



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT EMBU**

**CIVIL CASE NO. 108 OF 2009 (O.S.)**

**SMM.....APPLICANT**

**VERSUS**

**IMK.....RESPONDENT**

**AND**

**AGRICULTURAL FINANCE CORPORATION.....INTERESTED PARTY**

**J U D G M E N T**

**A. Introduction**

1. The plaintiff moved the court by way of Originating Summons dated 1<sup>st</sup> July 2009 seeking orders that can be summarised as follows: -

- a. A declaration that the property known as L.R. MUTIRA/KIAGA/xxxx (suit property) acquired by the joint funds of herself and the defendant is jointly owned by the two.**
- b. A declaration that the charge created by the defendant in favour of the interested party without the consent of the plaintiff is null and void.**
- c. An order do issue that the suit property be equally sub-divided between the plaintiff and the defendant and subsequently the charge of the suit property be transferred to the defendant's share.**

2. It is the plaintiff's case that she is a wife to the defendant and they had jointly developed the suit property which both own. She further states that the defendant without her consent charged the property in respect of a loan given by the interested party, which loan had since become due and the interested party had issued a Notice of Foreclosure.

3. The defendant did not file a response to the Originating Summons but there is a letter dated 17/9/2011 in which he consents to the application. The interested party responded vide a replying affidavit sworn on the 5/8/2009 in which the Chief Manager Legal Services gave a history of how the loan was obtained using title of the suit property that showed the respondent as the sole owner of the suit property. She deposed that as such there was a binding contract between the respondent and the interested party. It was also deposed that the interested party had registered a lawful lien over the subject parcel and as such did not owe the applicant any duty of care.

4. The counsel for the interested party did not attend court when the matter came up for hearing despite being served with the hearing notice. At the close of the applicant's case, her counsel chose not to file submissions.

**B. Analysis & Determination**

5. I have considered the entire record as well as the replying affidavit of the interested party. Upon an examination of the pleadings it is my opinion that this suit will turn on the following issue: -

**a. Whether the consent of the applicant was required prior to the charging of the suit property?**

**b. Whether LR. Mutira/Kiaga/xxx should be subdivided into two equal shares and the charge be registered against the share of the 1<sup>st</sup> respondent.**

**c. Who will pay the costs of the suit?**

6. It is not disputed that the applicant and the respondent are husband and wife and that the applicant contributed to the development of the suit property where they have established a matrimonial home. The applicant produced evidence to the effect that the 1<sup>st</sup> respondent had taken out a loan totalling to Kshs. 1,666,425/= which she had used in development of the suit property.

7. The relevant law in division of property or in respect of declarations sought thereof is Article 45(3) of the Constitution and the Matrimonial Property Act, 2013.

**8. Article 45(3) of the Constitution 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.**

9. Section 9 of the Matrimonial Property Act provides: -

**Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.**

10. The parcel of land Mutira/Kiaga//xxxx was given to the defendant by his clan. The plaintiff borrowed funds from the bank to the tune of Kshs. 1,666,425/= which was used to develop the property. The matrimonial home and other developments stand on the said property. The defendant does not deny these facts. He has indeed consented to the plaintiff's claim.

11. The interested party advanced a loan of Kshs. 1,800,000/= to Kirinyaga District Union of Jua Kali Self Help Group in which was guaranteed by the defendant without informing the plaintiff. It is much later that the plaintiff discovered that the land was under threat of being auctioned for failure to service the loan that the plaintiff was not aware of. The defendant never informed the plaintiff that he had used the land to guarantee the loan nor even sought the plaintiff's consent. The loan was guaranteed using two parcels of land the suit property and LR. Ngariama/Nyangeni/xxxx. The plaintiff is not interested in the 2<sup>nd</sup> parcel but in LR. Mutira/Kiaga/xxx where the matrimonial home sits.

12. The interested party in the affidavit of its Chief Manager, Legal Services states that it conducted due diligence on the suit land before accepting it as security. The land was registered in the name of the defendant and was a sound security

13. The Kirinyaga District Union of Jua Kali Self Help Group later defaulted in repayment of the loan and a foreclosure notice was issued on 17/12/2008 to the group and the guarantor. The interested party states that the loan advanced in 2006 is still outstanding. It is further stated that the interested party stands to suffer loss due to the action of the plaintiff who is not privy to contract. It is important to note that this case was formally proved through the testimony of the plaintiff but her counsel opted not to file submissions.

