



**PKB v Diamond Trust Bank Kenya Ltd (Civil Suit E014 of 2021)
[2021] KEHC 221 (KLR) (Commercial and Tax) (12 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E014 OF 2021
A MABEYA, J
NOVEMBER 12, 2021**

BETWEEN

PKB APPLICANT

AND

DIAMOND TRUST BANK KENYA LTD RESPONDENT

RULING

1. The subject of this ruling is a Notice of Motion dated 15/1/2021 brought, inter-alia, under Order 40 Rule 1 & 2 of the *Civil Procedure Rules*, Section 63(c) and (e) of the *Civil Procedure Act*, Section 93 of the *Land Registration Act*, Section 2,6,7,12(1) and 12(5) of the Matrimonial Properties Act and Article 23, 47 & 48 of the Constitution.
2. The plaintiff sought to restrain the defendant from entering, disposing, alienating and/or interfering with her quiet possession of Land Reference Number xxxx/xxx, Nairobi (the 'suit property') pending the hearing and determination of the suit.
3. The application was supported by an affidavit sworn by the plaintiff on even date. She contended that she was married to one BMP with whom she built her matrimonial home on the suit property. That despite being aware of that fact, the respondent failed to seek her spousal consent when advancing sums of money with respect to two continuous charge instruments. That subsequently, the respondent issued a notification of sale for the said matrimonial home.
4. It was the plaintiff's contention that, having failed to comply with the express provisions of the law, the charge instruments were null and void. That she would suffer irreparable loss if the orders sought were not granted. That the respondent would on the other hand suffer no prejudice.



5. The defendant opposed the application vide the replying affidavit of Amaan Kassam sworn on 2/2/2021 by its legal manager. He averred that the suit property was jointly owned by BMP and BRP, who had offered the same as security for various advances to various borrowers between 2006 and 2018.
6. That the suit property had been given to secure financial facilities to a company known as [Particulars Withheld] Limited and BRP. That further advances were made to a company known as [Particulars Withheld] Limited on the security of the suit property. That the plaintiff was a director in those two companies and had executed the various Letters of Offer as well as the charges in that capacity.
7. It was averred that the borrowers had defaulted and the requisite notices issued. That the plaintiff having been aware of the said facilities and having executed the securities and consented to their creation as such, she cannot now turn around and allege that she was entitled to execute the spousal consent. That the suit property was not a matrimonial property and debt was not disputed.
8. It was contended that the plaintiff had not met the ‘irreparable loss’ condition for the grant of an injunction as the bank could compensate the plaintiff in the event of a loss.
9. In response to the replying affidavit, the plaintiff swore a supplementary affidavit on 10/5/2021. She contended that the defendant could not deny that the suit property was matrimonial property yet it had sought her spousal consent in their letter of offer dated 30/7/2018. That the 5 facilities advanced between 14/3/2013 and 30/7/2018 were advanced after the commencement of the Land Act 2012 and no good reason had been advanced why her spousal consent had not been sought.
10. This is an application for an interim injunction pending the determination of the suit. The principles applicable are well known. The plaintiff must establish a prima facie case with a probability of success, secondly, the plaintiff must show that if the orders sought are not granted and the suit property is sold, she will suffer loss that is incapable of being compensated by an award of damages, thirdly, if in doubt, the Court will determine the matter on a balance of convenience.
11. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal defined prima facie case to be: -

“ ... in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.
12. The applicant pleaded that the charges on the suit property were null as her spousal consent was not obtained yet the property constituted matrimonial property.
13. The Court has looked at the documents on record which include a marriage certificate, Title deed, Charge instruments, various letters of offers thereto, the notification of sale and auction notice. The foregoing documents disclose that a spousal right to matrimonial property exists in favour of the plaintiff.
14. On the other hand however, it was contended by the defendant and not denied, that the plaintiff was not only aware of the securities but also executed the same as a director of two of the borrowers. The plaintiff did not deny this fact. The question that begs is whether, the plaintiff having acted as such she can now turn around and challenge those securities on the basis of the absence of the spousal consent.
15. The Court is of the opinion that, that section of the law is mandatory. A lender cannot ignore it for any reason whatsoever. The same was enacted to protect the unsuspecting spouses who, without their knowledge their spouses pledged matrimonial properties as securities for financial accommodation



behind their back, only later to be confronted with the eventuality of loss of the subject property. Those are the spouses that the law sought to protect.

16. In the present case however, the plaintiff was a director of two of the borrowers. She executed the securities leading to the financial accommodation. She had an interest in those companies. Those companies did enjoy the financial accommodation offered. Can she now turn around and question those security documents on the ground that her spousal consent was not sought?
17. The principal of spousal consent in my view was meant to protect the unsuspecting spouse. One who comfortably and innocently remained in a marriage and comfort of her/his matrimonial property and was only surprised when the lenders came calling after default. Where such a spouse was not only unaware but also never consented to the matrimonial home being offered as security.
18. Here, the plaintiff was not only a director in two of the borrowers, but she executed the security documents. She was not only aware of the transactions, but she authorized the same. Will equity come to her aid? One cannot willingly and freely participate in a transaction whose consequences he/she well knows then later turn around and say that there was an additional legal requirement which she/he herself has flouted. While equity follows the law, it will however treat as done that which ought to be done. By executing the securities the subject of the lending it might be safe to hold that the plaintiff had consented to the creation of the securities.
19. Here, the plaintiff did not execute one document once, but several and severally leading the defendant to rely on the knowledge that the plaintiff intended to be bound by her actions. The defendant acted on the plaintiff's action to its own detriment. The plaintiff cannot be allowed to rescile from that position.
20. Accordingly, I am not satisfied that the plaintiff has established a *prima facie* case with any probability of success.
21. On the second limb of *Giella v. Cassman Brown*, it was the plaintiff's contention that if the orders sought were not granted the suit property would be sold leading her to suffer irreparable loss and damage. Conversely, the defendant contended that the suit property had been offered as security for a loan and that it had therefore become a commodity for sale and that it could be quantified and compensated in the event of loss. The defendant further stated that it was a reputable bank capable of meeting any award of damages.
22. The Court is alive to the pronouncements that have been made on this point. In *Fatma Hassan Hadi v Diamond Trust Bank (K) Ltd* [2019] eKLR, it was held: -

“On irreparable loss, it is clear that if the property is sold, then it will be lost, and the plaintiff stands to lose her matrimonial home. There certainly is danger of the plaintiff suffering irreparable loss. Even if I was to consider the balance of convenience, it tilts toward preserving the property until this case is heard and determined”.
23. In *Bhalvinder Pal Singh s/o Surji Singh & another v Equity Bank* [2015] eKLR, the court held: -

“And what about adequacy of damages as a remedy to the plaintiffs? One would argue that the defendant is capable of paying damages. But it is not an unassailable position of law that where the respondent or defendant can pay damages, then the plaintiff or applicant is not entitled to injunctive relief”.
24. While this Court concurs that a lender with an adequate financial chest cannot violate the rights of either a borrower or guarantor on the grounds that it can adequately offer compensation, where



however, a party has not established the first limb of *Giella's Case*, the court is not to be concerned with the second limb thereof. In this regard, I am of the view that the property having been offered as security for the advances in question, it became a commodity for sale in the case of default.

25. The third limb is to determine where the balance of convenience lies. In the present case, the balance of convenience lies in allowing the bank to recoup its outlay.
26. In the premises, I find the application to be without merit and dismiss the same with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

