



Athuman v Bank of Africa Limited & 8 others (Environment and Land Appeal 3 of 2021) [2022] KEELC 13695 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 3 OF 2021**

M SILA, J

OCTOBER 19, 2022

BETWEEN

MARIAM MOHAMED ATHUMAN APPELLANT

AND

BANK OF AFRICA LIMITED 1ST RESPONDENT

IGARE AUCTIONEERS 2ND RESPONDENT

FARID SALIM FARAJ 3RD RESPONDENT

FASWEL SALIM FARAJ 4TH RESPONDENT

COAST FEEDS 5TH RESPONDENT

SALIM ALI RASHID 6TH RESPONDENT

ZENA MOHAMED ATHMAN 7TH RESPONDENT

REGISTRAR OF TITLES 8TH RESPONDENT

ATTORNEY GENERAL 9TH RESPONDENT

(Being judgment on appeal against the ruling of Honourable Charles Ndegwa, Senior Principal Magistrate, delivered on 28 January 2020 in respect of the appellant's application dated 27 October 2020, in the suit Mombasa Chief Magistrate's Court, Environment and Land Division, Civil Suit No. E16 of 2020, Mariam Mohamed Athumani vs Bank of Africa Limited & 8 Others)

JUDGMENT

1. The appellant filed suit at the chief magistrate's court, Mombasa, complaining of a charge created over the land parcel subdivision number 15472 section I (original number 860/40) Mainland North (CR 45279) (the suit land). She pleaded to be the wife of the registered owner, one Salim Ali Rashid,



sued as the 6th defendant (now 6th respondent), having been married under Muslim law in February 1992. She averred that she discovered that the 6th respondent had fraudulently charged the title to the suit land to the 1st respondent after the 1st respondent moved to sell the property through the 2nd respondent (an auctioneering firm). She pleaded that there was fraud in creating the charge, in that one Zena Mohamed Athman (the 7th respondent), purported to execute a spousal consent allowing for the charge. She averred that the charge was fraudulent for failing to procure a spousal consent from her as the legitimate wife of the chargor. The charge was created in order to secure some financial facilities accorded by the 1st respondent to the 3rd, 4th and 5th respondents. In the plaint, she sought a declaration that the suit land is matrimonial property within the precepts of section 79 (3) of the *Land Act*, 2012, section 93 of the *Land Registration Act*, 2012, and section 12 of the *Matrimonial Property Act*, 2013, and a declaration that the charge created is null and void for being perfected in a fraudulent and illegal manner for lack of a valid spousal consent. She wished to have the charge cancelled and the 1st and 2nd respondents permanently restrained from selling the suit land.

2. Together with the plaint, the appellant filed an application seeking orders of injunction to restrain the 1st respondent from selling the suit land pending the hearing and determination of the suit. The 1st respondent opposed the motion through a replying affidavit of Don Obiga. Inter alia, he deposed that the suit property was used to offer financial facilities to the 3rd and 4th respondents to facilitate working capital for the 5th respondent, a business that they operated. The charge was registered against the title of the suit property on October 16, 2012. He deposed that there was default which led the 1st respondent to issue various demands and a statutory notice. He deposed that the borrowers filed suit being Mombasa CMCC No 9 of 2016, and also the 6th respondent (the chargor) filed the suit Mombasa CMCC No 1558 of 2016 to stop the sale of the suit properties but their suits were dismissed. On the issue of spousal consent, he stated that the same was given by Zena Mohamed Athman, the 7th respondent. He raised issue that the marriage certificate that was attached by the appellant shows that it was issued on August 27, 2020, which demonstrates that its purpose was to frustrate the sale. He also added that following it, it means that the appellant was married while aged 15 years which in itself is an illegality. He deposed that the court ought to take judicial notice that the chargor was a muslim and he could be allowed up to four wives. He continued that the appellant had not denied that Zena was a spouse of the chargor. He deposed that they had attempted to sell the suit property in the year 2015 and if the appellant had an issue then she ought to have raised it at that time.
3. The appellant filed a supplementary affidavit where she deposed that she is the only spouse of the chargor. She added that under Islamic law a person can be married upon attaining 13 years so long as consent of the bride and of her parents is attained. She contended that the burden of proof was on the 1st respondent to prove that Zena was a wife to the chargor and that she lived on the suit property. On the other suits, she pointed out that she was never a party to them and the issue of spousal consent was never adjudicated.
4. The application by the appellant was heard and dismissed in the ruling delivered on January 28, 2021. The reason that the application was dismissed was because the trial court thought that the application was res judicata given the other two previous suits mentioned by the 1st respondent.
5. Aggrieved, the appellant has filed this appeal. There are 8 grounds but all of them question the finding of the trial magistrate that the appellant's case was res judicata. The appellant seeks that the ruling be set aside.
6. I have considered the appeal alongside the submissions made by counsel.



7. It will be recalled that the application by the appellant was considered to be res judicata. The trial court held so on the basis that there had been two similar applications for injunctions filed in the suits Mombasa CMCC No 9 of 2014 and Mombasa CMCC No 1558 of 2016. What was annexed by the 1st respondent in respect of the first of these cases was a ruling of January 20, 2016. From it, I can discern that the plaintiffs were Farid Salim Faraj and Faswel Salim Faraj T/A Coast Feeds Products, the borrowers in the subject facility offered by the 1st respondents. I can discern from the ruling that they wished to have an injunction to stop the sale of the suit property and that the interest accruing on the loan be stopped. A preliminary objection was raised that they do not have locus standi because they were not parties to the charge. The trial court (Hon LT Lewa, resident magistrate) in a ruling delivered on January 20, 2016 upheld the preliminary objection and dismissed both application and the suit for want of locus standi. I don't want to go deeply into this ruling though I must say that I find the holding of lack of locus standi curious because the plaintiffs were the borrowers and I think they could raise issue with matters related to the loan. The second suit, Mombasa CMCC No 1558 of 2016, was filed by the chargor himself on September 29, 2016, probably given that the court had held that the borrowers had no locus standi. The only material concerning this suit that was annexed by the 1st respondent (to this appeal), in response to the appellant's application for injunction, was a replying affidavit sworn by one Monica Kamau in that suit. Neither the pleadings nor the application that was being replied to were annexed nor was the ruling arising from the application. It is difficult for me to tell what exactly it was that was being complained of in the suit Mombasa CMCC No 1558 of 2016 and neither do I know the fate of that case. But what is clear is that the appellant herein was not party to that suit and nowhere in the replying affidavit annexed is it revealed that any issue related to spousal consent was raised in that case.

8. The principle of res judicata is ably captured by section 7 of the [Civil Procedure Act](#), which provides as follows :-

Res judicata

7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.



Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

9. From the above, it will be observed that for res judicata to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit, between the same parties, or between parties under whom they are litigating. This is not the position here. The appellant was not a party to the two previous suits. Neither, by any stretch of imagination, can it be argued that the appellant herein was litigating under the same cause of action as the previous two suits. In the first suit, the plaintiffs were the borrowers and from the limited material provided, it appears as if they were complaining about the interest rates. In the second suit, it was the chargor now complaining. I don't know what it is that he was complaining about but certainly it had nothing to do with the charge being null and void for want of spousal consent. Thus, res judicata could not apply in this instance as the parties were different and the issues different. This was a completely independent cause of action filed by a person who alleged her own individual rights over the suit property, that is, the right over the property as spouse. She contended that this was matrimonial property and that her consent was needed before a charge could be registered. The issue of whether or not the suit property was matrimonial property had not been canvassed in the previous two suits. Neither was the issue of who was the spouse of the chargor in issue in the previous two suits.
10. Why is it that now a wife of the chargor is being barred from filing suit to press her own independent rights over the suit property? such person cannot be shut out of the courts. Her case cannot and should not be trivialized. This in fact is a very serious case that needs to be tried. You cannot shut away the wife from pressing her own cause of action as to whether or not the charge was proper for want of spousal consent. A woman's right over matrimonial property is not a matter that should be taken lightly.
11. The case of the appellant had nothing to do with the interest rates charged by the bank to the borrowers. The case had nothing to do with whether or not the statutory notices had been issued. The case had nothing to do with the relationship between the bank, the borrower, and the person who charged the property. This case was over title to the land. It needed a finding as to whether the title to the suit land was independently held by the registered owner or whether this title was encumbered by spousal rights over it. The case required a holding on whether or not the title of the registered owner was solely held or whether this was matrimonial property to which a spouse could assert rights on. The case required a finding as to whether a disposition over the suit land could be made without the consent of the person claiming to be spouse. The case needed a holding as to whether or not the title to the land was properly encumbered by a legally created charge.
12. One of the core issues to be tried in the suit is whether or not the appellant is truly a wife of the title holder, whether or not her consent was required, and whether it was given, before the title could be encumbered by the charge. At stake were purely property rights related to the title of the land and the right to use and occupy the land. If the case of the appellant succeeds, the result is that the encumbrance section of the title of the suit property will be cleaned of the charge. That is why I am pressing the point that the issue is the title not the bank/customer relationship of the parties. This is a completely independent cause of action related to proprietary rights of a spouse over property. This could be asserted even if the loan was being repaid as agreed and even if no statutory notice had been issued.
13. I can draw an analogy with a situation where a person charges land but there are people on the land who claim rights of adverse possession over it. Let us assume that the title holder had filed suit to stop the bank from selling the land. Let us add to it that there has also been a case by borrowers of the financial facility trying to stop the sale of the land. Will we now say that because these two people had



