



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

PETITION NO. 5 OF 2019

BETWEEN

FSM Suing as a mother and next friend of FK AND JMM.....PETITIONER

AND

JMM.....1ST RESPONDENT

BANK OF AFRICA.....2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner's case is that the 2nd respondent ("the Bank") cannot exercise its statutory power of sale as it is enjoined to act in the best interests of the child under **Article 53(2)** of the Constitution. The petitioner has brought this case on the ground that the threatened sale of the suit property by the Bank threatens to violate the children's right to shelter protected under **Article 53(1)(c)** of the Constitution.

2. The parties filed affidavits setting out the facts and supplemented them with written submissions making their arguments in support of their respective positions.

Petitioner's Case

3. The facts leading to this petition are set out in the petition dated 17th April 2019 supported by two affidavits; a supporting and supplementary affidavit sworn on 17th April 2019 and 22nd October 2019 respectively.

4. The petitioner stated that she was married to the 1st respondent under Kamba customary law in 2002. The marriage was blessed with two children aged 14 and 9 years. The couple established a home on the property known as NAIROBI/BLOCK [Particulars withheld] situated in South B Estate, Nairobi ("the suit property") which she referred to as the matrimonial property. After the parties separated in 2017, the 1st respondent filed a case at the Nairobi Children's Courts (*Nairobi Children's Court Case No. 276 of 2018*). The court granted interim custody of the children to the petitioner and ordered that they remain in the matrimonial home.

5. The petitioner further stated that she was aware that the suit property had been charged to the Bank. She alleged that she and the 1st respondent were servicing the loan through the proceeds of their joint business. She claimed that after they separated, she was unable to access information about the loan and when she inquired from the Bank, she was informed that the 1st respondent had defaulted in servicing the loan and that the Bank had issued notices intending to sell the property. As she was not privy to the account, the Bank declined to give her the loan details.

6. The petitioner stated that she brought this petition as she fears that should the Bank exercise its power of sale, the rights of the children protected under **Article 53** of the Constitution will be violated as they will be denied shelter. It is her case that the children's best interests will be served by them remaining under her care in the matrimonial property. The petitioner seeks the following prayers in the petition:

1. A declaration by this honourable court that the minors' right to Shelter protected under Article 53(1) (c) of the Constitution is threatened and likely to be infringed by the 2nd respondent's imminent exercise of its power of sale over the matrimonial home in

South B Estate Nairobi on Land Title No. NAIROBI/BLOCK [Particulars withheld], where the minors live.

2. An order of permanent injunction in the interests of the minors to restrain the 1st and 2nd respondents, their servants, employees and agents from auctioning off or in any other way disposing off the matrimonial home in South B Estate Nairobi on Land Title No. NAIROBI/BLOCK [Particulars withheld], where the minors live.

7. The petitioner's case is grounded on the principal that the Constitution enjoins the court to ensure that in all actions concerning a child, the best interests of the children are given primary consideration as stated in **Article 53** of the Constitution and given effect in **section 4(2)** of the **Children Act, 2001**. The petitioner submitted that in its decision dated 21st May 2018, the Children's Court had determined that the best interests of the children would best be served by the children remaining in the matrimonial home and that the said order has neither been reviewed nor set aside. The petitioner maintained that should the Bank sell the property the children's best interests would be undermined.

8. The petitioner submitted that the Bank's interest in realizing the security could not supersede or override the best interests of the children which had already been ascertained by the Children's Court. Counsel for the petitioner contended that to allow the Bank to sell the suit property would upset or defy the constitutional order set out in **Article 53(2)** of the Constitution. Counsel invited the court to find that this case was not merely a case between the Bank and chargor but an exceptional case where children were involved and the best of interest of the children should be upheld.

9. The petitioner further submitted that other than selling the suit property, the Bank could exercise other remedies in order to protect the child's best interests. Counsel for the petitioner submitted that the Bank could sue the 1st respondent to recover the money due and owing under **section 91(1)(2)** of the **Land Act, 2012**. The petitioner also contended that the court could postpone the sale or any proceedings to recovery of money secured by the charge until alternative remedies are exhausted under **section 91(2)** of the **Land Act, 2012** since the 1st respondent had other properties which could be sold to recover the money.

1st respondent's case

10. The 1st respondent opposed the petition and filed a replying affidavit sworn on 24th May 2019. Although he admitted that he had cohabited with the petitioner for a period of 9 years and that they had two children, he denied that they were married under Kamba customary law as alleged by the petitioner. He confirmed that after their separation, he moved the court in **Nairobi Children's Court Case No. 276 of 2018** to seek protection orders.

11. The 1st respondent also denied that the suit property was matrimonial property since they were not married. He deposed that he acquired the suit property when he was an employee of the Bank and that he did so without the petitioner's consent. Having lost employment, he was unable to service the mortgage, a fact which the petitioner was aware of. He accused the petitioner of refusing to relocate from the suit property so that he could rent it in order to service the mortgage.

12. The 1st respondent stated that in view of the negligible income he is earning, he is unable to service the loan. He also stated that the petitioner did not contribute to the business she claimed and that it no longer exists. The 1st respondent avers that the petitioner is free to acquire the property if she can settle the mortgage debt.

13. The 1st respondent submitted that petitioner had no right to claim the suit property and that as the chargor, he did not have any objection to the Bank realizing the security provided that it was sold for a fair reasonable amount.

2nd respondent's Case

14. The Bank has opposed the petition through the replying affidavit of Victor Keitany, the Senior Recoveries Officer, sworn on 30th April 2019. The Bank admitted that it extended a loan facility of Kshs. 5,455,000/- to the 1st respondent which was secured by a charge dated 23rd August 2010 over the suit property. Mr Keitany deposed that the 1st respondent fell into arrears prompting the Bank to issue demand letters dated 23rd April 2012 and 14th May 2013 and that although the Bank acceded to his request to restructure the facility, he defaulted again. The Bank issued further demand letters and a 3-month statutory notice dated 16th July 2018 under **section 90** of the **Land Act, 2012**. Upon the lapse of the 3 months of service of the notice, the Bank through its advocates issued a notice of intention to sell the suit property. It thereafter instructed its valuers to value the suit property with the intention of selling it.

15. The Bank's position was it followed the due process set out in the **Land Act, 2012** by issuing the necessary notices and that its statutory power of sale had now crystallized. The Bank contended that the petitioner lacks the *locus standi* to stop the Bank from exercising its power of sale and that she has not made out a case for the grant of any relief.

Jurisdiction

16. The Bank filed a notice of preliminary objection dated 29th April 2019 in which it contended that the High Court lacked jurisdiction to hear and determine the application by virtue of **Articles 162(2)(b)** and **165(5)(b)** of the Constitution, **section 13(2)(e)** and **section 13(7)** of the **Environment and Land Court Act** and the **section 150** of the **Land Act, 2012**. The Bank also contended that the petitioner lacked the *locus standi* to institute these proceedings by reason of **section 103** of the **Land Act, 2012**.

17. In answer to the issue of jurisdiction, the petitioner submitted that the petition was filed under **Article 22** of the Constitution hence the petitioner had the right to institute these proceedings claiming that a right or fundamental freedom in the Bill of rights was being infringed. She contended that the petition was brought on behalf of the children to enforce their rights under **Article 53(2)** of the Constitution. The

petitioner further submitted that under **Article 165(3)(b)** of the Constitution, the High Court has jurisdiction to adjudicate on violation of fundamental rights.

18. In my view, **Article 22(1)** of the Constitution is dispositive of the issue of *locus standi for one* to file the petition. Any person, either on their own behalf or on behalf of any other person, has a right to institute any proceedings or the enforcement of fundamental rights and freedoms protected by the Bill of Rights under the Constitution.

19. As I understand, the Bank's position regarding jurisdiction was that in so far as the claim concerned land, the appropriate court with jurisdiction to determine the matter was the Environment and Land Court established under the **Environment and Land Court Act, 2011**. The Environment and Land Court is established pursuant to **Article 162(2)(b)** with jurisdiction to hear and determine disputes relating to, "*the environment and use and occupation of and, title to land.*" Further and under **Article 165(5)(b)** of the Constitution, the High Court is prohibited from dealing with matter reserved for the Environment and Land Court as a court with equal status to the High Court.

