REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 125 OF 2014

PHYLIS NYAGUTHE KANYI.................................... APPELLANT/APPLICANT

VERSUS

1. **BARCLAYS BANK OF KENYA...............1ST DEFENDANT/RESPONDENT**
2. **JOHN WAITHAKA GITHAIGA................2ND DEFENDANT/RESPONDENT**

(Being an appeal from the decision of the Learned (Acting)Senior Principal Magistrate J. Mwaniki in Nakuru CMCC NO. 197 OF 2014)

RULING

1. By an application dated the 28th November 2014 and brought under the provisions of Order 42 Rule 4 of the Civil Procedure Rules, the appellant Phylis Nyanguthie Kanyi sought orders of stay of execution of the Ruling of the Honourable Senior Principal Magistrate J. Mwaniki delivered on the 30th July 2014 in Nakuru **CMCC No. 179 of 2014** pending the hearing and determination of the appeal herein.

The applicant is alleged to be a wife of the 2nd Respondent in whose name property known as **Miti Mingi/Mbaruk block 5/742** is registered.

2. In her application, the appellant states that the 2nd Respondent who is alleged to be her husband charged the above property to Barclays Bank of Kenya Limited to secure some financial accommodation by way of a loan which he defaulted in paying prompting the bank to issue the statutory notices to sell the property to recover the outstanding sums pursuant to the terms and condition of a charge registered in its favour. The Bank through its agents, Garam Investments Auctioneers advertised the property for sale by public auction on the 17th December, 2014. On the 15th December 2014 the applicant was granted an interim stay of execution pending hearing of the application.

3. On the 15th November 2014, the trial court dismissed the applicants application for stay of execution pending hearing of this appeal on the grounds that the 2nd Respondent was clearly using the 1st Respondent, his wife, to frustrate the 1st Respondent's efforts to recover the money owed to it by the 2nd Respondent; and that no chances of success of the appeal were exhibited and no security for the due performance of the decree had been given.

4. The Applicant's submissions are but a repetition of submissions before the trial court that she and her children will suffer irreparable loss should the property be sold in realization of the

loan sum. She however does not propose to pay the outstanding loan to the 1st Respondent. The 2nd Respondent in his submissions through his advocate indeed admitted being indebted to the Bank, the 1st Respondent in the tune of Shs.2,373,684/= and was willing to pay in instalments – since May 2013. It is however noted that two years since he has not paid any sum to show his commitment to pay.

5. On behalf of the 2nd Respondent, the Bank, it was submitted that the application was filed only after the Bank instructed Auctioneers to advertise the property for sale and that the delay in filing the same was not explained. Further, it was urged that no deposit for security in *lieu* of execution was shown and no demonstration of substantial loss was given. It was submitted that an averment that the applicant and her children would suffer loss if evicted was not sufficient.

The 1st Respondent further submitted that the charge was executed on 24th March 2010 when spousal consent was not necessary under the repealed Land Registration Act and that Section 106(2) of the Land Act, the laws applicable at the time the charge was executed shall continue to be applied.

6. The court has considered the application, the affidavits and exhibits as filed. It is not in doubt that the 2nd Respondent is indebted to the 1st Respondent by virtue of the charge executed on the 24th March 2010. It is also clear that the 2nd Respondent has not made any efforts to pay the sum owed and is using his wife the applicant to frustrate the banks efforts to recover the loan amount by claiming that the property is a matrimonial property and cannot be sold to recover the loan as spousal consent was not obtained.

In the first instance, the applicant has not shown and proved that she is wife to the 2nd respondent. Exhibition of the childrens birth certificates is not enough. Even if she was indeed the wife, the requirement of spousal consent was not mandatory as at the date the charge was executed.

The **Land Act 2012** vide **Section 79(3)** that requires spousal consent cannot operate retrospectively as held in High Court **ELC Case No. 369 of 2013 BBK -vs- Ag** and **Judith Muok Atieno**, on the 24th March 2015.

7. It has been held over and over by the courts that once a property is given out as a security to secure a loan or financial accommodation, whether it be matrimonial property or not, it is deemed to be held as a commercial property capable of being sold.

See also **ZWN -VS- PNN (2012)E KLR and HCCC No.595 of 2012 Margaret Adhiambo Odhiambo -vs- EcoBank.**

As found by the courts in the above cases and many others, once a property is offered as security to secure financial accommodation, it is deemed to have been put forth as a commercial property notwithstanding that it is a matrimonial property.

8. That being the only reason and ground upon which the application is based, and in view of the court's finding that the property is deemed to have been put forth as a commercial property capable of being sold in default of repaying the loan, it is the court's finding that the applicant's application lacks merits and does not meet the threshold and principles for the grant of a stay of execution of a valid court order pending hearing of the appeal.

The application dated 28th November 2014 is therefore dismissed with costs to the 1st Respondent.

Dated, signed and delivered in open court this 17th day of September, 2015

COURT: The Ruling is read and signed in absence of parties

Parties to be informed of delivery of the Ruling.

JANET MULWA

JUDGE

Court clerk: Lina