come to court earlier, then the persons in adverse possession are barred from coming to court through their own independent case asserting title to the land and barred from trying to stop the sale of the disputed property? Certainly not (see for example the case of *David Wabome Gitonga (Suing as the legal Representative of the Estate of the Late Lucy Nyokabi Kiarie) v Mary Nyakio Kanini & 3 others, Nyahururu ELC No 284 of 2017, (2020) eKLR.*)

14. I am persuaded to find that the suit by the appellant was not res judicata. Having found that, I need to determine whether the appellant's application for injunction was merited.
15. The principles for the grant of an injunction is now a well trodden path and I need not reinvent the wheel. As put forth in the case of *Giella vs Cassman Brown (1973) EA 358*, one needs to demonstrate a prima facie case with a probability of success; show that he/will suffer irreparable loss if the injunction is not granted; and where the court is in doubt, it will decide the application on a balance of convenience.
16. The case of the appellant is that she is the only wife of the 6th respondent. She produced a certificate of marriage to demonstrate this. There is therefore prima facie evidence that the appellant is the wife of the 6th respondent. She asserted that this was their matrimonial home. Her argument was that the charge, which was dated October 12, 2012 and registered on October 16, 2012, was illegal, because she had not given consent to it, yet spousal consent was required. This charge was executed and registered after the coming into force of the *Land Act, 2012*, and the *Land Registration Act, 2012*. Section 79 (3) of the *Land Act*, provides as follows :-
 - (3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.
17. The above section of the law speaks for itself. Where there is a charge of a matrimonial home, the charge requires to be executed by any spouse of the chargor living in the said home, or in the alternative, there be evidence of assent to the charge. The appellant claims to be the only spouse of the chargor and denies signing any spousal consent. I have already pointed out that she has a marriage certificate. What the bank produced was a consent signed by one Zena Mohamed Athman. There is no evidence tendered that this is a spouse of the chargor. There is no evidence produced of any marriage certificate. There is no evidence provided that this person is actually married to the chargor. The bank does not say on what basis they consider Zena to be the wife of the chargor, or what sort of due diligence they undertook to come to the conclusion that Zena is wife to the chargor. In my opinion, the appellant has provided prima facie evidence that she is the spouse of the chargor and that her consent as spouse was required but not given. The final decision of whether or not she is really a spouse, or whether the suit land is matrimonial property, or whether Zena is actually a wife to the chargor, can only be made at a full hearing, but sufficient material has been provided by the appellant to demonstrate that she has presented a prima facie case with a probability of success.
18. On the question of irreparable loss, if the injunction is not granted, the suit land may be sold, and if indeed this is the matrimonial home of the appellant, she will have no home to live in, and she may forever lost it. Clearly, there is demonstration of irreparable loss if the injunction is not granted. Even if the court is to consider the balance of convenience, the same tilts towards maintaining the status quo as the matters raised by the appellant are being interrogated.
19. From the foregoing, it will be seen that I find merit in this appeal. The appeal is hereby allowed. The decision of the trial magistrate is substituted by an order that the 1st respondent, through her servants



and/or agents, is hereby restrained by an order of injunction from selling, or in any other way adversely dealing with the suit land until the conclusion of the case before the magistrate's court. The appellant will also have the costs of this appeal as against the 1st respondent.

Judgment accordingly.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA

In the Presence of :-

Ms. Nanjali holding brief for Mr. Lutta for the appellant.

Mrs. Karanu for the 1st respondent.

Mr. Makuto, State Counsel, for the 8th & 9th respondents.

No appearance on behalf of the other respondents.

Court Assistant : Wilson Rabong'o.