20. Although this suit concerns the enforcement fundamental rights and freedoms, the subject matter as I stated at the beginning of this case is whether the Bank can exercise its statutory power of sale in contravention of the principal of best interests of the child. The issue whether the High Court can deal with certain matters concerning land including charges was settled in the by the Court of Appeal in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna and 5 Others MSA CA Civil Appeal No. 83 of 2016 [2017]eKLR** where it held as follows:

[40] To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under Section 2 of the said Act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.

21. The same position was emphasized by the Court of Appeal in **TSS Investment Ltd and Another v NIC Bank Ltd MSA Civil Appeal No. 66 of 2018 [2019] eKLR** where the appellant sought to restrain the bank from exercising its statutory power of sale. The suit was initially filed in the Environment and Land Court, Mombasa and was transferred to the High Court. On whether the High Court had jurisdiction to hear the matter, the Court of Appeal observed as follows:

[18] Our view on the issue of jurisdiction is that the matter was rightly transferred to the High Court since the substantive dispute was about creation of security over land, which does not constitute land use, as provided in Article 162(2) of the Constitution and does not therefore fall under the jurisdiction of the Environment and Land Court. This Court pronounced itself on a similar issue in CO-OPERATIVE BANK OF KENYA LIMITED v PATRICK KANGETHE NJUGUNA & 5 OTHERS (supra). The Court held, inter alia:

*“Accordingly, for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted. Neither the *cujus doctrine* nor Article 260 whether expressly or by implication recognizes charging land as connoting land use.”*

We respectfully agree with that holding. We therefore dismiss the first ground of appeal.

22. According to those decisions, since the instrument of charge was not disputed but only the right to enforce it, the matter fell outside the realm of jurisdiction of the Environment and Land Court thus the High Court, has jurisdiction to determine the matter. I therefore find and hold that this court has jurisdiction to determine this claim. I now turn to consider the substance of the claim

Determination

23. The petitioners seek to enforce their fundamental rights and freedoms under the Bill of Rights. It is a well-established principle that a party seeking to enforce fundamental rights under **Article 22** of the Constitution has a duty to clearly set out the sections or provisions it claims to have been infringed or violated and show how these sections are infringed in relation to him or her. This principle has been established in a long line of cases since **Anarita K Njeru v Republic (No. 1) [1979] KLR** and was affirmed by the Court of Appeal more recently in **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others NRB CA Civil Appeal No. 290 of 2012 [2013] eKLR**.

24. At this stage, I wish to state that whether the parties were married or not is not the subject of this petition. The issue is whether the Bank is entitled to exercise its statutory power of sale in light of the decision of the Children's Court granting the petitioner custody and directing that the petitioner and, "*the minors shall remain in the matrimonial home and the Defendant/Respondent shall provide food and clothing*" [Emphasis mine]

25. The petitioner relied on the principle provided in **Article 53(2)** of the **Constitution** which states that, "*A child's best interests are of paramount importance in every matter concerning the child.*" The constitutional provision is reinforced by the **Children Act, 2001** and in particular **section 4(3)** thereof which reiterates the general principal. The petitioner contended that should the Bank exercise its statutory power of sale, it will violate the children's right to shelter protected under **Article 53(1) (c)** of the Constitution which provides that every child shall have the right to, "*basic nutrition, shelter and healthcare.*"

26. The petitioner contended that the children's best interests were ascertained by the Children's Court when it ordered that the petitioner and the children remain on the suit property. Her case was that the principle in **Article 53(2)** of the Constitution would be undermined if the Bank

exercised its statutory power of sale by disposing of the suit property to recover the loan. In order to succeed and in line with the principle in *Anarita's Case (Supra)*, the petitioner must demonstrate or show that the Bank was under a duty to provide shelter and that by selling or threatening to sell the suit property, the children's rights to shelter would be violated.

27. The decision of the Children's Court must be seen in the context of what was before it. The issue for determination in that court related to the custody of the two children. **Part VII** of the *Children Act* entitles any of the parents to apply for custody of the children and in this case the 1st respondent moved the court and the court granted interim orders of custody of the children to the petitioner. At the material time, the issue of the suit property as matrimonial home was never an issue nor was the Bank's interest as a charge on the property, a matter for consideration by the Children's Court. It is on this basis that I find and hold that that the decision of the Children's Court could not be construed as determining the Bank's interests in the suit property. If the Children's Court proceeded along that path, it would have violated the Bank's right to be heard on any matter affecting it. I therefore find and hold that the order of the Children's Court did impose any responsibility on the Bank to provide shelter to the children or in any way affect the Bank's right under the charge.

