



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 206 of 2008

JANE MUTHEU KALOKI.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....1ST DEFENDANT

DANIEL KALOKI KIOKO.....2ND DEFENDANT

RULING

(1) Jane Mutheu Kaloki, (“**the Plaintiff**”), filed suit on the 17th April 2008 against Barclays Bank of Kenya Ltd., (“**the Bank**”) and Daniel Kaloki Kioko, her former husband and the second Defendant in this case. She claims that she has been in actual occupation of Plot Title No.NAIROBI/BLOCK/78/348 (“**the suit property**”) together with her two children and to the exclusion of the second Defendant since October 2003 and that by virtue of such right and continued occupation, the Plaintiff’s interest is an “**overriding interest**” over the title. It is the Plaintiff’s case that the intended sale of the suit property by the Bank in exercise of its statutory power of sale is illegal and oppressive, because the Bank did not take the Plaintiff’s overriding interest as a wife of the second Defendant into consideration before taking the charge; that the Bank failed to inquire about the Plaintiff’s right of occupation before registering its security; and that the Bank knew or ought to have known that the suit property was her matrimonial home and should have sought the Plaintiff’s consent to the charge.

The Plaintiff therefore seeks a declaration that she is entitled to occupation of the suit property and a permanent injunction to restrain the Bank from exercising its statutory power of sale.

(2) The Bank, in a Defence dated and filed on the 9th May 2008, denies the Plaintiff’s claim. It states that the suit property was acquired by the second Defendant by way of a loan granted by the Bank on the security of a charge created on the 28th April 1999 prior to the alleged occupation by the Plaintiff (in October 2003) and accordingly, the alleged overriding interest could not have arisen before the registration of the Bank’s charge. The Bank further avers that the second Defendant having defaulted in payment of the loan, the Bank is entitled to exercise its statutory power of sale.

(3) In denying the averments made in the Plaint, the second Defendant in a Defence dated the 26th May 2008 says that he acquired the suit property with a loan from the Bank; that the Plaintiff is not entitled to any right of occupation as she was in any event aware at all material times that the suit property had been acquired by way of a loan from the Bank and that the Plaintiff has not disclosed any cause of action against the second Defendant.

- (4) The Plaintiff also took out a Chamber Summons (being the application now before me) on the 17th April 2008 under Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules seeking (among other orders) a temporary injunction to restrain the Bank together with its employees, servants and agents from selling, alienating or otherwise interfering with the suit property (Plot Title No. NAIROBI/BLOCK/78/348) pending the hearing and determination of the suit. In her affidavit sworn on the 17th April 2008 in support of her application, the Plaintiff reiterates the averments contained in the Plaintiff. She admits that the suit property was acquired by the second Defendant (her former husband) by way of loan from the Bank and that she and the second Defendant resided thereat from 1998 to October 2003 when he moved out leaving the Plaintiff and their two children in occupation. She states that she commenced separation proceedings against her husband in Judicial Separation Cause No. 19 of 2004 at the Nairobi Milimani Commercial Courts and that the marriage was dissolved by order of the court on the 25th October 2005; that there is still pending before the court another suit being Nairobi HCCC No. 161 of 2005 in which the Plaintiff seeks similar orders against the second Defendant; and that the Plaintiff having acquired an overriding interest over the suit property, she is entitled to continued occupation thereof against the Bank and the second Defendant.
- (5) The Bank opposes the application on the grounds set forth in the replying affidavits of Purity Raaria, its Legal Officer, dated the 23rd May 2008 and the 6th June 2008 respectively. She states that the second Defendant, then an employee of the Bank, acquired the suit property by way of a loan of K.sh.2.59 million from the Bank; that the Bank registered a Charge dated the 28th April 1999 over the suit property to secure repayment thereof and that the 2nd Defendant having defaulted in repayment, the Bank is entitled to exercise its statutory power of sale under the Charge. The Bank asserts that the Plaintiff's alleged overriding interest could not have arisen before the creation of the Charge and that in any event, the Plaintiff is no longer the wife of the second Defendant.
- (6) The Plaintiff also swore a supplementary affidavit on the 3rd June 2008 in answer to Ms. Raaria's replying affidavit. She contends that she has an overriding interest over the suit property which she alleges overrides any registered interest in the suit property.
- (7) Finally, the second Defendant in an affidavit sworn on the 6th June 2008 opposes the application on the grounds that he is the registered proprietor of the suit property having purchased the same in 1999 by way of a loan acquired from the Bank and secured by a charge thereover; that he was unable to repay the loan and accordingly agreed to sell the suit property to one Newton Amurega Senaji; that the Plaintiff vide Nairobi HCCC NO.161 of 2005 challenged the sale and obtained interim orders of injunction restraining the sale to Senaji whereupon the proposed sale was rescinded; that the marriage between him and the Plaintiff was dissolved and that the Plaintiff should not claim the suit property by virtue of that marriage and otherwise; and that the second Defendant being truly indebted to the Bank, the Bank is entitled to exercise its statutory power of sale over the suit property over which the Plaintiff has no claim whether by way of an overriding interest as alleged or at all.
- (8) In submissions Mr. Elisha Ongoya, learned counsel for the Plaintiff argued that the suit property having been acquired in 1999, it is matrimonial property and the Plaintiff, by physical occupation thereof, acquired an overriding interest superceding any registered interest therein, including the Bank's interest as chargee. He contended that the Charge in favour of the Bank having been "**discharged**" on the 28th December 2004 when Newton Senaji became the registered proprietor of the suit property and a charge in favour of Standard Chartered Bank of Kenya Ltd. registered against the title, the subsequent reinstatement of the Bank's Charge is null and void and of no effect.
- (9) Mrs. P. Karanja, learned counsel for the Bank, noted that the Plaintiff had not challenged the validity of the Charge in the Plaintiff; that the Plaintiff is not a party to the Charge and therefore has no *locus standi* to institute these proceedings; that the cause of action between the Plaintiff and the second Defendant is a matrimonial matter and cannot affect the Bank or its rights under the Charge; and that the Plaintiff's claim could not in any event have arisen before the creation of the Charge in 1999.
- (10) Mr. Muinde Kaluu, learned counsel for the second Defendant associated himself fully with the

