



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 761 OF 2014

CAROLYNE ATIENO ODULA.....PLAINTIFF

- VERSUS -

IGNATIUS OBONYO ODHIAMBO.....1<sup>ST</sup> DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2<sup>ND</sup> DEFENDANT

JUDGEMENT

1. By the is the plaint dated 12th June 2014. The Plaintiff seeks judgment against the Defendants jointly and severally for:

a. A declaration that the Plaintiff has equitable and registerable interest in the suit property identified as villa No.4 in the development known as Lavington Solo Villas erected on LR NO.3734/179 in Lavington within Nairobi and is entitled to have her interest noted in the said property.

b. A declaration that the Plaintiff is entitled to redeem the suit property identified as Villa No.4 in the development known as Lavington Solo Villas erected on LR.No.3734/179 in Lavington within Nairobi and be allowed by the 2<sup>nd</sup> Defendant to remit the requisite payments thereof.

c. An order that the 2<sup>nd</sup> Defendant jointly and severally be strictly enjoined and restrained whether by itself or by its servants, agents or otherwise howsoever from alienating, selling or otherwise disposing off the suit property identified as Villa 4 in the development known as Lavington Solo Villas erected on LR no.3734/179 in Lavington within Nairobi.

d. Costs.

e. Interest on (d) above.

f. Such other and/or further relief as this Honourable Court may deem just and fit to grant.

#### The Plaintiff's Case

2. The Plaintiff averred that she is married to the 1<sup>st</sup> Defendant since 2003. She further stated that during the course of their marriage, they both acquired **Villa No.4** in the development known as **Lavington solo villas** erected on **L.R No.3734/179** in Lavington hereinafter referred to (as "**the suit property**") became their matrimonial home hence she acquired an equitable and a registerable interest in it.

3. It is her case that the purchase of the suit property was partly financed by the 2<sup>nd</sup> Defendant and a Charge was duly executed and registered over it.

4. She contended further that the mortgage account is in the 1<sup>st</sup> Defendant's name but he defaulted payments prompting the 2<sup>nd</sup> Defendant to issue demand notices and to salvage the property, she began to service the loan and now wishes to exercise the right of redemption formally as provided for in the Land Act, 2012.

5. The 1<sup>st</sup> Defendant neither entered appearance nor filed a defence.

## **The 2<sup>nd</sup> Defendant's Case**

6. The 2<sup>nd</sup> Defendant entered appearance through M/S Kale, Maina & Bundotich Advocates and filed the statement of defence dated 10<sup>th</sup> February 2017. It denied the allegations contained in the plaint and contended that the suit property **L.R No.3734/179 (I.R 17986)** is registered in the name of the 1<sup>st</sup> Defendant and that it advanced him Ksh.14, 500,000/= and a charge was registered over the suit property.

7. It contended further that the Charge is between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant thus the Plaintiff is not a party to the contract.

## **The Plaintiff's Evidence**

8. The Plaintiff testified on 8<sup>th</sup> April 2021, she stated that she got married to the 1<sup>st</sup> Defendant in the year 2003. She further stated that in the course of their marriage, they both acquired the suit property through a mortgage which was financed by the 2<sup>nd</sup> Defendant. The suit property was to be registered in their joint names but she found out that it was registered in the 1<sup>st</sup> Defendant's name when she stumbled on the letter dated 15<sup>th</sup> January 2013 and the letter dated 7<sup>th</sup> November 2013 informing the 1<sup>st</sup> Defendant that he was in arrears and demanding that he maintains sufficient funds in his account to cater for the loan.

9. She also told the court that her husband moved to Dubai in November 2013 and his stay there is indefinite. She stated further that the 1<sup>st</sup> Defendant was completely unable to pay the mortgage and that the last time payment he made was on 30<sup>th</sup> January 2014.

