



**JKN v Equity Bank Limited & 2 others (Commercial Civil Case E669 of 2021)
[2021] KEHC 199 (KLR) (Commercial and Tax) (3 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 199 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E669 OF 2021
DAS MAJANJA, J
NOVEMBER 3, 2021**

BETWEEN

JKN PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS 2ND DEFENDANT

JMNM 3RD DEFENDANT

RULING

Introduction and Background

1. Together with the Plaint dated 6th July 2021, the Plaintiff filed the Notice of Motion of the same date made, inter alia, under Order 40 rules 1, 2 and 4 of the *Civil Procedure Rules* seeking an injunction restraining the Defendants from selling or otherwise dealing or interfering with her quiet possession, use and enjoyment of the matrimonial property known as LR NO. DAGORETI/RIRUTA/xxxx — NAIROBI COUNTY (“the suit property”).
2. The application is supported by the Plaintiff’s affidavits sworn on 6th July 2021 and 28th July 2021 respectively. It is opposed by the 1st and 2nd Defendants through the Statement of Grounds of Opposition dated 8th July 2021 and the replying affidavit sworn on 16th July 2021 by Mary Katoni, the 1st Respondent’s (“the Bank”) Credit Manager. There was no response from the 3rd Defendant.
3. The facts giving rise to the instant dispute can be gleaned from the Bank’s deposition. By an Agreement dated 26th March 2013, the Bank agreed to advance to the 3rd Defendant a loan facility of KES. 8,500,000.00 for purposes of working capital to the 3rd Defendant. As security for the loan, the 3rd



Defendant executed a charge dated 21st March 2013 in favour of the Bank over the suit property securing KES. 12,000,000.00.

4. Not long after, the 3rd Defendant failed to make the requisite repayments and the loan fell into arrears. This prompted the Bank to issue a Demand Notice dated 13th September 2013 requesting the 3rd Defendant to pay the outstanding debt which stood at KES. 12,511, 422.08. The 3rd Defendant failed to make payment whereupon the Bank sent to the 3rd Defendant a Statutory Notice dated 10th January 2014 under section 90 of the Land Act. Although the 3rd Defendant sought accommodation from the Bank for close to four years, he failed to honour his promises to make payment forcing the bank to send him a 40-day notice dated 11th April 2019 under section 96(2) of the Land Act. The 3rd Respondent did not settle the arrears causing the Bank to instruct the 3rd Defendant (“the Auctioneer”) to proceed with the sale of the suit property.
5. The Auctioneer advertised the suit property for sale by auction in the Daily Nation on 12th April 2021 after a valuation of the suit property had been done. The 3rd Defendant failed to settle the outstanding debt which stood at KES. 15,994,213.43 as at 26th April 2021. The suit property was scheduled for auction on 13th July 2021 thus precipitating the filing of this suit.

The Application and the Plaintiff’s case

6. The Plaintiff’s case is captured at paragraphs 7 to 12 of the Plaint where she states as follows:
 - [7] The intended auction is ill motivated and made in bad faith without establishing the real ownership and equitable ownership of the property intended for auction.
 - [8] The Plaintiff never gave any spousal consent over the purported charge on the property intended for auction to any of the Defendants as was required by law when the said loan was taken by the 3rd Defendant and secured on the matrimonial home.
 - [9] The Plaintiff raised all her adult children in the said home for over 20 years and contributed to the upkeep and maintenance of the family home.
 - [10] The Plaintiff is aggrieved by the said intended auction as she is not liable to (the) Defendants and therefore seeks an injunction to restrain the said attachment and auction of her marital property.
 - [11] The Defendants have blatantly refused to disclose to the Plaintiff information relating to the impugned charge.
 - [12] The Defendant have never issued the mandatory notices of default of loan repayment to the Plaintiff, and she has only come to know of the intended auction through a leaflet that was left at the gate to her home.
7. In summary, the thrust of the Plaintiff’s case is that the she is the spouse of the 3rd Defendant and that she never gave any spousal consent to the 3rd Defendant to charge the suit property to the Bank. She finds shelter in the provisions of section 28(a) and 93(1), (2), (3) and (4) of the Land Registration Act, 2012, which provide that spousal rights over matrimonial property overrides any other interest and that a disposition made without spousal consent shall be void at the instance of the spouse and that any charge over the suit land shall also comply with all relevant provisions of the Land Registration Act, 2012 including sections 32, 36, 43 and 56 which provide for registration, consent and mode of execution of such dispositions. The Plaintiff further contends that she is cushioned by section 79(3) of the Land Act which protects her real and equitable ownership rights by insisting on spousal consent in such cases.



