



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI HIGH COURT**  
**CIVIL CASE NO 168 OF 2014**

**MARY WANJIRA KIMONYE.....PLAINTIFF**

**VERSUS**

- 1. EASTERN & SOUTHERN AFRICAN TRADE  
& DEVELOPMENT BANK.....1<sup>ST</sup> DEFENDANT**
- 2. CORNFU INVESTMENT LIMITED.....2<sup>ND</sup> DEFENDANT**
- 3. JOHN GITUMA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. For the determination of the Court was the application by the Plaintiff dated 29<sup>th</sup> April 2014. The application was brought under the provisions of Order 40 Rules 1 & 4 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The Plaintiff sought to be heard on prayers seeking an injunction against the 2<sup>nd</sup> Defendant restraining it from selling Title Number Abothuguchi/Katheri/1959 (hereinafter referred to as the suit property).
2. The grounds upon which the application was predicated upon were that the suit property was matrimonial property, and that the Plaintiff stood to suffer irreparable damage unless the 2<sup>nd</sup> Defendant was restrained from disposing of the suit property.
3. In a lengthy supporting affidavit deponed on 28<sup>th</sup> April 2014, the Plaintiff, further to reiterating the grounds stated in the application, alluded that in a facility agreement dated 16<sup>th</sup> November 1998, the 1<sup>st</sup> Defendant and Tropical Foods Products International Ltd, of which she and one James Kamonye are directors, had agreed, further to providing personal guarantees, created a legal charge over the suit property to secure the sum of USD 250,000/-.
4. It was contended that on 10<sup>th</sup> January 2014, the 1<sup>st</sup> Defendant transferred the charge dated 18<sup>th</sup> December 1998 to the 2<sup>nd</sup> Defendant, and in which on an earlier date of 14<sup>th</sup> October 2013, had assigned the debts and securities it held to the 2<sup>nd</sup> Defendant. Further, it was argued that the acceptance of Kshs 20,000,000/- from the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Defendant on 24<sup>th</sup> June 2013, and subsequent release of the party on 25<sup>th</sup> September 2013 as guarantors was in bad faith, and

- also, that the transfer was invalid for the reason that the suit property was matrimonial property and that no consent had been obtained for such transfer to the 2<sup>nd</sup> Defendant.
5. The transfer of the suit property was registered on 5<sup>th</sup> February 2014, with the statutory notice being issued on 14<sup>th</sup> February 2014. It was averred that the demand of Kshs 38,000,000/- by the 2<sup>nd</sup> Defendant was usurious, illegal and an attempt at unjust enrichment and that the actions by the Defendants was an intention at the furtherance of fraud.
  6. The application was opposed by the 1<sup>st</sup> Defendant through its replying affidavit deposed to on 4<sup>th</sup> July 2014. It was contended that Tropical Foods International Ltd had by agreement dated 8<sup>th</sup> December 1998 received a facility of USD 250,000/- from the 1<sup>st</sup> Defendant. After default in repayment of these sums, and on 26<sup>th</sup> October 2009, Tropical Foods International Ltd referred the matter to the International Chamber of Commerce claiming delayed disbursements and loss of revenue & profits.
  7. Tropical Foods International Ltd failed to pay its portion of the costs of the proceedings in the International Chamber of Commerce, and which proceedings were subsequently withdrawn. The 3<sup>rd</sup> Defendant, as a guarantor, offered to purchase the debt of USD 449,948.66 as at 30<sup>th</sup> June 2013, for the sum of Kshs 20,000,000/-, in full and final settlement of the facility, and on further condition of the transfer and assignment of all its rights and interests to the 2<sup>nd</sup> Defendant.
  8. The 1<sup>st</sup> Defendant accepted the 3<sup>rd</sup> Defendant's offer and on 6<sup>th</sup> November 2013, a deed of release of the guarantors and deed of assignment were registered in favour of the 3<sup>rd</sup> Defendant and 2<sup>nd</sup> Defendant respectively. Further, it was contended that the applicable laws as at the time did not require spousal consent, and that the 1<sup>st</sup> Defendant complied with all the requirements of the law.
  9. On its part the 2<sup>nd</sup> Defendant denied the allegations made by the Plaintiff through its replying affidavit dated 21<sup>st</sup> May 2014. Therein, it was reiterated that the Plaintiff had no title to the suit property, and that the same was registered in the name of James Kimonye who was also a director, and had charged the property in the charge dated 8<sup>th</sup> December 1998. Further, it was contended that the Plaintiff could not superintend the realization of a valid security by alleging that the suit property was a matrimonial home.
  10. It was contended that the 1<sup>st</sup> Defendant assigned its rights and interests over the facility dated 16<sup>th</sup> November 1998, secured by the properties of the directors of Tropical Foods International Ltd by charges created on 8<sup>th</sup> December 1998, and that therefore, it acquired all rights and liabilities under the facility as an assignee, and could therefore lawfully enforce the provisions of the facility, including realization thereof in satisfaction of the facility.
  11. It was averred that the 3<sup>rd</sup> Defendant as guarantor had settled his liability under the guarantee, and was therefore, lawfully entitled as of right, to transfer, if he deemed fit, the securities of the other remaining guarantors, and of which Section 86(2) of the Land Act, did not require any consent from the chargor for the transfer of the charge.
  12. The application was further opposed through the replying affidavit of the 3<sup>rd</sup> Defendant dated 21<sup>st</sup> March 2014. Therein, it was deposed to that the 3<sup>rd</sup> Defendant had taken over the debt as a guarantor and settled the outstanding claim to the amount of Kshs 20,000,000/- on 24<sup>th</sup> June 2013, and had the debt assigned to the 2<sup>nd</sup> Defendants. It was reiterated that the Plaintiff had failed in settling and honouring their contractual obligations, and further, that they sought to have the suit property released from properties guaranteed by Tropical Foods International Ltd under the guise of matrimonial property.
  13. Further, it was deposed to that spousal consent wasn't applicable when the facility was secured by the charge over the suit property, that the regime of the Land Act and Land Registration Act did not apply retrospectively, that the transfer of charge was validly effected under the Land Control Act.
  14. That the 3<sup>rd</sup> Defendant as guarantor had settled his liability under the guarantee and thus entitled to transfer and assign the rights accruing therefrom and that there is neither consent required of the chargor for the transfer of a charges nor consent from the Land Control Board. It was further contended that the Plaintiff had no *locus standi* whatsoever in seeking the reliefs as prayed for in the application as she was not a registered proprietor of the suit property.

