



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE NO. 41 OF 2013

MARY NGARU..... PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LTD.....1ST DEFENDANT/RESPONDENT

RIRANGA GENERAL CONTRACTORS LTD. 2ND DEFENDANT/RESPONDENT

RICHARD NGARU NGWARE..... 3RD DEFENDANT/RESPONDENT

RULING

1. The uncontroverted facts in this dispute can be summarized thus:-

In 2010 the 1st Respondent, Family Bank Limited, extended a loan amounting to Kshs.2, 500,000/= to the 2nd respondent.

2. As security for the loan, the 3rd respondent charged his property known as **DUNDORI/LANET BLOCK 11/76 (MUWA)** hereinafter referred to as **“the suit property.”**

3. As the charge instrument executed by the 3rd respondent authorized the bank to continue from time to time to loan or advance any financial facilities and/or other accommodation to the 2nd respondent (clause B of the charge instrument), the 1st respondent upon application by the 2nd respondent did advance to the 2nd respondent further amounts, notably Kshs.1,500,000/= (vide a letter of offer dated 24th May, 2011) and Kshs. 15,000,000/= vide a letter of offer dated 8th June, 2011.

4. Apparently the 2nd respondent breached its obligations under the charge instrument and the 1st respondent sought to exercise its statutory power of sale of the suit property, being one of the properties which secured the loans hereinabove.

5. Upon service of the statutory notices, notification of sale and redemption notice, on the 3rd respondent, the 3rd respondent's wife hereinafter called **“the applicant”** brought this suit against the defendants seeking:-

1. A declaration that the entry into a contract of guarantee between the defendants and her spouse and the registration of a charge over the suit property (their matrimonial property) is illegal and

unconscionable;

2. A declaration that the redemption notice and the notification of sale issued in respect of the suit property is illegal, inequitable, unconscionable and void;
3. The title to the suit property to be discharged and any monies advanced to the 2nd defendant to accrue as liability in personam without any attachment of the suit property.
4. The liability of the 3rd defendant in respect of the loan advanced to the 2nd defendant to accrue as liability in personam; and
5. Costs of the suit to be borne by the defendants.

6. Alongside the suit the applicant brought an application for temporary injunction to restrain the Respondents from selling, disposing of, transferring or in any other way interfering with the title to the suit property.

7. The application is premised on grounds, that although the suit property is registered in the name of the 3rd respondent, the said property and all the developments thereon constitute the applicant's matrimonial home; that at all times the applicant was in occupation of the suit property, and in her capacity as the 3rd respondent's wife had an overriding interest to the suit property and the developments thereon. Further, that being the spouse of the 3rd respondent, the plaintiff was in the position of *cestui que* trust and the 3rd respondent was a custodial fiduciary of the matrimonial property. That the respondents acting in concert and without the plaintiff's knowledge caused the title to the suit property to be used as a collateral security for a loan granted by the 1st respondent to the 2nd respondent-a transaction even though adverse to the plaintiff's interest in the suit property had no benefits accruing to her; that the 1st respondent has instructed auctioneers to issue a redemption notice and a notification of sale of the suit property to recover the sums guaranteed by the 3rd respondent and unless this court issues the injunction sought, the 1st respondent will proceed with the intended sale which is illegal, irregular, inequitable, unconscionable and greatly prejudice to her.

8. The application is supported by both the 2nd and the 3rd respondent who contend that there is no reason why the 1st respondent should sell the suit property as the 2nd respondent has been servicing the loan. Further that the 1st respondent should have conducted due diligence before charging the property and that the 1st respondent having failed to do so should not be heard to say that it has a right to sell the property when the applicant clearly has an overriding interest in it.

9. The 3rd respondent on his part has averred that although the title to the suit property is registered in his name, the plaintiff and his children have a beneficial interest thereon as it is their matrimonial home. However he has conceded that he offered and charged the suit property to secure a loan of Kshs.2,100,000/= on behalf of the 2nd respondent.

10. It is his testimony, that when he executed the charge he had confidence that the 2nd respondent would clear the loan, which it did. Further that when the loan he guaranteed was cleared the 1st and 2nd respondent did not inform him so as to apply for discharge of the charge. Instead, without his knowledge, they entered into other transactions using the title to the suit property. In this regard, he denies having sanctioned or been aware of the subsequent transactions entered into between the 1st and 2nd respondent terming them wrongful, unprocedural and illegal as his title deed is insufficient to secure the loans advanced.

11. He contends that he has been prejudiced by the actions of the 1st and 2nd respondent.

12. In the replying affidavit sworn for and on behalf of the 1st respondent it is contended:-

- a. That the application is incompetent, bad in law and based on a misapprehension of the law.

- b. That the 3rd respondent charged the suit property in favour of the 1st respondent to secure an advance of Kshs. 2,100,000/= granted to the 2nd respondent by the 1st respondent;
- c. That clause B of the charge instrument provided that the bank could continue from time to time to loan or advance any facilities or other accommodation to the 2nd respondent.
- d. That the 2nd respondent subsequently applied for other loan facilities which the 1st respondent, in accordance with the charge instruments it advanced;
- e. That the 2nd respondent defaulted and the bank (1st respondent) initiated the process of realizing the securities held by issuing the requisite statutory notices on the 3rd respondent.
- f. That the charge instrument was duly executed by the 3rd respondent who was the registered owner of the suit property.
- g. Further that by the time the impugned transaction was entered into the suit property was free from any encumbrances.
- h. That the applicant and the 3rd respondent have by collusion brought this suit with a view of defeating the 1st respondent's legitimate interest therein;
- i. That registration of the impugned charge was done after exercise of due diligence and in full compliance with the law.
- j. It is also contended that the spousal interest that the applicant seeks to advance cannot be a subject of these proceedings as there is nothing in law upon which the applicant can hinge her claim. Further that the 3rd respondent having already defaulted, the 1st respondent is entitled to realize the security.

13. During the pendency of the plaintiff's application, the 3rd respondent brought the motion dated 18th October, 2013 to restrain the 1st respondent from advertising for sale, selling, disposing of, transferring or in any other way interfering with the suit property pending the hearing and determination of the suit.

14. The application is premised on the grounds that the 1st and 2nd respondent wrongfully, illegally, secretly and fraudulently obtained and furnished a loan using the applicant's title as security; that the applicant was neither aware of transaction nor did he consent or participate in the transaction; that the 2nd defendant has apparently defaulted on the loan repayment and the 1st respondent has issued a statutory notice of sale of the suit property; and the applicant and his family has been greatly prejudiced by the wrongful actions of the 1st and the 2nd respondents.

15. The application is supported by the affidavit of the 3rd respondent in which he has reiterated the foregoing contentions.

16. When these applications came up for hearing the court, with the concurrence of the parties, ordered that the two applications be heard together. Subsequently, the parties filed written submissions. They also addressed me on the pertinent issues arising from the applications. I will consider their arguments and submissions in the course of this ruling.

17. The applications herein being for grant of a temporary injunction to restrain the 1st applicant from proceeding with the threatened sale of the suit property the onus at this stage, is upon the Applicants to persuade the court that upon the facts they have relied on and on the application of the law, they or any of them has a *prima facie* case with a probability of success at the trial; that an award of damages will not be adequate compensation if the injunction is not issued; and finally that the balance of convenience is in their favour. See **Giella V. Cassman Brown & Company Limited (1973) E.A 358.**

18. Starting with the second last principle, the answer was provided by the Court of Appeal in **Nyanza**

Fish Processors Ltd. V Barclays Bank of Kenya Civil Appeal NO. 114 of 2009 where the Judges said:-

“If the property, the subject matter of this litigation is sold, the loss to the Applicant will be financial. True, it may be the property is unique. Its value however is ascertainable... The Applicant itself had offered the property as security. No matter that the validity of the charge is being challenged. The conduct of the Applicant in charging the same made it a commercial property the loss of which in an appropriate case would entitle the Applicant to damages. The Respondent is a bank and there is no gain saying that it will be able to satisfy the loss.”

