



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 38 OF 2016

ELIZABETH WANJIRU WAWERU.....PLAINTIFF

VERSUS

JOHN WAWERU CHEGE.....1ST DEFENDANT

CREDIT BANK LIMITED.....2ND DEFENDANT

JAMES GITHINJI WAWERU.....3RD DEFENDANT

SPINKS DANIELE MAE.....4TH DEFENDANT

RULING

(Application for injunction; applicant being wife to 1st defendant; 1st defendant charging their matrimonial home in the year 2011; contention by the plaintiff that the charge is invalid for want of spousal consent; spousal consent brought by the Land Act, 2012 which was not in force when the charge was created; bank cannot be victimized for not obtaining spousal consent when it was not a requirement; no prima facie case established; application dismissed with costs)

1. The plaintiff is wife to the 1st defendant. In this suit, which was filed on 10 February 2016, she has claimed that she supported her husband to acquire the land parcel Bahati/Bahati Block 1/1349 (hereinafter the suit land) and they built a matrimonial home where they have since lived. It is the place she and her family of four children call home. In the month of January 2016, some persons came into the property and introduced themselves as auctioneers. It is then that the plaintiff avers that she came to learn that the 3rd and 4th defendants had taken a loan from the 2nd defendant and that her husband had guaranteed the loan with the suit property as security. The charge was registered on 30 November 2011. The plaintiff contends that the 1st defendant never consulted her nor the children who are of age and the charge was registered without spousal consent. She has alleged that the defendants colluded to fraudulently deal with the property and the following particulars of fraud are pleaded :-

(i) The 1st defendant failed to consult and/or seek consent of the plaintiff when charging the property.

(ii) Due to the 2nd defendant's negligence, the defendants fraudulently caused the charge to be registered without the plaintiff's consent thereby violating her rights on the parcel.

(iii) The transaction was never disclosed to the family and was surreptitiously entered into to

defraud the family of its parcel and the matrimonial home.

2. The plaintiff has pleaded that she has an equal right to the ownership of the property despite it being registered in the name of her husband which right she contends is protected by the Constitution. In the suit, she has sought the following prayers :-

(a) *A declaration that the subject land Bahati/Bahati Block 1/1349 is matrimonial property.*

(b) *A declaration that the charge registered on Bahati/Bahati Block 1/1349 is defective, unlawful and unenforceable under the law of failure to obtain spousal consent.*

(c) *A permanent injunction to restrain the defendants from attaching, selling, disposing off, or in any other manner interfere with the land parcel Bahati/Bahati Block 1/1349.*

(d) *Costs of the suit.*

3. Together with the suit, the plaintiff filed an application for injunction, seeking to have the 2nd defendant restrained from selling the suit land pending hearing and determination of this case. It is that application which is the subject of this ruling.

4. The 2nd defendant has filed a statement of defence and has opposed the application.

5. In his submissions, Mr. Ikuu for the plaintiff submitted that no spousal consent had been obtained. He also submitted that no consent of the Land Control Board was obtained. It was his argument that in those circumstances, the plaintiff's case has merit.

6. Mr. Ombui for the 2nd defendant on his part argued that the charge was created in the year 2011 when no spousal consent was needed. On the issue of the consent of the Land Control Board, he submitted that this has not been raised in the pleadings and affidavit and should therefore be disregarded. He relied on the case of ***Elizabeth Nthenya Wambua vs Philip Wambua Masila & 3 Others, Nairobi ELC No. 240 of 2012, (2013) eKLR*** and my own decision in the case of ***Moses Kibiego Yator vs Eco Bank Kenya Limited, Eldoret ELC No. 426 of 2013 (2014) eKLR***.

7. I have considered the matter. The core complaint of the plaintiff is that no spousal consent was sought from her before the charge was registered. The need for spousal consent was introduced by Section 79(3) of the Land Act, Act No. 6 of 2012 which provides as follows :-

S. 79 (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.

8. These provisions of the law came into force on 2 May 2012. The charge in our case was signed on 22 November 2011. It was presented for registration on 30 November 2011. At this time, the Land Act, had not been enacted. I observe that the property in issue is one registered under the Registered Land Act (now repealed by the Land Registration Act, 2012 which also came into force on 2 May 2012). I have not been shown any provisions of the Registered Land Act, and I have no knowledge of any, which required that there be spousal consent.

9. In the case of ***Moses Kibiego Yator vs Eco Bank Kenya Limited***, I stated that the Bank could not be victimized for not finding it necessary to obtain a spousal consent when there was no requirement to do so. I still hold the same view. That was also the position of Mutungi J, in the case of ***Elizabeth Nthenya Wambua vs Philip Wambua Masila & 3 Others*** (supra). I have not been persuaded by Mr. Ikuu that I need to change that view.

10. This case is solely hinged on the allegation that there was no spousal consent. Although Mr. Ikuu tried

to argue that no consent of the Land Control Board was obtained, that to me is an afterthought as it is neither in the pleadings nor is it among the grounds that the application for injunction is hinged upon. It is an issue that was raised from the bar by Mr. Ikuu at the hearing of this application. The bank did not of course have any opportunity to respond to that point and it will be unfair for the plaintiff to be allowed to introduce that at the submissions stage. I will therefore ignore that complaint.

11. I am not of the view that the plaintiff has displayed a prima facie case with a probability of success for the reason that it has not been demonstrated to me that spousal consent was a requirement when the charge was created. Not being in doubt, I need not consider the balance of convenience. I probably need to make clear that that is my view at this point of the proceedings and it is without prejudice to any contrary holding that I may make after hearing the suit on merits.

12. For the above reasons, the application for injunction is dismissed with costs.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st day of September 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Ngamate holding brief for Mr. Ikuu for the plaintiff/applicant

Mr Ombui for the 2nd defendant /respondent

C/Assistant : Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU