



REPUBLIC OF KENYA

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

Civil Case 266 of 2006

CONSOLIDATED BANK OF KENYA LTD.....1ST PLAINTIFF

MARK ONE LTD2ND PLAINTIFF

VERSUS

KATHERINE K. MBITI.....1ST DEFENDANT

THE PRINCIPAL REGISTRAR OF TITLES...2ND DEFENDANT

JUDGMENT

The 1st plaintiff filed suit by originating summons under the provisions of **Section 57(5)** and **64** of the **Registration of Titles Act, Order XXXVI Rule 3B** of the **Civil Procedure Rules** and other enabling provisions of the law seeking orders of the court to compel the defendants to remove or withdraw the caveats placed against the suit property i.e. LR No. 3734/653(Original No. 3734/3/212) IR No. 16061. The 1st plaintiff further prayed for an order of the court to direct the 2nd defendant to register a transfer by chargee duly lodged by the purchaser and issue a certificate of title in the purchaser's name. The 1st plaintiff prayed for the costs of the suit plus interest at courts rates. Mark One Ltd, the purchaser of the suit property was later enjoined in the suit as 2nd plaintiff. The originating summons is supported by the annexed affidavit of Julius Gikonyo, the officer in charge of remedial unit of the 1st plaintiff. He swore a further affidavit in support of the 1st plaintiff's case. The 1st defendant swore a replying affidavit in opposition to the suit. Although the Attorney General entered appearance on behalf of the 2nd defendant, no papers either in support or in opposition of the suit was filed by the 2nd defendant. Thuita Mwangi, a director of the 2nd plaintiff, swore an affidavit in support of the plaintiffs' case.

The parties to these proceedings took directions before this court and resolved to have the originating motion determined by the parties making submissions before court. Prior to the oral hearing of the suit, the parties agreed to file written submissions in support of their respective opposing positions. They duly complied and filed the said written submissions, including the authorities that they sought to rely on in support of their respective cases. At the hearing of the suit, I heard oral submissions made by Mr. Lilan for the 1st plaintiff, Mr. Muriuki for the 2nd plaintiff and Miss Mumbi for the 1st defendant. Mr. Lilan submitted that the plaintiffs were seeking the removal of the two caveats registered in the title of the suit property by the defendants. The plaintiffs were further seeking to compel the 2nd defendant to register the transfer by chargee in favour of the 2nd defendant, the purchaser. He narrated how the suit

property came to be charged to the 1st plaintiff. He submitted that by a first legal charge dated 1st March 1993, a limited liability company known as Kiathi Co. Ltd charged the suit property to the 1st plaintiff. The company defaulted in repaying the loan that was advanced to it together with the accrued interest. The 1st plaintiff attempted to recover the amount owed by realizing the security charged to it. The company resisted the exercise by the 1st plaintiff of its statutory power of sale. The company filed suit seeking to restrain the 1st plaintiff from exercising its statutory power of sale. The application for interlocutory orders of injunction was dismissed. Subsequent thereafter, the 1st defendant filed suit against the 1st plaintiff and her estranged husband, Daniel Mbiti Mathili seeking to restrain the 1st plaintiff from exercising its statutory power of sale. The application for interlocutory orders of injunction was dismissed by the court on the ground that the 1st defendant lacked capacity to file suit in respect of a property owned by a limited liability company.

Mr. Lilan submitted that, after the dismissal of the application for injunction, the 1st plaintiff put in motion the realization process. The suit property was sold to the 2nd plaintiff in a public auction. The 1st plaintiff executed a transfer by chargee in favour of the 2nd plaintiff. The transfer could not however be registered due to the fact that the 1st defendant had lodged a caveat in respect of the title of suit property claiming an interest on alleged rights accruing to her on the basis of her marriage. In essence, he submitted, the 1st defendant was claiming that the suit property was matrimonial property. He further submitted that the 2nd defendant lodged another caveat on the basis of a letter written by the police who were alleging that they were investigating fraud connected to the charge of the suit property to the 1st plaintiff. Mr. Lilan maintained that the 2nd defendant had no legal basis by which to lodge the caveat and therefore urged the court to order the removal of the caveat. He submitted that the claim by the 1st defendant that she had not signed the legal charge or that the company had not made a resolution charging the suit property to the 1st plaintiff was not supported by evidence and neither was it tenable in view of the fact that no suit had been filed to challenge the validity of the charge. He urged the court to discount the allegation by the 1st defendant that there was fraud in the execution of the charge by its directors. He maintained that in view of the fact that there was no pending dispute regarding suit property between the 1st plaintiff and the 1st defendant, there was no basis upon which the caveat could be legally maintained. He urged the court to allow the prayers sought in the suit with costs.

Mr. Muriuki for the 2nd plaintiff supported the submission made on behalf of the 1st plaintiff. He submitted that 2nd plaintiff was the lawful purchaser of the suit property after the same was sold by the 1st plaintiff in a public auction in exercise of its statutory power of sale. He submitted that the 2nd plaintiff complied with the conditions of sale by paying the amount that was required to be paid as deposit at the fall of the hammer. He reiterated that although the 1st plaintiff had executed transfer by chargee, the 2nd plaintiff has been unable to register the transfer due to the caveats lodged by the defendants. He submitted that the lodging of the caveats had frustrated the 2nd plaintiff from being registered as the owner of the suit property even though the 2nd plaintiff had lawfully purchased the same from the 1st plaintiff. He maintained that 1st defendant had no basis in law to claim a property owned by a limited liability company as matrimonial property. He was of the view that the complaint lodged by the 1st defendant to the police in regard to the alleged fraud was an afterthought and solely aimed at frustrating the transfer of the suit property to the 2nd plaintiff. He submitted that upon the sale of the suit property to the 2nd plaintiff by the 1st plaintiff in exercise of the latter's statutory power of sale, the company's equity of redemption, and to that extent any claim by or on behalf of the 1st defendant, was extinguished. He urged the court to disregard the claims made by the 1st defendant and allow the prayers sought in the plaintiffs' suit.

Miss Mumbi for the 1st defendant submitted that the 1st defendant had a legal claim over the suit property since she had established that suit property was matrimonial property. She maintained that in so far as the basis of the sale of the suit property to the 2nd plaintiff was the charge, then the same could not proceed in view of the allegation of fraud made by the 1st defendant. She submitted that the 1st defendant had established that her signature on the charge had been forged. She took issue with the fact that no resolution by the company had been passed before the suit property was charged to the 1st plaintiff. She maintained that the caveats were properly lodged in view of the questionable circumstances in which her signature in the instrument of charge was secured. She reiterated that the 1st defendant had established that the charge was invalid and therefore, could not be used by the 1st plaintiff to exercise a purported statutory power of sale. She submitted that the 1st plaintiff had loaded illegal interest charges on the company's account and thus resulting in an inflated figure which was demanded by the 1st plaintiff from the company and its directors. She maintained that the 1st defendant had a valid claim over the suit property since she had established the same to be matrimonial property. She reiterated that illegalities were committed in the execution of the charge thus rendering all the subsequent actions taken pursuant to the charge null and void. She submitted that the plaintiffs had failed to establish proprietary right over the suit property to entitle the court to order the removal of the caveats lodged respectively by the 1st and 2nd defendants. She urged the court to dismiss the suit with costs.

I have carefully considered the rival submissions made by the parties in this suit. I have also considered the authorities cited by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiffs established sufficient grounds upon which this court can exercise its jurisdiction as provided under **Section 57(5)** of the **Registration Titles Act** by directing the registrar of titles to remove the two caveats placed in the register of the title of the suit property. Under **Section 57(1)** of the **Registration of Titles Act** any person claiming a right whether contractual or otherwise in respect of some defined interest in land capable of creation of an instrument registrable under the Act, may lodge a caveat forbidding the registration of any dealing in the land either absolutely or subject to the claim of the person lodging the caveat. It is therefore evident that it is only a person who has a legal claim over a parcel of land that is capable of being registered that can lodge a caveat. It will not do for such a person to claim that he has a moral claim over the parcel of land. To gain legal recognition, the person lodging the caveat must have an interest in the land that is capable of registration. Similarly, under **Section 57(5)** of the **Registration of Titles Act**, a person seeking the removal of a caveat must establish proof of ownership of the land. In **Mwamunga vs. Njendu [2002] 2KLR 790**, Onyango Otieno J (*as he was then*) held that for a plaintiff to succeed in a claim made under **Section 57(5)** of the **Registration of Titles Act** for the removal of the caveat, he must prove that he is either a proprietor of the land in question or that he is a person claiming the land in question.

In the present suit, certain facts are in dispute. It is not disputed that a company known as Kiathi trading company Ltd charged the suit property to secure certain sums from the 1st plaintiff. I perused the charge I noted that it was executed by the two directors of the company. One of the directors of the company is the 1st defendant. Although the 1st defendant claimed that her signature in the charge was forged, it was evident the issue of the alleged forgery was raised as an afterthought. This was in view of the fact that the 1st defendant had the opportunity to raise the issue when she filed the two suits against the 1st plaintiff in the attempt to prevent the 1st plaintiff from exercising its statutory power of sale by chargee. In the suit filed at **Meru High Court, i.e. Meru HCCC No. 120 of 1996 Kiathi Trading Co. Ltd & 2 others vs. Consolidated Bank of Kenya Ltd**, the 1st defendant made no averment in the plaint that the charge was invalid. In the subsequent suit filed by the 1st defendant i.e. **Nairobi HCCC No. 109 of 2004 Katherine K. Mbiti vs. Consolidated Bank Ltd & Another**, Emukule J in his ruling held at page 4 as follows:

*“It is common ground that the Nairobi property LR. No. 3734/653 – (the Lavington, property) is neither owned by the plaintiff nor the second Defendant. It is registered in the name of a limited liability company called Kiathi Trading Company Limited in which the plaintiff and the second Defendant are said to be shareholders. Now it is a cardinal principle of law, established long ago in **Salmon vs Salmon & Co. Ltd.** that Salmon, the individual is not Salmon & Co. Ltd the Company which has a life or existence of its own from the beneficial owners. The Plaintiff does not therefore have capacity to sue on this property, the Lavington property and this leg of the plaintiff’s suit is non-suited and must fail on this count.”*

It is therefore clear that a court of competent jurisdiction has considered the 1st defendant’s claim on the suit property and reached a finding that the 1st defendant did not have a claim over the suit property. The court held that the 1st defendant lacked legal capacity to enforce a claim over a property that she had no proprietary interest. The 1st defendant’s application seeking to restrain by means of a temporary injunction the 1st plaintiff from exercising its statutory power of sale by chargee was dismissed.

It was upon this dismissal that the 1st plaintiff realized the security by selling the suit property to the 2nd plaintiff. When the 1st defendant realized that she could not make any headway in court, she made a report to the police to the effect that her signature in the charge documents had been forged. This court wondered why the 1st defendant did not make the allegation in the two suits that she filed when she sought to challenge the exercise of statutory power of sale by the 1st plaintiff. This court is of the view that the 1st defendant’s decision to report the purported forgery to the police was made with a view to enabling secure legal foundation or footing to lodge the caveat against the title in respect of the suit property.

The 1st defendant argues that the suit property is matrimonial property and therefore she has a legal right over the same. I think the law is now settled that a property registered in the name of a company cannot constitute matrimonial property. The property registered in the name of a company can only be the property of its shareholders. This position of the law was affirmed by the Court of Appeal in **Mereka vs. Mereka [2004] eKLR**. It is therefore evident that the 1st defendant has no proprietary right over the suit property which according to **Section 57(1) of Registration of Titles Act** is capable of creation by an instrument registrable under the Act. The registrar of titles therefore made an error when he registered the caveat lodged by the 1st defendant in the title of suit property. The registrar of title further made an error of law when he acted on an unsubstantiated letter written by the police by lodging a caveat against title of the suit property.

I further hold that any claim to the suit property by the 1st defendant cannot override the interest of the 1st plaintiff as the chargee of the suit property. Such interest (if any) of the 1st defendant cannot override the 1st plaintiff’s right to sell the suit property to recover any outstanding amount in exercise of its statutory power of sale. Under **Section 69B(2) of the Transfer of Property Act**, a transfer made in exercise of the mortgagee’s statutory power of sale to a purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, that due notice was not given or that the power was otherwise improperly or irregularly exercised. In the present suit, it is clear that the 1st defendant has no pending suit against the 1st plaintiff that would entitle her to claim that she had an interest recognized in law in the suit property. The 1st defendant cannot therefore purport to prevent the 1st plaintiff from transferring the suit property to the 2nd plaintiff, either by claiming that the suit property is matrimonial property or by lodging a report with the police that her signature in the instrument of charge was forged. The second plaintiff is recognized by the law as the legal owner of the suit property. The 2nd plaintiff’s recognition occurred the moment the hammer fell in the public auction and the suit property was knocked down to the 2nd plaintiff. The former owner’s equity of redemption was in the process of the fall of the hammer for ever extinguished (**See Captain Patrick Kanyagia & Anor –vs-**

Damaris Wangechi & 2 others C.A. Civil Appeal No.150 of 1993 (Nairobi) unreported. The 2nd plaintiff has established ownership of the suit property in accordance with the provisions of **section 57(5)** of the **Registration of Titles Act**.

In the premises therefore, I will allow the prayers sought in the plaintiffs' originating summons. The caveats lodged respectively by the 1st and 2nd defendants against the title of the suit property i.e. LR No. 3734/653 (Original No. 3734/3/212) IR No. 16061 are hereby ordered removed or withdrawn. The 2nd defendant is ordered to register the transfer by chargee duly lodged by the 2nd plaintiff to thereby reflect the 2nd plaintiff as the owner of the suit property. The plaintiffs shall have the costs of the suit.

It is so ordered.

DATED at NAIROBI this 10th day of JUNE 2009

L. KIMARU

JUDGE