19. That is the situation the 3rd respondent finds himself in. Although he contends that he had not sanctioned the subsequent advances by the 1st respondent, he has led no evidence to prove the alleged lack of knowledge or fraudulent conduct by the 1st and 2nd respondent. Moreover, the charge instrument he executed in favour of the 1st respondent provided that the 1st respondent could **“continue from time to time to loan or advance or grant any financial facilities or other accommodation or to grant time so long as it may think fit.”** I find nothing in that clause or any subsequent communication to the 1st respondent prohibiting or qualifying the application of that clause.

20. Although best practice would have required the bank to consult and inform the 3rd respondent before making further advances on the basis of the security he gave, there being no such requirement in law or in the charge instrument, I am not persuaded that the 1st respondent breached the law or its contractual obligations with the 3rd respondent to warrant issuance of the orders sought.

21. Regarding the application by the plaintiff (the 3rd respondent's wife) it is submitted that the 3rd respondent's wife being a person in occupation of the suit property she has an overriding interest over the suit property. Reliance is made on **section 30(g)** of the **Registered Land Act** (now repealed) which provides:-

“Unless the contrary is expressed in the register, all registered land should be subject to such of the following overriding interests as may from time to time subsist and affect the same without being noted on the register-

(g) The right of a person in possession or actual occupation of the land to which he is entitled only on such possession or occupation, save where an inquiry is made of such person and the rights are not disclosed.”

22. It is also submitted that the foregoing provision of the law, which is replicated in the Lands Act, 2012, puts an obligation on a party acquiring an interest in registered land to make an inquiry and establish whether there are prior subsisting rights that would adversely affect or encumber the registered rights. That where no such inquiry is made any right registered over the land is bound to be defeated or made subject to the overriding interest.

23. Reference is made to **National Provincial Bank v. Hastings Car Art (1964) 1 All ER 688** where Lord Denning, while interpreting section 70(1)(g) of the English Land Registration Act observed:-

“So far as registered land is concerned, the right of a deserted wife to remain in occupation is a right within section 70(1)(g) and is an overriding interest available against all save where an inquiry is made of her rights and her rights are not disclosed.”

24. Reference is also made to Eunice **Wairimu Kibe v. Edward Kibe Maina & Others - Nakuru HCCC NO. 88 of 2010** where Emukhule J. observed:-

“The replying affidavit of Francis Komen refers in Paragraph 18 to a valuation report annexed as “FK 9”. It is observed in paragraph 4.8 of the report that-

'The property is part owner occupied and part let out to monthly tenants.'

This clearly confirms the overriding interest of a person in possession or actual occupation, which interest subsists until an inquiry establishes that possession or actual occupation is wrongful.”

25. Responding to the foregoing submissions counsel for the first respondent has submitted that a party can only be granted a temporary injunction if he has sought injunctive relief in the plaint. Pointing out that no injunction is sought in the plaintiff's suit, counsel has submitted that a temporary injunction cannot issue in applicant's favour.

26. Reliance is made on Kihara v. Barclays Bank (2001) 2 E.A 240 where Ringera J. (as he then was) observed:-

“The plaintiff's application for interlocutory relief did not sound under rules 1(a) and 1(b) at all (though both rules have been invoked) but fell under rule 2. Though this had been mentioned by counsel the plaint had not been amended and the application for an interim injunction was incompetent as the plaintiff did not seek any relief in the form of a permanent injunction in the plaint.”

In those circumstances and seeing that the plaint has not been amended to incorporate such prayer I am constrained to agree with the submission on behalf of the bank that the application is incompetent and ought to fail on this ground alone.” (Emphasis mine).

27. Counsel also cited the decision of Emukhule J. in James Archimedes Gichana v. Pyrethrum Board of Kenya- Nakuru HCCC NO. 237 of 2007 where the judge observed:-

“Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require clear indication or prayer in the suit seeking such an injunction. Where an applicant for injunction fails to demonstrate that he first sought an order of temporary injunction in his suit his application is said not to sound in either rule 1(a) and 1(b) of the said order 40 and will be deemed to be incompetent...The reason for this is clear. It is found in Order 2 rule 6 of the Civil Procedure Rules 2010. That no party may in any pleadings make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit...6(1) without first amending his pleadings. 6(2) No party can depart from his pleadings whether in evidence or in an interlocutory application, to do so the party must first amend his/its pleadings.”

