



**SBM Bank(Kenya) Limited v Ongeri & another (Civil Appeal
E042 of 2021) [2024] KEHC 1269 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E042 OF 2021
PN GICHOHI, J
FEBRUARY 15, 2024**

BETWEEN

SBM BANK(KENYA) LIMITED APPELLANT

AND

NAHSHON BORURA ONGERI 1ST RESPONDENT

BRENDA NYAMBEKI MWANGI 2ND RESPONDENT

*(Being an appeal from the ruling and order in Kisii CMCC
No. 380 of 2020 by Hon. E.A.Obina (PM) on 14th April, 2021)*

JUDGMENT

1. The background of this Appeal is that by an offer of banking facility dated 12th August, 2015, the Appellant advanced to the 1st Respondent a loan facility of Kshs. 12,500,000/= for purchase of the property known as LR. Central Kitutu/Daraja Mbili/3982 (suit property) which property was to be charged upon registration as security for the loan facility.
2. By a copy of title deed tendered in evidence, the suit property was purchased and registered on 10th September, 2015 in the name of the Nahshon Borura Ongeri (1st Respondent) and a charge over the said property was registered on the same date.
3. Subsequently, 1st Respondent failed to service the loan and the Appellant issued to the 1st Respondent a notice of statutory power of sale dated 15th February, 2019. That notice prompted the Respondents to file the suit, which is the subject of this appeal, simultaneously with an application whereby they sought orders to restrain the Appellant from dealing in whatsoever manner in the suit property pending the hearing of the main suit where the Respondents sought orders among others, a declaration that the charge over the suit property was null and void for lack of spousal consent.



4. The Appellant vehemently opposed the application but the trial court rendered its ruling on 14th April 2021, agreed with the Respondents and granted them temporary injunctive orders dated 14th April, 2021.
5. Aggrieved by the said ruling and/or orders , the Appellant preferred this Appeal based on nine (9) grounds:-
 1. The learned magistrate erred in both law and fact in ignoring the fact that the 1st Plaintiff acquired the loan of Kshs. 12,500,000/= to purchase the property Title Number Central Kitutu/Daraja Mbili/3982 which was subsequently used as security for the loan.
 2. The learned magistrate erred in both law and fact in ignoring the fact that the 1st Plaintiff signed a declaration of marital status that he only has one spouse by the name Jackline Chepkwony C who became his spouse on 20th May 2007 and that he does not co-habit with or any other person that could be deemed as a spouse by interpretation or association.
 3. The learned magistrate erred in both law and fact in concluding that the Defendant failed to inquire how many spouses the Chargor had.
 4. The learned magistrate erred in both law and fact in concluding that the spousal consent of the 2nd Plaintiff was required yet she was not a spouse when the property was acquired.
 5. The learned magistrate erred in both law and fact in ignoring the fact that both the 1st Plaintiff and his lawful spouse Jackline Chepkwony C. accepted the terms and conditions of the letter of offer and even gave an unconditional consent for the use the suit property as security for the loan of Kshs. 12,500,000/=.
 6. The learned magistrate erred in both law and fact in failing to find that the 40 days Statutory Notice to sell and the three months' notice were duly served.
 7. The learned magistrate erred in both law and fact in ignoring the fact that the 1st Plaintiff admitted default and requested the bank for time to find a buyer to whom he would sell the property to offset the loan.
 8. The learned magistrate erred in both law and fact in failing to find that the Plaintiffs did not meet the conditions for grant of interlocutory injunction.
 9. The learned magistrate erred in both law and fact in considering extraneous factors neither pleaded nor produced as evidence.
6. The Appellant therefore prayed for orders that: -
 1. The ruling dated 14th April 2021 and the consequential orders be set aside.
 2. The Respondent's Application dated 6th August 2021 in the Chief Magistrate's Court be dismissed with costs.
 3. The Appellant be awarded the costs of the suit and of the Appeal.
7. This Appeal was canvassed by way of written submissions. In its submissions dated 12th August 2022, the Appellant maintained that the property in question was not a matrimonial property during the acquisition and therefore , there did not exist any trust in favour of the 2nd Respondent.
8. On their part, the Respondents submitted that the 2nd Respondent was wife to the 1st Respondent having got married to each other on 1st June 2015, a date when the first charge was registered. They



therefore maintained that the suit property was matrimonial property and the 2nd Respondent did not give her consent.

9. The Respondent further submitted that the 1st Respondent has never received the 90 days' Notice and the 40 days' Notice as required by law as the notices were alleged to have been served in Kericho and nothing shows that they were served through the alleged emails.
10. Lastly, the Respondents maintained that they had satisfied the conditions of granting the interlocutory injunction and therefore urged the Court to uphold the Ruling by the trial court and dismiss this appeal with costs to the Respondent.

Determination

11. Having considered the appeal in the light of the evidence presented before the trial court and the submissions by the parties, the issue in question is whether the temporary injunction orders granted on 14th April, 2021 were merited.
12. Any discussion on temporary injunctions is not complete without reiteration of the requirements for grant of injunctions as set out in *Giella v Cassman Brown* [1973] EA 358 that: -

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

13. The principles on which courts will grant an injunction were restated by the Court of Appeal in [*Nguruman Limited v Jan Bonde Nielsen & 2 others*](#) (2014) eKLR together with the mode of their application as follows:-

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

14. The Court of Appeal went on to say:-

“These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v Afraba Education Society* [2001] Vol. 1 EA 86.”

14. Further, the Court of Appeal in the case of *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR interpreted the condition as to *prima facie* case as follows:

“A *prima facie* case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which on the material presented to court; a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the other party as to call for an explanation or rebuttal from the latter."

15. In this matter, there is no dispute that the 2nd Respondent's consent was not sought prior to execution of the charge over the suit property which she claims belongs to her spouse, the 1st Respondent herein.
16. This Court is satisfied from the material presented before the court that the trial court properly directed itself and rightly concluded that there exists a genuine and arguable case for trial.
17. As to whether the Respondents' claim will succeed, that is an issue to be determined at the full trial of the case when the parties will have an opportunity to call evidence to explain or rebut the circumstances under which the suit property was charged.
18. From the foregoing: -
 1. This Appeal is dismissed for lack of merit.
 2. The costs of this Appeal are awarded to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUAL) THIS 15TH DAY OF FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of;

Mr. Ouro for the Appellant.

Mr. Godia for Nyangacha for the Respondents

Lauren Njiru / Aphline , Court Assistant

