



Mohammed & another v Family Bank Limited & another (Civil Case 1 of 2021) [2024] KEHC 16220 (KLR) (11 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16220 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL CASE 1 OF 2021
PJO OTIENO, J
DECEMBER 11, 2024**

BETWEEN

ZENAH MAKOKHA MOHAMMED 1ST PLAINTIFF

MARTHA ATIENO ONYANGO 2ND PLAINTIFF

AND

FAMILY BANK LIMITED 1ST DEFENDANT

PAWABA AUCTIONEERS 2ND DEFENDANT

JUDGMENT

Apology

1. The court concluded production of evidence in this matter on the 11.07.2023 and ordered parties to file submissions. The matter was then mentioned on the 27.09.2023 to confirm compliance when both sides did confirm having filed submissions and the court directed the parties to come for judgment on the 15.12.2023.
2. Unfortunately, the file was never brought to the Judge for purposes of preparation of the judgment and it remained mislaid till the 14.11.2024 when the defendants counsel brought it to my attention through the Deputy Registrar.
3. The very long delay attributable to failures of the registry is highly regretted and the court apologises to the parties. The court equally thanks counsel for his follow up and urges parties and counsel, that when a date for decision passes without notice, it is their duty to court to not only ask but also peter for a new date. Apologies once again.



Historical Background and Overview of The Case

4. The dispute in this suit has its root in a contractual relationship between Thomas Shimanyula Levi (“borrower”) and Family Bank Ltd. At the commencement, the plaintiff named four defendants, including Joyce Pacilisha Shimanyula, as the first, Thomas Shimanyula as the second and Pawaba Auctioneers as the fourth defendant. The summonses on the first, second and fourth defendants were never served hence the suit against them was marked as abated for that failure. The suit is now between the plaintiff and the 3rd defendant only.
5. It is pleaded that by way of a letter of offer dated 20th January, 2016, Defendant advanced a loan facility in the sum of Kshs.33,943,000/ to the borrower which loan was secured by the borrower’s property known as LR No. Butso/so/Shikoti/2866 (hereinafter referred to as “the security”). That security was perfected by a first charge instrument dated 6.2.2016 and a further charge dated 17.9.2019.
6. The borrower has since defaulted in servicing both loans and the Defendant sought to realise the security in order to recover the loan balance by way of the statutory chargee’s power of sale.

The Case As Pleaded

7. The Plaintiffs plead that they are the wives to the borrower and that the security is jointly owned by them and the borrower, as matrimonial property, though registered in the sole name of the borrower. They allege that as spouses of the borrower, their consent to have the security charged as a security for the loan facility advanced to the borrower, was never sought nor obtained and that they only came to learn of the situation when the 2nd defendant wrote to them a letter dated 16th April, 2021 informing them of an eminent sale of the security pursuant to a loan facility advanced by the defendant. They assert that for failure to obtain their consent, the intended sale of the security by public auction is void ab initio. On the basis of the alleged impropriety by failure to comply with a statutory requirement, the plaintiffs are seeking the following orders;
 - a. Injunction orders prohibiting the public auction scheduled by the 4th defendant of Land Parcel No. Butso/so/Shikoti/2866 because it is a result of recovery of money secured by a charge which was void.
 - b. Cost of this suit.
 - c. Any other reprieve this honourable court sees fit and expedient to grant in the circumstances.

Defendant’s Case

8. Vide a statement of defence dated 11th June, 2021, the defendant contends that the borrower requested and was afforded financial accommodation to be secured by the security. The facility was secured by a legal and further charge over the security. The defendant asserts that at the time of contracting, the borrower indicated that he was married to one Lona Shaki Chapa from whom there was obtained a spousal consent to charge and that it was not their business to interrogate whether the borrower had more than one spouse where such spouse had not been disclosed. For the further charge, however, the borrower said that he had no wife and thus no spousal consent was required and none was therefore sought nor obtained.
9. At the case conference, the parties agreed that each would call a single witness who would adopt the witness statement filed as evidence in chief. The bundles of documents filed were by consent agreed to be produced as filed and were in fact marked as PEH1 and DEH1 respectively



Testimonies

10. Martha Otieno testified as PW1 and it was her sworn evidence that she stays at Marava estate in Kakamega in her own home which stands on the security land. She stated that she was the borrower's wife and proceeded to adopt her statement which reiterates the contents of the plaint and further stated that she shares three children with the borrower. She also relied on the list and copies of documents filed and produced as PEH1 which included the birth certificates of six children, three each by the plaintiffs.
11. On cross examination she stated that she married the borrower under customary law though she had not filed any documents in court to prove this fact. She further stated that though she participated in the acquisition of the suit land which she referred to as matrimonial property, she did not have evidence to prove the same and she also detailed that there are two units in the security land whereby she occupies one and the other is leased out. She denied knowledge why her husband and the other defendants were never served with summons.
12. On being questioned by the court she stated that she shared a home with the borrower with whom she had three children aged, 11, 9 and 7. She also confirmed Knowing Joyce Shimanyula who lives in Kakamega like her but she had not visited her home.
13. Everlyne Auma Etemesi testified as DW1. She gave evidence that she was a banker by profession and employed by the defendant. She adopted her witness statement and relied on the documents produced as DEH1.