15. I have considered the application by the Plaintiff, the responses by the Defendants and the dispositions made by the parties. The Plaintiff's case is three fold; (1) that the 3<sup>rd</sup> Defendant's payment of Kshs 20,000,000/- to the 1<sup>st</sup> Defendant was in bad faith as he did not involve Tropical Foods International Ltd or the other guarantors under the facility, (2) that the said transfer of the suit property is invalid as the suit property is matrimonial property that cannot be transferred without spousal consent; and (3) that the suit property was transferred without valuable consideration to the 2<sup>nd</sup> Defendant, and that the demand of USD 449,948.60 (equivalent to Kshs 38,000,000/-) declared due and owing as at 30<sup>th</sup> June 2013, was in variance to the consideration of Kshs 20,000,000/- paid to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant in full and final settlement of the outstanding debt.
16. On its part, the Defendants contend that the Plaintiff has failed to establish a prima facie case for consideration of the exercise of the Court's discretion in issuing a restraining order against the 2<sup>nd</sup> Defendant. They contend that the grounds enunciated in the oft cited cases of **Giella v Cassman Brown & Another (1973) EA 348** and **Mrao v First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** have not yet been established by the Plaintiff, ostensibly on the grounds that (1) she has no locus standi to institute the instant suit and application as she is not the registered proprietor of the suit property and (2) that is so far as there is a claim that the suit property is matrimonial property and therefore subject to spousal consent does not apply, as the charge over the same was created before the enactment of the Land Act and Land Registration Act.
17. In **Elizabeth Nthenya Wambua v Philip Wambua Masila & 3 Others [2013] eKLR** submitted by the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants, it was held by Mutungi, J that;

*“As a further observation I would like to state that where a property that would otherwise be considered as matrimonial property is tendered as security for a bank loan as in the instant matter, such property becomes a commercial commodity available in the market and liable to be sold by the chargee under the chargees statutory power of sale and the exercise of such power of sale cannot be defeated by a claim that such property constitutes matrimonial property. That indeed should be viewed as what informed the requirement in the new Land Registration Act of 2012 requiring spouses to give their consent to the charging of Matrimonial properties so that none of the spouses may be heard to say they were not aware or were not consulted when the charge was taken. Charges taken before the enactment of the Land registration Act 2012 cannot be invalidated on the basis that spousal consent had not been obtained. It was not a requirement prior to the enactment of the new Land Registration Act and therefore the plaintiff in the present case cannot have refuge under the new Land Act.”*

Further, Gikonyo J in **David Ngugi Ngaari v Kenya Commercial Bank Limited [2015] eKLR** held thus;

*“I will deal with the last issue on sentimental attachment to the charged property by citing a work of the court in 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”.

See also the case of **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133** at 139 where Honourable Nyamu, J. 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”.

And a work of the court in Jimmy **Wafula Simiyu vs. Fidelity Bank Ltd [2014] Eklr** in the rendition below:

On matrimonial home

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. Now let me consider the substantive issues herein. Therefore, the fact that the charged property is a matrimonial home alone will not suffice as a ground of granting an injunction as long as the chargee has fully adhered to the law. Let me now examine the other issues cited by the Applicant.”

