 to 14 of the Plaintiff's written submission makes it perfectly clear that her right to relief in this matter rests on her right to bring proceedings under section 103 (1) (c) of the Land Act.

47. As earlier stated, the scope and object of section 103 (1) (c) has to be considered as worded when the suit was filed. This Court has interpreted the right under that provision to be available only to a spouse who was entitled by the provisions of section 79(3) to give spousal consent.

48. If that is so, then the Plaintiff cannot invoke the provisions of section 103(1) (c), as she now does, to question the validity of the charges for failure to obtain consent of the Land Control Board or argue that the advance made pursuant to the said charges have been settled simply because her consent as a spouse was not required for the creation of the charges over the suit property under the regime of law that existed when the charge was created.

49. If, however, I were to grant the Plaintiff her proposition that relief under section 103 could be brought by any spouse then I would also have to give a plain interpretation to the entire section. What is good for the goose is good for the gander! The result as noted earlier would be to restrict the Plaintiff's challenge to the issues raised in section 85 (3) (a) and (b). None of these can give the Plaintiff the pedestal to question the validity of the charge documents for want of a consent under the Land Control Act or to raise questions as to whether the advances for which the charge was taken have been paid in full.

50. The Plaintiff's case was predicated around an apparent right of relief given to her under section 103(1) Of the Land Act, 2012. This Court has reached a conclusion that the Plaintiff is not the spouse contemplated by those provisions and if the spouse, those provisions, at the material time, could not grant the Plaintiff the remedy or relief she has sought.

51. The upshot is that the Plaintiffs case is dismissed with costs to the 1st Defendant. The 1st Defendant shall also have costs for successfully resisting the Interested Party's claim.

Dated, Signed and Delivered in Court at Nairobi this 17th Day of November 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Mahugu holding brief for Marete for the Plaintiff.

Miss Kadima holding brief for Chacha Odera for the 1st Defendant.

Museve holding brief for Guserwa for the Interested Party.