REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

PETITION NO. 20 OF 2015

IN THE MATTER OF INFRINGEMENT AND DENIAL OF FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 40 & 45 OF THE CONSTITUTION OF KENYA, 2010 AND SECTIONS 90(4), 96 (3) & 103 OF THE LAND ACT, 2012

BETWEEN

ELIZABETH SESE MOREMA..... 1ST PETITIONER

ROBERT NYAKOE.....2ND PETITIONER

JOHN ASUGA…….....…..3RD PETITIONER

BEN ASUGA…….....…….. 4TH PETITIONER

JAMES NYAMBANE……..…….....…..5TH PETITIONER

EVANS MONGARE……..…….....… 6TH PETITIONER

DICKSON OMWOYO.....7TH PETITIONER

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED……...…...1ST RESPONDENT

NAFTALI MOREMA MBUNYA.....2ND RESPONDENT

GRAIN OMBATI.....3RD RESPONDENT

NIXON NYAMONGO.....4TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The Petitioners commenced this suit by way of a Petition dated 15th day of May, 2015 and filed in court on 18th May, 2015 wherein they sought the following orders;

a. A declaration that the charge in favor of the 1st Respondent in respect of **LR. No. NORTH MUGIRANGO/553** (hereinafter referred to as "the suit property) is illegal, null and void for having been done without consulting and /or seeking the consent of the

Petitioner.

b. A mandatory injunction directing the Land Registrar Nyamira County to cancel the charge on the suit property.

c. An Order compelling the 1st Respondent from recovering the amount that is due to her from the 3rd and 4th Respondents.

d. General damages.

2. The 1st Petitioner is the wife to the 2nd Respondent, while the 2nd to 7th Petitioners are children of the 1st Petitioner and the 2nd Respondent.

3. It is the Petitioners' case that a charge was registered over the suit property on 10th November 2011 without their consent or knowledge thus infringing on their fundamental rights under Article 45 of the Constitution of Kenya 2010. The Petitioners seek that the said charge to be annulled for the lack of consent.

4. In response to the Petition the 1st Respondent filed a Replying Affidavit sworn by one Wycliffe Senelwa denying the claims by the Petitioners. The 1st Respondent averred that she did all the due diligence that was required before the charge was registered in her favor to secure loan facilities advanced to the 3rd Respondent. It is the 1st Respondent's case that by the time the charge was being registered in her favor, the applicable law was the Registered Land Act(now repealed) that did not require the consent of the spouse and therefore the charge was regularly registered and there is nothing illegal about it.

5. The Petition proceeded by way of *viva voce* evidence and the parties each called one witness.

THE EVIDENCE

6. The 2nd Petitioner testified as PWI and stated in his evidence in chief that he together with the 2nd Respondent, the 1st Petitioner and his sisters and brothers stay and on the suit property. He told the Court that they were shocked to see a valuer coming to the suit property in 2015. The valuer stated that he was doing a valuation of the suit property in respect of an auction that had been commissioned by the 1st Respondent.

7. PWI further told the Court that as a family they came to discover that the suit property had been charged but the 2nd Respondent, who is their father denied signing the charge. PW1 produced various documents including, a copy of the title deed (PExh 1); Certificate of Official Search (PExh 2); Notification of Sale (PExh 3) Letter by 3rd Respondent seeking facility restructuring (PExh 4); Chief's letter confirming the subject land is ancestral property (PExh 5); Copies of IDs for the 1st Petitioner and 2nd Respondent (PExh 6); and photos of the property (PExh 7).

8. On cross-examination PW1 confirmed that the charge in respect of the suit property was used as a security for the loan of 8 million shillings advanced to the 3rd Respondent and that the 2nd Respondent never informed them that he was guaranteeing the loan. He stated that the bank told them that the person who had taken the loan had defaulted in repayment of the same. PW1 also told the Court that he did not know whether notices were sent to the 2nd Respondent as he did not know the address that the 2nd Respondent had used when guaranteeing the loan.

9. On the other hand, the Respondents called DWI, an Accountant with the 1st Respondent who gave oral evidence by adopting his statement dated 13th March, 2019 and produced the documents listed in the 1st Respondent's List of Documents. He testified that he knew the 3rd Respondent as their customer who took a loan with the 1st Respondent and used the suit property to secure it through a properly executed charge, which was registered on 10th November 2011. He told the court that the 3rd Respondent defaulted in repayment of the loan after which it was restructured in 2014 but she still failed to pay.

10. Upon cross-examination, DWI stated that the loan was advanced to the 3rd Respondent and that there was no requirement for spousal consent when the charge was effected. He admitted that the valuation report done in the year 2011 showed that there were various buildings on the suit property. He further stated that the loan was secured by the suit property and other properties and that the 1st Respondent was following up on the said properties as well.

11. After hearing the testimonies of the parties, the court directed them to file submissions. Both parties filed their submissions which I have considered.