10. She took it upon herself to salvage the home and has been repaying the loan and to date she has paid Kshs.21million.

## **The 1<sup>st</sup> Defendant's Evidence**

11. The 1<sup>st</sup> Defendant did not enter appearance thus he did not participate in these proceedings.

## **The 2<sup>nd</sup> Defendant's Evidence**

12. DW1, Edward Odek told the Court that the bank offered a mortgage facility to the 1<sup>st</sup> Defendant to the tune of Kshs.14,050,500/= to complete the purchase of the suit property. He further stated that the mortgage agreement was between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant as the Plaintiff was not party to the same at all. He also stated that the Plaintiff's remitting of payments towards the loan account is a private arrangement between the Plaintiff's act and the 1<sup>st</sup> Defendant and the bank. He stated that the loan was cleared on 30<sup>th</sup> July 2020 thus the bank has no interest in the suit property.

13. When he was re-examined, he told the court that the bank has no obligation to contact the spouse of 1<sup>st</sup> Defendant but would contact the Unclaimed Assets Authority.

## **The Plaintiff's Submissions**

14. They are dated 26<sup>th</sup> April 2021. Counsel for the Plaintiff identified the following issues for determination;

**a. Whether the Plaintiff and the 1<sup>st</sup> Defendant are husband and wife.**

**b. Whether the subject suit property identified as Villa No.4 in the Development known as Lavington Solo Villas erected on L.R. No. 3734/179 in Lavington Nairobi is matrimonial property.**

**c. Whether the Plaintiff has acquired an equitable and registrable interest in the suit property identified as villa No.4 in the Development known as Lavington Solo Villas erected on L.R. No. 3734/179 in Lavington Nairobi.**

**d. On determination of the issues above and upon entry of judgement who is to bear the costs of this suit.**

15. Counsel for the Plaintiff submitted that the issue of the marriage between the Plaintiff and the 1<sup>st</sup> Defendant was not contested and in any case, their certificate of marriage was produced in evidence. On the issue whether the suit property is matrimonial property, counsel for the Plaintiff submitted that the suit property meets the definition of "matrimonial property" under statutes being Section 2 and 6 of the Matrimonial Property Act, No.49 of 2013, Section 2 of the Land Act, No.6 of 2012 and Section 93 of the Land Registration Act. He submitted further that the property has been utilized by both the Plaintiff and the 1<sup>st</sup> Defendant as their matrimonial home and the Plaintiff has been resident on the property along with her children since 2007.

16. On whether the Plaintiff has acquired an equitable & registrable interest in the suit property, he submitted that the Plaintiff and the 1<sup>st</sup> Defendant both acquired the suit property and that registration of the 1<sup>st</sup> Defendant as the registered proprietor was contrary to the agreement between the Plaintiff and the 1<sup>st</sup> Defendant. It had been agreed, by virtue of the contribution of the Plaintiff that the same was to be registered in their joint names.

17. On the issue of costs, the Plaintiff submitted that even though costs follow the event, the 2<sup>nd</sup> Defendant's conduct was so egregious that it should be condemned to bear costs. He asked the court to consider its conduct in the manner for that it has treated the Plaintiff in her quest to

redeem the suit property and for accepting a sum of Kshs.260,000/= per month for eight (8) months yet it was aware that the mortgage had already been redeemed.

### **The 2<sup>nd</sup> Defendant's Submissions**

18. They are dated 27<sup>th</sup> May 2021. On the issue whether the Plaintiff has acquired an equitable and registrable interest over the suit property, counsel for the 2<sup>nd</sup> Defendant submitted that the 2<sup>nd</sup> Defendant is alive to the provisions of Section 102 and Section 103 of the Land Act, 2012 which provide for the rights of Chargor to discharge charge on payment of any sum due any time before sale. He submitted further that the 2<sup>nd</sup> Defendant is also alive to the provisions of Section 85(1) of the Land Act 2012 which outlines the procedure for discharge of charge.