She further explained that in the second loan, the borrower sought to take over the loan facilities advanced to Respect Express Company Limited though at all times the suit land served as security for all the loan facilities.
14. On cross examination she stated that at the time of accepting the security, they did an inquiry and relied on the word of mouth from the borrower which confirmed that the security was a matrimonial property and they proceeded to obtain a spousal consent from one Lorna Chania who the borrower had stated was his wife. She further stated that when the Valuer visited the land in 2013 the said Lorna was living on a bungalow in the suit land. She added that when the property was last inspected there was a spouse occupying the property but the name of the spouse was not disclosed. On being re-examined the witness told the court that she was familiar with the borrower who had never denounced being married to Lorna.
15. On being questioned by the court she stated that she had never met Lorna and could not confirm if the bank had ascertained the persons living on the suit property.

Plaintiffs' Submissions

16. The plaintiffs identify two issues for determination by the court to be:-
 - a) Whether the suit land herein is matrimonial property and;
 - b) Whether the charge over the security herein was lawfully registered in favour of the defendant.
17. On whether the suit land is matrimonial property the plaintiffs submit in the affirmative asserting that by dint of section 6(c) of the *Matrimonial Property Act*, No. 49 of 2013, matrimonial property is defined to include immovable property jointly owned and acquired during the subsistence of the marriage. It is submitted that the suit land was acquired jointly by them and the borrower during their marriage and it is thus matrimonial property.



18. On whether the charge over the security herein was lawfully registered in favour of the defendant, they contend that section 28 of the [Land Registration Act](#), 2012 recognizes spouses' rights over matrimonial property as an overriding interest that requires no registration and cite the case of *Mary Wanjiru Njuguna v Peter Weru KABui & 2 others* (2020) eKLR in support thereto.
19. The plaintiffs further cites section 12(1) of the [Matrimonial Property Act](#), No. 49 of 2013, which requires the consent of a spouse when it comes to alienation of matrimonial property by way of a mortgage.
20. It is thus asserted that with the charge instrument having been secured without the consent of the two spouses, this court ought to issue a prohibitory order against the public auction for the security and that the subsequent charge be declared a nullity ab initio.

Defendant's Submissions

21. The defendant also identify to court only two issues for determination; whether the property is matrimonial and whether the charge was lawfully created.
22. On whether the security is matrimonial property, the defendant invokes the incidence and burden of proof and contends that the plaintiffs failed to avail proof of marriage by way of a marriage certificate, affidavit of marriage, testimony from independent witnesses or even family photographs tendered by the plaintiffs to validate their marital status. They assert that the evidence of marriage is a matter which is proved with evidence as held in the case of *Kimani Gituanja v Jane Njoki Gitunja* (1983) eKLR.
23. It is further argued that the position of the plaintiffs as wives to the borrower is undermined by their failure to serve the borrower with summons leading to the convenient abatement of the suit against the borrower, yet the two claimed to cohabit with him.
24. For failure to prove marriage, it is submitted that the pedestal to claim matrimonial property as a basis to challenge the legality of the charge must fail. In addition, the plaintiffs were content not to challenge the position of Lorna as the wife of the borrower who gave consent just as much as no effort was made to show contribution by dint of section 93 of the [Land Act](#).
25. It was stressed that there was never a plea for presumption of marriage and that even if the same had been put forth, there would still be paucity evidence as outlined by the Supreme Court as mere cohabitation doesn't automatically imply marriage. The defendant avers therefore that there has not been proof that the plaintiffs have met the threshold of proving the suit property to be matrimonial property.
26. On whether the charge was lawful, the defendant submits that failure by the plaintiffs to establish themselves as lawful spouses to the borrower renders the question of the validity of the charge moot. There is submission that the defendant complied with all the legal formalities for the execution of a charge instrument which includes acquisition of spousal consent from Lorna Shali Chapia and all the charge instruments bear the hallmarks of due execution. They further contend that the borrower swore an affidavit affirming his single status when executing the further charge dated 17/9/2019 and for that reason they argue that they were within their right to invoke their statutory power of sale triggered by the borrower's default on the loan. They pray that the suit be dismissed with costs.

