



**Shitogo v Maru & 4 others (Environment and Land Appeal E014 of 2021)  
[2022] KEELC 4931 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4931 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E014 OF 2021  
DO OHUNGO, J  
SEPTEMBER 27, 2022**

**BETWEEN**

**LILIAN MUYESHI SHITOGO ..... APPELLANT**

**AND**

**ALICE JEPCHUMBA MARU ..... 1<sup>ST</sup> RESPONDENT**

**NEBERT MISHEBA MUGESI ..... 2<sup>ND</sup> RESPONDENT**

**HENNESSY INTERNATIONAL LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**FAULU MICROFINANCE BANK LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**KENNETH MILTON LUVUTSE ..... 5<sup>TH</sup> RESPONDENT**

*(Being an appeal from the ruling of the Chief Magistrate's Court at Kakamega (B Ochieng, Chief Magistrate) delivered on 27th April 2021 in Kakamega MCELK No 10 of 2019 Lilian Muyeshi Shitogo v Alice Jepchumba Maru and others)*

**JUDGMENT**

1. Prior to approaching this court, the appellant herein filed in the subordinate court, an application by way of notice of motion dated January 23, 2019, seeking an order of status quo over the ownership and use of land reference number Kakamega/Sergoit/2012 pending hearing and determination of her suit against the respondents. Upon hearing the application, the subordinate court (Hon B Ochieng, Chief Magistrate) delivered a ruling on April 27, 2021 in which it concluded that the application was not merited and consequently dismissed it with costs in the cause. The 5<sup>th</sup> respondent herein participated in the proceedings before the subordinate court as an interested party. Although not initially included as a party in the memorandum of appeal, he was made a party through an order made by this court on November 11, 2021.



2. Dissatisfied with the ruling of the subordinate court, the appellant filed this appeal. The grounds of appeal as listed in the memorandum of appeal dated May 6, 2021 are as follows:
  1. The trial court erred in fact and law by dismissing the application dated January 23, 2019;
  2. The trial court erred in fact and in law by finding that the claims of fraud were not substantiated yet before him was a purported affidavit of spousal consent allegedly sworn by a person who has sworn that he has never been the chargor's wife;
  3. The trial magistrate erred in law and in fact in overlooking the defects that are on the surface of the charge and which are undisputed and in some cases admitted by both parties;
  4. The trial magistrate erred in law and in fact overlooking spousal rights which are overriding rights and instead and in complete misapprehension of the law held;
 

“,,even if the suit property turned out to be matrimonial property, the same could not provide a defaulter with a shield from realization of the security given under a charge”
  5. The trial magistrate erred in law and fact by in implying there was a valid charge yet the validity of the charge is the subject of the suit.
  6. The trial magistrate erred in law and in fact in holding that “the suit property had already been sold” yet before him was an official search showing the suit property has not been transferred.
  7. The trial magistrate erred in fact and in law in finding that the interested party was a purchaser in good faith yet the interested party did not even allege that he had bought the land but that his property has the same registration number as the suit property.
3. Based on the above reasons, the appellant prayed that the appeal be allowed with costs, that the subject ruling be set aside, that an order of status quo be granted as she had sought and that the file in the subordinate court be allocated to a different magistrate for purposes of determination of the suit.
4. The appeal was canvassed through written submissions. The appellant argued that the crux of the case in the subordinate court is validity or otherwise of the impugned charge and that if the charge is found to be invalid, the appellant's case succeeds and vice versa. That, consequently, the subordinate court's decision should have been informed by the question of validity of the charge. She further argued that the learned magistrate erred by terming her a defaulter yet she has nothing to do with the loan. Further, that there is no dispute that the suit property was at the material time, matrimonial property.
5. In response, the 4<sup>th</sup> respondent agreed with the appellant that the dispute revolves around the question of validity of the charge and further argued that issues of validity of the charge and fraud can only be ventilated at trial. It added that the suit property had been sold by the time the appellant filed the suit in the subordinate court and that the appeal should be dismissed for being unmerited.
6. The 5<sup>th</sup> respondent argued that granting the orders sought by the appellant will prejudice him since the suit property has since been transferred to him. He equally concluded that the appeal lacks merit and urged the court to dismiss it with costs.
7. Although served, the 1<sup>st</sup> to 3<sup>rd</sup> respondents neither appeared in this appeal nor filed submissions.
8. The principles that guide an appellate court while considering an appeal against an order made in the exercise of discretion are settled. The Court of Appeal recently reiterated in the case of *Mombasa Cement Limited v Kitsao & 34 others* (Civil Appeal E016 of 2020) [2022] KECA 562 (KLR) (24 June 2022) (Judgment) that an appellate court will not interfere with the exercise of discretion by an inferior