19. She also submitted that the charge herein was registered in the name of Ignatius Obonyo Odhiambo thus the Plaintiff is a stranger to the transaction. He added that the Chargor neither defended these proceedings nor gave consent in writing to the Chargee or introduce the Plaintiff herein as the person to repay the loan and eventually redeem the suit property.

20. He also submitted that the 2<sup>nd</sup> Defendant is not laying any claim on the charged property as the facility has been paid in full but it is only faced with a predicament as to what to do in so far as the execution of the discharge of charge and release of the original title to the suit property is concerned and in the circumstances it will be guided by the directions of the court.

21. On the issue of costs, counsel for the 2<sup>nd</sup> Defendant submitted that even though costs is a discretionary matter, the court should order the Plaintiff to bear her own costs and pay the 2<sup>nd</sup> Defendants costs as well. This is because the Plaintiff is still married to the 1<sup>st</sup> Defendant thus she had the option of getting her rights acknowledged under the charged property without necessarily filing a suit against the bank. The Chargor had the option of authoring the bank in writing that the Plaintiff was to take over payment of the facility and eventually discharge the charge and release the title document to her.

22. On the issue of excess payment raised by Plaintiff's counsel during cross-examination of the bank's witness, counsel for the 2<sup>nd</sup> Defendant submitted that all payments made by the Plaintiff were deposited in the account held by the 1<sup>st</sup> Defendant and if there were excess payments, they can only be accessed by the 1<sup>st</sup> Defendant as is the norm in banking practice.

### **The Plaintiff's rebuttal submissions to the 2<sup>nd</sup> Defendant's submissions dated 27<sup>th</sup> May 2021**

23. They are dated 7<sup>th</sup> June 2021. Counsel for the Plaintiff submitted that provisions of Section 102(2), 103 and 85(1) of the Land Act, 2012 relied on by the 2<sup>nd</sup> Defendant do not expressly bar a party such as the Plaintiff and on the mitigating circumstances in this matter from seeking the orders sought.

### **Issues**

- a. Whether the Plaintiff has established an interest in the suit property.**
- b. Whether the Plaintiff is entitled to execute the discharge of charge.**

### **Analysis and Determination**

24. The Plaintiff led evidence that she got married to the 1<sup>st</sup> Defendant in 2003. They then acquired the suit property and have lived thereon since 2007. There is evidence that the Plaintiff and the 1<sup>st</sup> Defendant are still married though the 1<sup>st</sup> Defendant relocated to Dubai in 2013. This evidence is uncontroverted.

25. The Plaintiff pleads with the court to find that the suit property qualifies to be matrimonial home under the law. She cites that it was acquired in the course of their marriage and that she made contribution towards its acquisition. Evidence points to the fact that the Plaintiff has made substantial deposits towards paying the loan facility which was used to acquire the property. Even though the mortgage was registered before the Land Act and the matrimonial Property Act came into force, spousal beneficial interests were an overriding interest under common law before the said law came into force.

26. On the issue whether the Plaintiff can execute the discharge of charge, the loan is fully paid. If the suit property is found to be matrimonial property, the court can intervene to protect the property. In practice, the borrower is the one who instructs and pays the advocate to prepare the discharge of charge and forwards the same to the bank to sign.

27. I have considered the pleadings, the evidence on record, the submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-

- i. Whether the Plaintiff and the 1<sup>st</sup> Defendant are husband and wife and or legally married.**
- ii. Whether the suit property is matrimonial property.**
- iii. Whether the Plaintiff has acquired an equitable and registrable interest on the suit property.**
- iv. Is the Plaintiff entitled to the reliefs sought?**

**v. Who should bear costs of the suit?**

28. It is not in dispute that the Plaintiff and the 1<sup>st</sup> Defendant are legally married. The Plaintiff produced a marriage certificate as exhibit P1 in this case. It confirms that they got married on 13<sup>th</sup> August 2003. This fact has not been challenged. I find that the Plaintiff and the 1<sup>st</sup> Defendant are legally married.