8. The Plaintiff contends unless an injunction is granted she will suffer irreparable loss and damage as the suit property is her matrimonial home.

The Bank's Reply

9. In addition to the averments made in the introductory part above, the Bank's position is that the Plaintiff lacks the standing to this suit as she is not privy to the charge. The Bank further points out that the Plaintiff has not established that she is the spouse of the 3rd Defendant and or that the suit property is their matrimonial home. The Bank accuses the Plaintiff of non-disclosure of material facts based on the existence of a suit; Milimani Chief Magistrates Court Civil Case No. E2801 OF 2021, JMM v Equity Bank Limited ("MCCC E2801 of 2001") where the court issued but subsequently discharged an ex-parte injunction restraining the Bank from selling the suit property.
10. Counsel for the Bank submits that the Plaintiff has made several falsehoods that are apparent from the deposition made by the 3rd Defendant in MCCC E2801 of 2021 and the facts of the case. On the issue of privity of contract, the Bank points out the when the 3rd Defendant charged the suit property, one MW gave consent to the creation of charge as the 3rd Defendant's spouse. It therefore submits that the Plaintiff is a stranger to it. The Bank reiterates that Plaintiff has not attached any documents to her deposition to show that she is the 3rd Defendant's wife.
11. The Bank points out the suit property is not matrimonial property. It points out that the title document of the suit property attached in MCCC E2801 of 2021 indicates that the 3rd Defendant became the registered proprietor on 15th May 2008 but that in the present application, the Plaintiff states that she has lived on the suit property with all her five children for over 20 years and that would only mean that the title to the suit property was acquired before 2001.
12. The Bank further depones that it has never interacted or known who the Plaintiff is as she has never come forth at any instance to protest the letters and notices issued to the 3rd Defendant in those 8 years the Bank accommodated the 3rd Defendant.

Analysis and Determination

13. Apart from the issue whether the Plaintiff has made out a case for the grant of an injunction, the Bank contends that this suit and application is res sub judice on the ground that it seeks the same reliefs sought and granted in MCCC E2801 of 2021 which is still pending before the trial court. The principle of res sub judice is grounded on section 6 of the [Civil Procedure Act](#) which provides as follows:
 6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
14. I reject the submission that the suit violates section 6 aforesaid on the ground that the Plaintiff is not a party to the suit before the Subordinate Court although the case deals with the suit property. The Plaintiff's claim is grounded on her matrimonial interest which is independent from any other party and is not issue in the pending suit.
15. Turning to the substance, the application before the court is for an interlocutory injunction under Order 40 rule 1 of the Civil Procedure Rules. The principles for the grant of an injunction are well settled. The Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil*



Appeal No. 77 of 2012 [2014] eKLR reiterated the settled principles set out in *Giella v Cassman Brown [1973] EA 358* 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.

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.

16. From the excerpts of the Plaintiff I have set out above, the Plaintiff's case is firmly founded on her matrimonial interest in the suit property. The issue for resolution then is whether the plaintiff has established, on a prima facie basis, that she is the 3rd Defendant's spouse and thus required to give her consent to the charge. In dealing with this issue, I am also guided by the decision of the Court of Appeal in *Stella Mokeira Motara v Thaddues Mose Mangenya & Another KSM CA Civil Appeal No. 63 of 2014 [2016] eKLR* where it stated as follows:

[20] It was not sufficient for the appellant merely to raise issue or arguments as to why the 2nd respondent should not have been allowed to exercise its statutory right of sale of the suit properties, she was under an obligation to demonstrate that there had been an infringement of her rights and she was most likely to succeed in her suit against the respondents.

17. Since the suit property was charged in 2013, the legal basis of the Plaintiff's claim is section 79 (3) of the *Land Act*, 2012 which states that:

79(3) A charge of a matrimonial home, shall be valid 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.

18. The Plaintiff asserts that she is the 3rd Defendant's wife, has lived on the suit property, which is the matrimonial home, with her children and that she had neither executed the charge nor assented to it. "Matrimonial home" is defined by the *Land Act*, 2012 to mean "any property that is owned or leased by one or both spouses and occupied as their family home."
19. The Charge shows that the spousal consent to charge the suit property was given by one MW on or about 21st March 2013. In her supplementary affidavit, the Plaintiff denies that MW is the 3rd Defendant's spouse. She has produced an affidavit of marriage sworn on 6th February 2008 by her and the 3rd Defendant and birth certificates of the five children from the marriage to show that she is the 3rd Defendant's spouse. She accuses the Bank of failing to conduct due diligence before issuing the loan.
20. The Plaintiff also discounts the fact that she has not lived on the suit property by producing an application for an electricity meter in the name of her son, DNM, a letter for the Chief of Ngando location confirming that she has been a resident of the suit property for a period of 20 years and confirmation from the local Church confirming that she has been a member of the local congregation from the year 2000. The Plaintiff states that she moved on the suit property in 1998.