Issues, Analysis and determination

27. The court has anxiously perused the pleadings filed, evidence led and the submission filed by parties and concurs with the parties that three issues arise for its determination. The issues are:-



- a. Whether the plaintiffs are spouses of Thomas Shimanyula Levi?
 - b. Whether LR No. Butso/2866 is a matrimonial home?
 - c. Whether the charge created and held by the defendant was lawfully created with spousal consents of the plaintiffs?
28. The court shall strive to determine the issues in a seriatim manner but notes from the onset that a determination of the first question will determine whether the other two need delving into in great length. This view is informed by the fact that it is marriage that invoke the character of the property as matrimonial or otherwise and thus whether such a spouse gave an informed consent to charge.

Whether the plaintiffs are spouses of Thomas Shimanyula Levi

29. Section 2 of the *Matrimonial Property Act*, CAP 152, Laws of Kenya defines a spouse to mean a husband or wife. It was the evidence of PW1 that she was married to the borrower under customary law. Notably, she does not specify in line with the customs of which community or even the time she got married. Furthermore, no independent evidence by way of family photos, oral evidence by people who know her as being so married or even the husband himself to produce the confirmation of such marriages.
30. The husband who was the borrower and was initially a party to this suit would have at least shed some light on whether he had married the plaintiffs but the plaintiffs instead conveniently failed to serve him with summons to enter appearance thus leading to the abatement of the suit against him. Even with such abatement, nothing stopped the said husband from attending court and confirming the marriages.
31. Without such evidence, the court has no other option but to find that there is no evidence on record to show that the borrower married either of the plaintiffs. In coming to this determination, I stand persuaded by the decision in *Esther Njeri Mwangi V Equity Bank Ltd & Another* (2017) eKLR where it was held:-
- “It is the Plaintiff’s assertion that the charges are invalid due to absence of her consent as the spouse of the borrower... She also urged that the suit property is her matrimonial home; that she resides there with her children and stands to be rendered destitute if the suit property is sold. The Plaintiff has led no evidence to prove that her matrimonial home is situated on the said property. It is her duty and responsibility to bring herself under the armpit (sic) of Section 2 of the Matrimonial Act which defines a Matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property. It was her duty to lay evidence before the Court that the Plaintiff and 2nd Defendant occupy the suit property as their family house and that there is a home on the suit property and that the Plaintiff and defendant occupy the home as their formerly home/matrimonial home. I hold and find that the Plaintiff has not established that she is a spouse for which consent was required and secondly that the suit property is a matrimonial property.” (emphasis provided)
32. On the face of such finding and conclusion, the remaining two issues become rather academic but having been isolated the court shall briefly handle the same as below.



Whether LR No. Butsotso/Shikoti/2866 is a matrimonial home

33. Section 2 of the *Matrimonial Property Act*, CAP 152, Laws of Kenya defines a matrimonial home as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property. Here the 1st plaintiff asserts without rebuttal that she occupies and cohabits with the borrower on a part of the property while another portion is occupied by tenants. That evidence if coupled with proof of marriage would no doubt qualify the property as matrimonial property.
34. Without proof of marriage there is no foundation to hold and find that the suit land was matrimonial property.
35. On the last question on legality of the charge, the court finds that Section 12 of the Act makes it mandatory that before a matrimonial property is encumbered by way of a charge, a written and informed consent of the spouse be sought and obtained. Even though the provision addresses only monogamous situations, the courts have interpreted same to command that even in polygamous circumstances the consent of all spouses be sought and obtained unless there is evidence that a particular spouse or spouses have no stakes in the subject property. See *EKN vs AS and 2 others* (2019) eKLR para 32.
36. In this matter the question was whether the plaintiffs were spouses and not whether their consent was sought and obtained. On the finding that there was never proof of marriage, the question of their consent become moot and therefore their locus to challenge the charge is equally untenable. Of course, the flip side is that had matrimony been proved and without evidence of their consent having been sought and obtained, it would have been obvious that the charge is vitiated by the law. In that event the court would have been fully persuaded by the decision in *EKV* (supra) as well as the decision in *Mary Wanjiku Njuguna vs Peter Weru Kabui & 2 others* (2020) eKLR where the court declared the charge a nullity and nullified the same.
37. Ultimately and for the conclusions foregoing, the court finds that the suit lacks merit and the same is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED, VIRTUALLY, THIS 11TH DAY OF DECEMBER, 2024.

PATRICK J O OTIENO

JUDGE

In the presence of:

Ms. Lugulu for the Plaintiffs

No appearance for the Defendants

Court Assistant: Upton