14. The interested party after filing its response in this case, participated fully in the hearing of the application which successfully sought injunctive orders against it. The orders were issued by Ong'udi, J. in her ruling delivered on 9<sup>th</sup> May 2012. However, the interested party did not participate in the hearing of this case.

15. This court therefore did not have the benefit of the submissions of the plaintiff and that of the interested party. This case was not opposed by the defendants. However, the interested party having opposed the claim and filed its list of documents, the court will proceed to consider its case as presented.

16. It is not in dispute that the defendant gave as security his two parcels of land as a guarantor to a borrower who failed to repay the loan. Reminders were issued to the borrower by the interested part which were not honoured and eventually led to a foreclosure notice being issued to the defendant.

17. The evidence of the interested party consisted among others of the following: -

**a. A letter of offer duly executed for facility of Kshs. 1,800,000/= to Kirinyaga District Union of Jua Kali Self Help Group dated 25/07/2007.**

**b. Certificate of registration of the self-help group from Ministry of Gender, Sports, Culture and Social Services dated 21/04/2004.**

**c. Copies of title for LR. Mutira/Kiaga/xxxx and Ngariama/ Nyangeni/xxxx.**

**d. Letter of guarantee and indemnity duty executed by the defendant dated 20/07/2007.**

**e. Power of Attorney executed by the defendant on 30/07/2007.**

**f. Notification of charge showing the date of registration as 16<sup>th</sup> August 2007 for the facility of Kshs. 1,800,000/= at 10% p.a.**

**g. Foreclosure notice dated 17/12/2008 for demand of the outstanding loan of Kshs. 2,114,500/=.**

18. The documents are evidence of a contract between the interested party and the borrower on one hand and between the interested party and the defendant on the other hand.
19. The interested party is not asking for any orders in this case save for dismissal of the claim. The dispute is referred to in the submissions filed in respect of the application for injunctive orders as a dispute between husband and wife.
20. The plaintiff among other orders seeks for sub-division of LR. Mutira/Kiaga/247 which is one of the securities for a loan that the borrower already defaulted. As such the interested party should be at the forefront to defend its interest or ask for dismissal of the suit if it was convinced that it was wrongly joined in the suit.
21. It is important to appreciate that the repealed Registered Land Act, Cap 300 did not provide for requirement of spousal consent in selling, transfer or charge of matrimonial property. The Land Act, 2012 provides for the said requirement which if not complied with may affect the validity of a contract. The loan in issue was advanced and guaranteed by the defendant in the year 2007 before the Land Act, 2012 became operational.
22. I am of the considered view that the defendant was not legally bound to seek spousal consent to charge the property registered in his name. Similarly, the interested party had no such obligation to seek or ensure that spousal consent was provided.
23. The plaintiff sued her husband herein after the interested party had already issued a foreclosure due to the default by the self-help group. The interested party was acting in pursuance of the terms of the contract between it and the defendant.
24. It was held in the case of **Housing Finance Co. Ltd Vs Faith Kimeriah and Harison Kimeriah Nairobi Civil Appeal No. 214 of 1996**, a case with similar facts, that: -

**.....These disputes have nothing to do with HFCK who is merely the charge whose interest is merely to realize the loan. We see no basis whatsoever, in this case upon which HFCK could be implanted in the proceedings. Clearly the wife seeks to obtain more time by virtue of the application so that HFCK may postpone the inevitable sale of the property and so far she has succeeded in doing so.**

**Any suit filed under Section 17 of the Married Women's Property Act of 1882 of England or for any speedy resolution of the issue of what share, if any, the wife is entitled to the matrimonial property; that issue can be of no concern to the charge.**

25. It was held in the case of **Moses Ngenye Kahindo Vs Agricultural Finance Corporation Nairobi HCCC No. 104 of 2001** that: -

**“a person who charges his property to secure a loan does so knowing only too well that upon default, the property could be sold to recover the loan. It does not therefore lie in the mouth of such a person to state that he would suffer an injury which cannot adequately be compensated in damages if the lender realizes the security in question.**

26. The contract between the defendant and the interested party is still valid and will not be affected by the matrimonial rights of the plaintiff while the loan advanced is still outstanding. It does not help the plaintiff that the suit is unopposed by the defendant. The property in issue LR. Mutira /Kiaga/xxx is no longer free for sub-division to realise the matrimonial rights of the parties until it is discharged by the interested party.
27. It is my finding that the plaintiff has failed to prove her suit on the balance of probabilities as required by the law.
28. The suit is hereby dismissed with costs to the interested party.
29. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 24<sup>TH</sup> DAY OF JULY, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Mr. Njage Morris for the Applicant**

**Respondent present**