29. It is the Plaintiff's case that they contributed to the acquisition of the suit property. That the same was partly financed by the 2<sup>nd</sup> Defendant. She told the court that they had agreed the suit property be registered in their joint names. She believed this was the case until she saw the notices from the 2<sup>nd</sup> Defendant addressed to the 1<sup>st</sup> Defendant.

30. She further stated that she has been residing on the suit property from 2007 to date. She also told the court that the 1<sup>st</sup> Defendant relocated to Dubai in 2013. This evidence has not been controverted.

31. **Section 2** of the Matrimonial Property Act, No 49 of 2013 defines matrimonial home as:-

**‘Matrimonial home’ means any property that is owned and leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property”**

**Section 6** of the Matrimonial Property Act defines matrimonial property as:

**“1. For the purposes of this Act, matrimonial property means-**

**a. the matrimonial home or homes;**

**b. household goods and effects in the matrimonial home or homes; or**

**c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”**

32. **Section 2** of the Land Act 2012 defines “matrimonial home” as

**“.....any property that is owned or leased by one or both spouses and occupied by the spouses as their family home”.**

33. **Section 93** of the Land Registration Act, 2012 provides as follows:-

**“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act”.**

34. It is clear from the foregoing provisions that the suit property is matrimonial property. The same was acquired during the subsistence of the marriage. The plaintiff has made substantial payments in a bid to service the mortgage after the 1<sup>st</sup> Defendant left for Dubai in 2013 and defaulted in the repayment. I find that even though the mortgage was registered before the Land Act, 2012 and the Matrimonial Property Act, came into force, spousal beneficial interests were an overriding interest under Common law before the said law came into force.

35. It is not in dispute that the plaintiff has made substantial payments hence has substantially contributed to the acquisition of the suit property. In the case of **Mugo Muiru Investments Limited vs EWE & 2 Others [2017] eKLR**, the Court of Appeal stated as follows:-

**“Even before the Land Registration Act came into force on 2<sup>nd</sup> May 2012, the equitable beneficial interest of a spouse in a matrimonial home occupied by such spouses 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 provisions expressly declaring it an overriding interest”.**

36. Similarly in **Wilfrida Opiyo vs Pascal Omolo Agila [2014] eKLR**, Kaniaru J stated as follows:-

**“Does the plaintiff have interest in the suit property? The plaintiff still is, in law, the defendant's wife.**

**Property concerns in the new constitutional dispensation have to be handled with circumspection in order to achieve equity and equality between and/or among spouses.**

**Indeed, article 60(1)(f) spells out a principle of land policy in Kenya aimed at eliminating gender discrimination in law, custom and practices related to land and property in land.**

**The same principle is captured yet again in the same words in Section 4(2)(f) of the Land Act, 2012. This is the principle that must light the path that I must walk in deciding this matter.**

**As a spouse, the plaintiff also has another good thing going for her. The thing is that: The plaintiff has an overriding interest as a spouse under Section 28(a) of the Land Registration Act, 2012. The Section provides for spousal right over matrimonial property”.**

37. I am guided by the above authorities in finding that the Plaintiff has acquired an equitable and registrable interest in the suit property. The 2<sup>nd</sup> Defendant’s defence dated 10<sup>th</sup> April 2017 does not seriously contest the facts set out by the Plaintiff.

38. The 2<sup>nd</sup> Defendant does not dispute that it had been receiving monies paid in by the Plaintiff which amounts have been duly utilized in offsetting the outstanding loan. It is clear from the deposit slips that the Bank was aware of who was making the payments. It confirmed the loan was fully settled on 30<sup>th</sup> July 2020. The Bank cannot claim the Plaintiff is a stranger to this transaction.