21. The Bank's case is that the 3rd Defendant presented MW as his spouse who gave the spousal consent. It states that it never interacted with the Plaintiff despite its long association and interaction with the 3rd Defendant. While it disputes that the suit property is matrimonial property, it points out that when the Bank attempted to sell the suit property, the 3rd Defendant filed suit before the Subordinate Court where he stated in his supporting affidavit that, "The subject property is matrimonial property where my family including my children stay and do not know of any other home" meaning that the 3rd Defendant was referring to MW as his spouse and part of his family.
22. The Bank also stated that Plaintiff case is also based on falsehoods as the suit property was acquired by the 3rd Defendant on 15th May 2008 yet Plaintiff deponed that she and her children had lived on the suit property for a period of 20 years implying that the suit property was acquired way before the property was acquired in 2001. The bank also disputes that the suit property is matrimonial property on the ground that the 3rd Defendant applied for a loan for working capital proceeds to improve the suit property and use the proceeds to pay off the loan.
23. From the unchallenged documentation presented by the Bank, the 3rd defendant presented the said MW as his wife and she signed the spousal consent. As to whether the suit property is matrimonial property, a part from the 3rd Defendant own deposition, a description of the suit property is set out in a valuation report dated 11th March 2021 prepared by Accurate Valuers Ltd for the Bank shows there is a double story residential house and four single story rental blocks. The report further states that, "At the time of inspection, the double storey residential house was occupied by the family of the registered owner while the rental blocks were let out to various tenants".
24. On the basis of the material before the court, I am prepared to accept that the suit property is matrimonial property. However, the question remains whether the Plaintiff has a spousal interest in the suit property as against the Bank. As I understand, the thrust of the Plaintiff's case is that had the Bank done due diligence, it would have found out that she was the 3rd Defendant's spouse hence it is entitled to an injunction.
25. I also accept that a spouse has an interest in matrimonial property (see *Stella Mokeira Motara v Thaddues Mose Mangenya & Another* (Supra)). In this case the 3rd Defendant has introduced MW as his spouse and she had given her consent. This leads to the question whether there anything that would have alerted the Bank to the fact that the Plaintiff was the 3rd Defendant's a wife? I do not find any evidence. It is the 3rd Defendant who introduced MW as his wife in 2013 when charge was executed. The spousal consent was executed before the 3rd Defendant's Advocates. For the period when the 3rd Defendant defaulted and engaged the Bank from time to time, nothing emerged that would have alerted the Bank to the fact that MW was not his wife. Alternatively, nothing excluded the possibility that the said MW was his wife as polygamy is legal. In reality, the only person who could shed light on the relationship between the Plaintiff and MW is the 3rd Defendant. The Bank cannot be blamed in this respect.
26. Another issue that has caused me considerable anxiety, is the fact that MW, as the 3rd Defendant's wife who gave consent, has a spousal interest in the suit property. I would be required to make a judgment regarding the relationship between her, the Plaintiff and 3rd Defendant. The rules of natural justice require that that before an adverse decision is made against a person, the person has a right to be heard. Since the said MW was a known person, she ought to have been joined to the suit. Further, I have gone through the record, and it is apparent from the only affidavit of service on record, the 3rd Defendant was not served with court process.



27. The totality of my findings is that the Plaintiff has not established, on a prima facie basis, that the Bank, exercising any due diligence, would have concluded that she, instead of MW, ought to have signed the spousal consent. This court should not be put in a position of adjudicating on who between the Plaintiff and MW is the 3rd Defendant's wife, a matter that does not concern the Bank. That being the case and the suit property having been offered as security for a loan, there is no evidence that the Plaintiff will suffer irreparable loss not compensable by damages if the injunction is not granted.

Disposition

28. For the reasons I have set out above, I dismiss the Notice of Motion dated 6th July 2021 with costs to the 1st and 2nd Defendants. The interim orders in force are hereby discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Mutua instructed by Moraa Atandi Advocates for the Plaintiff.

Mr Andole instructed by Prof. Albert Mumma and Company Advocates for the 1st and 2nd Defendants.