ISSUES FOR DETERMINATION

12. From the pleadings, the evidence adduced during trial and the submissions of the parties I deduce the following as the issues for determination;

a. Whether the 1st Respondent required to seek the consent of the Petitioners before considering the suit property as security for the loan advanced to the 3rd Respondent.

b. Whether the 1st Respondent was required to issue notices to the Petitioners before commencing its statutory power of sale.

c. Whether the court should reopen the charge and order for the recovery of the money secured under it from the 3rd and 4th Respondent.

Whether the 1st Respondent required to seek the consent of the 1st Petitioner before registering the charge over the suit property

13. In his submissions, learned counsel for the Petitioners argued that the suit property was ancestral land, which the 2nd Respondent held in trust for the Petitioners all of whom occupied the same. He contended therefore that there was need for the 1st Respondent to seek the consent of the Petitioners before considering the suit property as security to the loan advanced to the 3rd Respondent. Counsel referred the court to a valuation report prepared by Green Grain Consultants on behalf of the 1st Respondent prior to the charge being registered over the suit property. The said valuation report showed that there were various people residing on the suit property.

14. He argued that it was not in order for the 1st Respondent to ignore her duty of informing the occupants of the suit property about the intended charge in her favor. Counsel submitted that the 1st Respondent's action of not seeking the consent of or informing the Petitioners about the charge over the suit property amounted to a violation to Article 45 of the constitution which recognizes a family as a fundamental unit of the society which should enjoy recognition and protection by the state. He further submitted that parties to a marriage were entitled to equality at the time of marriage, during marriage and at the dissolution of Marriage.

15. Counsel relied on the case of **Williams & Glyn's Bank v. Boland [1979] 2 All E R 697** where Lord Denning stated that;

> *Anyone who lends money on the security of a matrimonial home nowadays ought to realize that the wile may have a share in it. He ought to make sure the wife agrees to it or to go to the house and make enquiries of her. It Seems to me utterly wrong that a lender should tum a blind eye to the wife's interest or the possibility of it and afterwards seek to turn her and the family out on the pleas that he did not know she was in actual occupation. If a Bank Is to do its duty, in the society in which we live, it should recognize the integrity of the matrimonial home. It should not destroy it by disregarding the 's interest in it, simply to ensure that it is paid the husband's debt in full, the high interest rate now prevailing. We shall not give monied might Over social justice. We should protect the position of a wife who has a share, just as years ago we protected the deserted wife...."*

16. Counsel for Petitioner also argued that the suit property was a matrimonial home and as such, spousal interest arose which is recognized as an overriding interest to which regard ought to be given by someone acquiring or intending to acquire an interest in the property.

17. In support of his arguments the learned counsel relied on the Court of Appeal decision in **Mugo Muiru Investments Limited Vs E W B & 2 others [2017] eKLR** where it held at paragraphs 51 and 52 that:

> *"Elizabeth's interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth's interest. The evidence in this appeal shows that the appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The appellant took the property subject to Elizabeth's overriding interest in it and Elizabeth being a part-owner could not be removed from the property. Even before the Land Registration Act Cap 300 came into force on 2nd May 2012, the equitable beneficial interest of a spouse in the matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title to the matrimonial home was subject to such overriding interest. It is immaterial that there was not at the time statutory provision expressly declaring it to be an overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the appellant acquired the title registered in the name of S B subject to the interest of Elizabeth. In effect, the appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth's overriding interest nor was the appellant entitled to possession. The transfer to the Appellant was subject to Elizabeth's overriding encumbrance.*
>
> *The learned judge was wrong in striking Elizabeth's claim for a declaration that she had a beneficial interest in the matrimonial home. He was however spot on in his decision, which we uphold, in making a declaration that the purported sale of the property was null and void."*

18. Learned counsel for the 1st Respondent in his bid to counter the above argument by the Petitioners argued that the 2nd Petitioner admitted upon cross-examination that there was no evidence before court either in the form of an affidavit, marriage certificate or birth certificates to prove that indeed the 1st Petitioner was the spouse to the 2nd Respondent or to suggest that the 2nd to 7th Petitioners were children to the 2nd Respondent. Counsel argued that according to section 107 of the Evidence Act, the burden of prooflies with the person who alleges and as such in this matter, there was no evidence to show that the Petitioners were in any way related to the 2nd Respondent. Counsel thus contended that petitioners were not related to the 2nd Respondent and theytherefore lackedthe *locus standi* to bring this suit.

19. On the issue of spousal interest advanced by the learned counsel for the Petitioners, counsel for the 1st Respondent argued that before 2012, the applicable law was the Registered Land Act (now repealed) which did not require spousal consent as a pre- condition for the registration of a charge. Counsel thus argued that the 1st Petitioners'contention that spousal consent was required before the registration of the charge did not hold water.

20. He further argued the Petitioners did not prove that the land subject of this suit was matrimonial property, nor did they prove that indeed there was a matrimonial home on the suit property.