court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion.

9. I have considered the appeal and the parties' submissions. The only issue for determination is whether notice of motion dated January 23, 2019 was merited. Although expressed as seeking an order of status quo, the application was essentially one of an interlocutory injunction. The principles that guide any court which is considering an application of that nature are well known. They were laid down in the case of *Giella -vs- Cassman Brown & Co Ltd* [1973] EA 358 and reiterated with more clarity in *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR. In summary, such an applicant must establish a prima facie case with a probability of success. Even if she succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.
10. A perusal of the appellant's plaint and application in the subordinate court shows that her case was that the 2<sup>nd</sup> respondent who was the registered proprietor of the suit property charged it in favour of the 4<sup>th</sup> respondent. She contended that she is the 2<sup>nd</sup> respondent's wife, that she ordinarily resides and works in the United Kingdom and that she did not give any spousal consent in respect of the charge. She added that the suit property is their matrimonial property and that a spousal consent signed by the 1<sup>st</sup> respondent is fraudulent since the said 1<sup>st</sup> respondent is not married to the 2<sup>nd</sup> respondent. Basically, her case is that the charge is invalid for want of spousal consent and that the 4<sup>th</sup> respondent cannot therefore exercise charge's statutory power of sale. She concedes that there are two other pending cases being Nairobi PMCC No 3184 of 2018 and Nairobi Milimani Commercial Court Case No 193 of 2019 between the respondents herein concerning repayment of the loan. She however maintains that those cases do not concern the issue of validity of the charge.
11. I have perused the copy of the charge that was exhibited by the appellant. Annexed to it is a spousal consent signed by the 1<sup>st</sup> respondent in the presence of an advocate. On the other hand, the appellant's claim of marriage to the 2<sup>nd</sup> respondent is based on document that she annexed as 'LIM-1' to her supporting affidavit and which she termed as marriage certificate. I note that the annexed copy is incomplete, and I am unable to ascertain if indeed it is evidence of marriage. Simply put, the appellant did not demonstrate that the 1<sup>st</sup> respondent had no capacity to sign the spousal consent. As correctly noted by the learned magistrate, allegations of fraud are serious matters and the appellant ought to have done more to substantiate them, more so when it is considered that disputes have arisen over repayment of the loan leading to at least two other suits being filed prior to the subject suit. In view of that background, the appellant needed to demonstrate clearly that her claims are not just another attempt at keeping the chargee from realising the security.
12. Based on the foregoing, the appellant has not demonstrated any misdirection on the part of the learned magistrate or that the magistrate arrived at a wrong conclusion. I agree with the learned magistrate that no prima facie case was demonstrated. That being the case, there would be no need to consider the limbs of irreparable injury and balance of convenience. I find no merit in this appeal and I accordingly dismiss it with costs to the 4<sup>th</sup> and 5<sup>th</sup> respondents. I do not award any costs to the 1<sup>st</sup> to 3<sup>rd</sup> respondents since they neither appeared in this appeal nor filed submissions.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**D. O. OHUNGO**



## **JUDGE**

Delivered in open court in the presence of:

No appearance for the appellant

No appearance for the 1<sup>st</sup> to 3<sup>rd</sup> respondents

Mr Fundi for the 4<sup>th</sup> respondent

Ms Wilunda for the 5<sup>th</sup> respondent

Court Assistant: E. Juma