28. Did the plaintiff comply with the foregoing requirements of the law? If not, does the non-compliance render the application incompetent or fatally defective?

29. Having carefully perused the court file and seen the plaint filed in this suit, I can confirm that the plaint does not contain a prayer for an injunction and that no amendment was made to the plaint to incorporate such a prayer.

30. Clearly the application offends order 2 rule 6 (1) and (2) of the Civil Procedure Rules.

31. Does lack of a prayer for an injunction in the suit render the plaintiff's application fatally defective?

32. My answer is in the affirmative. This is because a temporary injunction is issued with the aim of preserving the property pending the hearing and determination of the suit. If the applicant succeeds in his quest to permanently prohibit the sale or alienation of the property the court would issue a perpetual injunction restraining the sale, alienation and/ or interference with the property. Without such a prayer, nothing would prevent the sale of the property immediately after the suit is heard and determined effectively rendering the subsistence of a temporary injunction during trial nugatory.

33. Although the foregoing determination suffices to put to rest the quest by the plaintiff to restrain the 1st respondent from selling and/or transferring the suit property, given that the plaintiff's application raises a serious question of law, this court feels obliged to share its views on the question, which is- whether the plaintiff's occupation of the suit property as a spouse of the registered owner constitutes or constituted an overriding interest capable of defeating the 1st respondent's registered interest in the suit property?

34. As pointed out above, counsel for the plaintiff has submitted that the 1st respondent was, by law, obligated to inquire into the plaintiff's interest in the suit property and probably obtain her consent or views before entering into the transaction it entered into with her husband (the third respondent) and that having failed to do so, its acquired rights over the suit property are encumbered or subject to the plaintiff's unregistered interests thereon.

35. Counsel for the 1st respondent does not agree. He has submitted that at the time the impugned charge was executed, the suit property was free from any encumbrance; that the purported interest of the plaintiff was not noted in the title and that the 1st respondent entered into the transaction upon conducting a search which reveals no adverse interest in favour of the plaintiff; that the plaintiff has no proprietary rights to the suit property and as such a temporary injunction cannot issue in her favour. In this regard counsel has cited:-

(a) **Nairobi Mamba Village v. National Bank of Kenya** (2002) EA 197 where Ringera J. (as he then was) held:-

“In the context of rule (1) of (former) order xxxix of the civil Procedure Rules the party seeking to prevent alienation, wastage or damage to the property in dispute therein must establish that he has legal rights in such property which he seeks to protect by the injunction sought.”

(b) **Mwa Kalindile v. NBC Holding Corporation** (2001) EA 148 where the Court of Appeal of Tanzania held:-

“We agree that the appellants have a registrable interest in the house which as provided under the Act could be protected by a caveat. The appellant did not register a caveat with the registrar of titles. The caveat would serve as a warning to the respondent that the house was a matrimonial property...there was no way in which the respondent would have known that the house was a matrimonial property...the 2nd respondent voluntarily mortgaged the house which was in his name. The mortgaging and alienation of the house was not null and void.”

c. **Also in the case of Kamau v. Mungai & Another** (2008) KLR (G & F) where the Court of Appeal held:-

“The 1st respondent (husband) was perfectly entitled to subdivide his land and sell it to any willing purchaser. The 2nd respondent came in as a purchaser and the transaction was conducted in accordance with the law. No fraud or illegality was pleaded and hence the 2nd respondent ought not to be dragged into this domestic dispute between husband (1st respondent) and his wife respondent).

The learned judge considered all that was placed before him and came to the conclusion that the appellant's claim was for dismissal. We have considered that evidence, and evaluated it and have come to the conclusion as did the learned judge that the appellant's claim was indeed baseless.”

(d) I also consider the decision in **Sabina Wanjiru Muchoki v. Joseph Njaramba Mwangi** (2005) eKLR Nairobi HCCC No. 28 of 1994 where JB Ojwang J. (as he then was) held:-

“The terms of proprietorship as shown on the document of title include the right of

alienation, and it is not specified that the lawful title holder is under any obligation during his life time to pay regard to broader family preferences before exercising such right. This has the effect of conferring upon property titles the marketable quality which guarantees that third parties acting in good faith and giving value in return, can lawfully acquire land title from its original owner.....”