submission of Mrs. Karanja. He added that the Plaintiff has the option of redeeming the Charge if she wishes to acquire any rights to the suit property but not having done so, she cannot obtain any interim reliefs to restrain the Bank from exercising its statutory power of sale.

(11) Having considered all these arguments in conjunction with all the affidavits filed by or on behalf of the parties, I have come to the conclusion that the application must fail for a number of reasons.

Firstly, by virtue of the Certificate of Official Search dated the 16th April 2008, the second Defendant is the registered proprietor of the suit property, subject to the Charge in favour of the Bank to secure repayment of the sum of K.sh.2,590,000/=. The second Defendant admits that he has defaulted in payment of the moneys secured thereunder and that the Bank has lawfully demanded payment and sought to exercise its statutory power of sale.

(12) The Plaintiff claims an overriding interest in the suit property by virtue of her physical occupation thereof, such right having arisen by reason of the Plaintiff's marriage to the second Defendant. The Plaintiff does not claim to have contributed to the acquisition of the suit property either for valuable consideration or otherwise. Indeed in her Judicial Separation Cause No.19 of 2004, she made no claim whatsoever to the suit property. In her Petition, verified by affidavit sworn on the 4th June 2004, the Plaintiff seeks, among other orders, that she and the second Defendant be Judicially separated; that the second Defendant be ordered not to interfere, harass or threaten the Plaintiff or her children and that the second Defendant be ordered to pay for the reasonable upkeep of the Plaintiff and her children.

(13) Section 30 (g) of the Registered Land Act [Cap.300] upon which the Plaintiff relies reads as follows—

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

(14) On the evidence, the Plaintiff's alleged claim to an overriding interest could not have arisen before the second Defendant acquired the suit property in 1999. Further, the Plaintiff is not the wife of the second Defendant and any right she claims by virtue of her occupation of the suit property is not an overriding interest within the meaning of Section 30(g) of the Registered Land Act. Accordingly, I find and hold that she cannot assert such right against the second Defendant as the registered proprietor of the suit property and/or against the Bank as chargee thereof. As I have already said, the Plaintiff has not claimed or shown any proprietary interest in the suit property by reason of any contributions she has made to the purchase or development thereof or otherwise howsoever. The application is also an abuse of the process of the court in view of the Plaintiff's pending suit (Nairobi HCCC No.161 of 2005) seeking similar orders.

(15) For the reasons I have given, the application fails. I therefore order that the Chamber Summons filed on the 17th April 2008 be and is hereby dismissed with costs to both Defendants and the temporary orders of injunction made on the 18th April 2008 be and are hereby discharged and vacated accordingly.

Order accordingly.

Dated and delivered at Nairobi this Twenty-third day of January 2009.

P. Kihara Kariuki

Judge