39. It appears the only problem is that the Charge was registered in the name of the 1<sup>st</sup> Defendant. This was contrary to what had been agreed between the Plaintiff and the 1<sup>st</sup> Defendant. **Section 102** of the Land Act 2012 provides that:-

**“1. At any time before the charged land is sold, or withdrawn from sale, the chargor or any other person entitled to discharge the charge may discharge the charge in whole or in part by paying to the chargee all money secured by the charge at the time of payment.**

**2. If payment is made under subsection (1), the chargee shall deliver to the chargor—**

**a. a discharge of the charge in the prescribed form over the whole or that part of the charged land to which the payment relates; and**

**b. all instruments and documents of title held by the chargee in connection with the charged land.”**

Section 103 provides that:-

**1. An application for relief against the exercise by the chargee of any of the remedies referred to in section 90(3) may be made by—**

**a. the chargor;**

**b. if two or more persons are joint chargors, by one or more of them on their own behalf;**

**c. a spouse of the chargor to the extent that the spouse was required to give consent to the creation of the charge but did not give consent;**

**d. deleted by Act No. 28 of 2016, s. 75 ; or**

**e. if the chargor has been adjudged bankrupt, the bankruptcy trustee of the estate of the charger.**

**2. If an application made in accordance subsection (1)(b) is not made by all the joint chargors, then, unless the court orders otherwise, it must be served on all the joint chargors.**

**3. An application for relief may be made at any time after the service of a notice under section 90(1), section 91(2), section 94(1), section 95(1), or during the exercise of any of the remedies contemplated in those sections.**

**4. An application for relief is not to be taken as an admission by the chargor or any other person applying for relief that—**

**a. there has been a breach of a covenant of the charge by the chargor;**

**b. by reason of such a breach, the chargee has the right to exercise the remedy in respect of which the application for relief has been made;**

**c. all notices that were required to be served by the chargee were properly served; or**

**d. the period for remedying the breach specified in the notice served under section 90 was reasonable or had expired, and the court may grant relief without determining all or any of the matters described in paragraphs (a), (b), (c) or (d).**

Section 85(1) of the Land Act 2012 provides that:-

**“Subject to the provisions of this section, the chargor shall, upon payment of all money secured by a charge and the performance of all other conditions and obligations under the charge, be entitled to discharge the charge at any time before the charged land has been sold by the chargee or a receiver under the power of sale.”**

40. The Plaintiff in her evidence told the court that she has not been in contact with the 1<sup>st</sup> Defendant since he left for Dubai in 2013. It is therefore highly unlikely that the 1<sup>st</sup> Defendant will write to the Bank to give consent that the discharge of charge be done in favour of the Plaintiff.

41. As the Bank, had been accepting payments from the Plaintiff, there is no reason why the discharge of charge cannot be undertaken in her favour.

42. I find that the Plaintiff is entitled to the reliefs sought except the order for injunction as the 2<sup>nd</sup> Defendant stated it had no interest on the suit property.

Section 27(1) of the Civil Procedure Act provides that:-

**“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

43. Given the peculiar circumstances of this case and noting that the chargor is the 1<sup>st</sup> Defendant. I do direct that each party do bear own costs.

44. In conclusion I find that the Plaintiff has proved her case as against the Defendants on a balance of probabilities. I enter judgement in her favour as follows:-

**a. That a declaration is hereby issued that the Plaintiff has an equitable and registrable interest in the suit property known as Villa No 4 in the Development known as Lavington Solo Villas erected on LR NO.3734/179 in Lavington within Nairobi and is entitled to have her interest noted in the said property.**

**b. That a declaration is hereby issued that the Plaintiff is entitled to redeem the suit property identified as Villa NO 4 in the Development known as Lavington Solo Villas erected in LR NO 3734/179 in Lavington within Nairobi.**

**c. Each party will bear own costs.**

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Makori for the Plaintiff

No appearance for the 1<sup>st</sup> Defendant

Ms Mathenge for the 2<sup>nd</sup> Defendant

Steve - Court Assistant