21. In view of the arguments advanced by counsel for the Petitioners, it is important to determine whether there exists a marriage between the

2nd Respondent and 1st Petitioner out of which the 2nd to 7th Petitioners were born. Unfortunately, the Petitioners did not adduce any cogent evidence of the 1st Petitioner's marriage to the 2nd Petitioner save for a letter from the chief which was neither here nor there. Marriage is a legal status which must be proved by way of evidence. Even in instances where the court presumes a marriage, there must be sufficient evidence to enable the court make such an inference. In this case, I am constrained to agree with counsel for the 1st Respondent that the Petitioners did not discharge the burden of proof placed upon them by dint of the provisions of section 107 of the Evidence Act. The said section provides as follows:

> *"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person".*

22. If the 1st Petitioner intended to rely of the fact that she was married to the 2nd Respondent, she ought to have led evidence to prove the existence of the said marriage. It is only upon proof of such marriage that she would be able to raise the issue of the suit property being a matrimonial home since a matrimonial home cannot exist in the absence of a valid marriage.

23. Although counsel for the Petitioners referred to the case of **Mugo Muriu Investments** (supra), the same is distinguishable from the instant case as in the said case there was no dispute about the existence of the marriage. Furthermore, there is no prayer for the declaration of a trust in the Petition herein, nor was there evidence leading to the inference of a trust in the suit property by the petitioners. In the **Mugo Muriu Investments** case, the Court of Appeal made the following observations:

> **41.***"The peculiar circumstances and evidence in this appeal show that HFCK knew or ought to have known that S B was not entitled to deal with it (HFCK) as he wished without the involvement and concurrence of Elizabeth who was in possession and control of the matrimonial home and who had interest in it as an unregistered co-owner and a beneficiary. Prior to coming into force of the **Land Registration Act Cap 300**, a married spouse's unregistered proprietary interest in the matrimonial home by dint of his or her contribution to its acquisition and, therefore, as a part-owner thereof, was held in trust on his or her behalf by the spouse registered as title holder and owner, and such unregistered proprietary interest was in common law an overriding interest which superseded any registered instrument conveying title in the matrimonial property including a transfer and a charge. In the instant case, the transfer to the appellant was subject to Elizabeth's overriding interest as an unregistered co-owner. S B could not pass good title to HFCK, and the transfer by HFCK to the appellant was subject to Elizabeth's overriding, albeit unregistered, interest in the matrimonial home.*
>
> ***42.** There is ample evidence to show that when HFCK started the process of realizing the security, HFCK knew or ought to have known that Elizabeth was the wife of S B and that Elizabeth was in actual possession and control of the matrimonial home and had proprietary interest in it. In other words, HFCK knew or ought to have known that Elizabeth was not merely a wife sitting on the property; she had proprietary interest in it and S B held it in trust for her and himself. When, therefore, it sold the property, HFCK sold it subject to Elizabeth's interest. HFCK could not transfer to the appellant a better title than S B had in the property. As the interest of B was not for the whole property, the appellant could not get a good title for the said property because it was encumbered with the trust in favour of Elizabeth. It was urged that the appellant was an innocent buyer; that the appellant was a bona fide buyer for value without notice. But the appellant could not get a better title than S B had in the property. The appellant's title was subject to Elizabeth's interest. S B was to all intents and purposes a trustee for Elizabeth to the extent to which Elizabeth was entitled. As a purchaser, the appellant ought to have made physical checks of the property besides searching the title at the Lands Office. Whereas a buyer of a property who fails to physically check the state in which the property is before the sale runs the risk of having a sitting tenant or an adverse possessor, in the event that overriding interest exists as in this case, the buyer takes subject to such overriding interest and cannot claim to be entitled to possession because, once overriding interest is established or it is shown that the sale was in breach of trust, the sale must be vitiated and transfer cancelled.*

24. It is clear from the above cited authority that before the court can arrive at the finding that charged property is matrimonial property that requires protection of the law, one must prove the existence of the marriage. It is therefore my finding that having failed to prove that she was married to the 2nd Respondent; the 1st Petitioner cannot argue that the suit property was a matrimonial home which could not be charged without her consent.

25. Additionally the Petitioners did not pray for a declaration that the court infers a trust in their favour over the suit property. It is trite law that parties are bound by their pleadings and the court can only make orders in respect of matters that have been pleaded by the parties.

26. Having arrived at the finding that there is no proof of marriage between the 1st Petitioner and the 2nd Respondent, and noting that the existence of such marriage would have formed the basis of the Petitioners' claim, I find it unnecessary to delve into the issue of the statutory notices and the reopening of the charge. In any event the 2nd Respondent has not denied that the loan advanced to the 3rd Respondent is still outstanding nor has he complained that he was not served with the statutory notices. However, considering the fact that the loan was not advanced to the 2nd Respondent and taking all other circumstances of this case into account, the 1st Respondent may wish to consider pursuing the 3rd and 4th Respondents.

26. The upshot is that the Petitioners have failed to prove their case on a balance of probabilities and I dismiss it with costs to the 1st Respondent.

Dated, signed and delivered at Kisii this 11th day of June, 2021.

…….

J.M ONYANGO

JUDGE