18. It is not in dispute that the suit property may be deemed as matrimonial property. But by dint of the suit property being deemed as such, does not act as an estoppel against the 2<sup>nd</sup> Defendant from realizing the security in settlement of the outstanding debt owing to the 2<sup>nd</sup> Defendant from Tropical Foods International Ltd as the principal borrower and James Kimonye as the director/guarantor.
19. The suit property albeit being a matrimonial home is not an absolution of contractual obligations under the facility agreement entered on 16<sup>th</sup> November 1998. Further, the Plaintiff, admitting that she is the wife of one James Kimonye and also a director in Tropical Foods International Ltd, the principal borrowers, was at all times aware that the suit property, being a matrimonial home, was

charged as security on 8<sup>th</sup> December 1998, and as such, cannot refute the contractual obligations attendant to.

20. Also, as at the time the facility agreement was entered into, there was no requirement under the law existing then for spousal consent. The arguments therefore, as raised by the Plaintiff, do not give rise to establishment of a *prima facie* case.
21. With regards to the issue of the deed of assignment and deed of release of the guarantor, Section 86(2) of the Land Act is applicable. Under the said provisions it is provided that;

**Subject to the consent of the chargor which shall not be unreasonably withheld, the other persons who may make a written request under subsection (1) are— (a) any person who has an interest in the land, lease or land, that is the subject of the charge; (b) any surety for the payment of the amount secured by the charge; and (c) any creditor of the chargor who has obtained a decree for sale of the land, lease or charge, that is the subject of the charge.**

22. It is not in dispute that the 3<sup>rd</sup> Defendant acquired the debt due to Tropical Foods International Ltd, which was the principal borrower. In a letter dated 8<sup>th</sup> July 2013 (DM-9) at pg. 77 of the 1<sup>st</sup> Defendants documents, it was stated *inter alia*;

**We thank you for your letter of 24<sup>th</sup> June, 2013 and confirm that your offer of payment of Kshs 20 million (Kenya Shillings Twenty Million Only) in consideration for the assignment of the loan and the securities to yourself, assignees, successors, personal representatives or nominees and further in discharge of all and any liability due to PTA is accepted.**

The 3<sup>rd</sup> Defendant and the 1<sup>st</sup> Defendant further executed a Deed of Assignment of loan facility on 14<sup>th</sup> October 2013 (pgs. 95-100) and deed of release of guarantor (pgs. 102-104) in the 1<sup>st</sup> Defendants affidavit, and which were both registered on 6<sup>th</sup> November 2013. These procedure was in compliance with the provisions of Section 86(2)(b) of the Land Act, and that in accordance thereto, no fraud, as alleged by the Plaintiff, has been established. All actions committed by the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant in the issuance of deed of assignment and the release of guarantors was in compliance with the law, as provided under Sections 86(2) of the Land Act.

23. Further, the claim of the payment of approximately Kshs 38,000,000/- (USD 449,948.60) is a dispute as to the amount outstanding, which is not a ground that the Court would consider in granting an order for injunction. In **Argos Furnishers Ltd v Ecobank Kenya Limited & Another (2014) eKLR** cited by Nyamu, J (as he then was) in **Labelle International Ltd & Another v Fidelity Commercial Bank & Another (2003) 2 EA 541**, a dispute as to the amount outstanding was not sufficient grounds upon which an application for injunction was predicated. It was held in the former *inter alia*;

*“The subject on whether disputes on the sum owing and interest charged on a mortgage sum could be a basis for the issuance of an injunction is replete with ample judicial precedents as well as respected literary works. I am content to adopt a work of Rudd, J in Bharmalal Kanji Shah & Another v Shah DevarDevji (supra) that:*

***“...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage.”***

The amount of Kshs 20,000,000/- was an amount that had been negotiated and accepted by both the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. The outstanding amount due at the time was USD 449,948.60 or approximately Kshs 38,000,000/-. This was the amount due and owing, and which the 2<sup>nd</sup> Defendant, as assignee, had demanded from Tropical Foods International Ltd and James Kimonye in the statutory

notice dated 14<sup>th</sup> February 2014. It cannot be imputed that there was a violation of the provisions of Sections 86(3) of the Land Act, as there was consideration to the amount of Kshs 20,000,000/- that had been paid to the 1<sup>st</sup> Defendant. Further, and in relying on the decision in **Labelle International Ltd & Another v Fidelity Commercial Bank & Another** (supra), if there was any dispute as to the amount due to the 2<sup>nd</sup> Defendant, then the same was not a ground which the Court would consider in an application for injunction.

24. In the premises and for all the above reasons I find and hold that the application by the Plaintiff lacks any merit and I order the same to be dismissed with costs to the Defendants.

**Dated, Signed and Delivered in Court at Nairobi this 27<sup>th</sup> day of May, 2016.**

.....

**C. KARIUKI**

**JUDGE**