In theory therefore Peter Muchoki Gachina's land title or part of it could lawfully pass on to the defendant through an exclusive transaction involving vendor and purchaser without the intervention of broader family interest such as represented by the plaintiff in this case. This being possible it follows that the defendant if he acted in good faith and gave value for the suit land and lawfully got himself registered as the new owner, would become the lawful proprietor of the same for all purposes, and his title could not then be defeated by claims founded on morals of the family...

So long as the plaintiff's husband Peter Muchoki Gachina is alive and is the registered proprietor of a parcel of land his autonomy in alienating that land stands in every sense unqualified, and his wife, the plaintiff can in no way limit that freedom as a matter of law, by relying on broad family interest. The only time the plaintiff can assert her rights in relation to such property are firstly during succession when the registered proprietor is no longer alive and secondly when issues of matrimonial property come up and it becomes necessary to make provision for the plaintiff herself.”

36. Other authorities cited by the 1st respondent include Muriu v. Stotia (1984) KLR 587, Bilha Wanjiku Gichangi v. Richard Njama Gichangi & Another Nakuru HCCC No.269 of 2007, Peter Mburu Echaria v. Priscilla Njeri Echaria (2002) eKLR.

In Muriu v. Stotia, Cocker J. (as he then was) held:-

“The plaintiff's occupation her work and labour in the alleged development were as a result of her being a member of the 1st defendant's family. An Occupation of such nature did not give rise to ownership over her husbands (the 1st defendant's property).

Under normal circumstances, it is reasonable for a lender to presume that only members of the family of the registered owner would be residing and working on the property involved in the transaction and if the courts were to start paying heed to such considerations which have no legal basis then the rights of a registered owner to raise a loan on the security of his immovable property would be undermined.

As the 2nd defendant had ascertained the 1st defendant's ownership of the premises and that it was free from encumbrances, obtained the consent of the Land Control Board to the transaction and otherwise complied with the requirements of Cap 300 was under no obligation to inform any other party of the intended advance of the loan under the charge...”

37. Regarding the authorities cited by the plaintiff it is submitted that the authorities are distinguishable.

38. Upon considering the peculiar circumstances of this case and the law which governed the property, at the time the impugned transaction was entered into, and in particular, section 39 of the Registered Land Act, I agree with the sentiments of the judges in the authorities cited by counsel for the 1st respondent, and in particular, the sentiments of J.B Ojwang J. and Cocker J.

39. Section 39 aforementioned provides:-

“39(1) No person dealing or proposing to deal for valuable consideration with a proprietor shall be required or in any way concerned:-

- a. **To inquire or ascertain the circumstances in or the consideration for which that proprietor or any previous proprietor was registered; or**
 - b. **To see to the application of any consideration or any part thereof**
 - c. (c)....
2. **Where the proprietor of land, a lease or a charge is a trustee, he shall, in dealing therewith, be deemed to be absolute proprietor thereof, and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust.**” (Emphasis mine).

40. By dint of the express provisions of section 39(2) the plaintiff's contention that the 3rd defendant was in breach of his trust obligation to her is incapable of founding a claim against either the 3rd respondent or the 1st respondent.

41. As observed in Tanzania case, Mwa Kalindile v. NBC Holding Corporation (supra) it is the plaintiff who ought to have registered her interest, if any, against that of her husband (registered owner) to warn any third party interested in it that the property was a matrimonial home. Without such warning and in the absence of proof of any malice or acts of fraud on the 1st respondent's part, it was reasonable for the 1st respondent to presume that only members of the family of the registered owner would be residing and working on the suit property.

42. By entering into the impugned transaction the bank neither acted unlawfully nor breached any known rights of the plaintiff. On this reason alone, her claim against the 1st respondent fails.

43. For the foregoing reasons I find the applications herein to be unmerited and dismiss them with costs to the 1st and 2nd respondent.

Dated, Signed and Delivered at Nakuru this 28th day of February, 2014.

H.A OMONDI

JUDGE