28. The best interests of the child in the context of the Children's Court case was in relation to custody as regards both parents who, under **Article 53** of the Constitution, have equal responsibility for any child born out of their union regardless of the marital status of the couple. **Article 53 (1) (e)** of the Constitution provides that a child has a right to, "parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not." The importance of these provisions is that it is the parents, the petitioner and 1st respondent, who have parental responsibility including the responsibility to provide shelter to the children.

29. Does the Bank have the responsibility to provide shelter to the children of the petitioner and 1st respondent? This question brings to the debate about horizontal and vertical application of the bill of rights. In *Isaac Ngugi v The Nairobi Hospital and 3 Others NRB Petition No. 407 of 2012 [2013] eKLR*, I dealt with the issue and I stated as follows:

[22] The issue whether the Bill of Rights applies horizontally or vertically is beyond peradventure. (See Satrose Ayuma and 11 Others v Registered Trustees of Kenya Railway Staff Retirement Benefits Scheme Nairobi Petition No. 65 of 2010 [2013] eKLR). The real issue is whether and to what extent the Bill of Rights is to apply to private relationships. The question as to whether it is to be applied horizontally or just vertically against the State depends on the nature of the right and fundamental freedom and the circumstances of the case. In the case of Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi, Petition Number 625 of 2009 [2011] eKLR Gacheche J., observed that, "...the rigid position that human rights apply vertically is being overtaken by the emerging trends in the development of human rights litigation...We can no longer afford to bury our heads in the sand for we must appreciate the realities which is that private individuals and bodies such as clubs and companies wield great power over individual citizenry who should as of necessity, be protected from such non-state bodies who may for instance discriminate unfairly or cause other constitutional breaches...The major challenge to horizontal application of human rights is the fact that it (is) a novel area and courts bear great responsibility of examining individual cases so as to decide each case on its own merits as a horizontal application does not and should not cut across the board...I find that fundamental rights are applicable both vertically and horizontally save that horizontal application would not apply as a rule but it would only be an exception which would obviously demand that the court do treat (it) on a case by case basis by examining the circumstances of each case before it is legitimized."

[23] For instance, the court will be reluctant to apply the Constitution directly to horizontal relationships where specific legislation exists to regulate the private relations in question. In other cases, the mechanisms provided for enforcement are simply inadequate to effectuate the constitutional guarantee even though there exists private law regulating a matter within the scope of application of the constitutional right or fundamental freedoms. In such cases the court may proceed to apply the provisions of the Constitution directly.

[24] A number of jurisdictions around the world recognise the horizontality of the bill of rights while others have confined themselves to the vertical application. Some Constitutions expressly specify whether the human rights provisions are enforceable against private individuals and bodies or only against the State.....

[25] I take the position that from the history of our country and the events leading up to the promulgation of the Constitution leave no doubt that it was intended to be a transformative document. I would be hesitant to adopt a hard and fast position that would prevent the principles and values of the Constitution being infused into the lives of ordinary Kenyans through application of the Bill of Rights to private relationships where necessary.

30. The circumstances in this case is that both parents have parental responsibility to provide shelter to the children. The court had merely provided interim custody and the matter, as is apparent from the orders issued in the Children Court, is yet to be heard in full. It is not contended that either the petitioner or the 1st respondent cannot provide shelter or absent the Bank, either of them will fail to provide shelter for the children. In short, the petitioner has not demonstrated or established how the right to shelter has been violated by the Bank's exercise of its statutory power of sale.

31. **Article 21(1)** of the Constitution imposes on the State the, "fundamental duty to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights." Thus the primary duty to realise the right to shelter for children guaranteed by **Article 53(1) (c)** of the Constitution and the right to accessible and adequate housing under **Article 43(1)(b)** of the Constitution is on the State. Not only has the petitioner not shown that the State has failed in its duty in the circumstances of this case, she has not demonstrated in the petition how the Bank is required to provide shelter to the children within the framework of the Constitution.

32. I would also add that property law including the *Land Act, 2012* and other statutes regulate the manner in which the right to property guaranteed under **Article 40** of the Constitution is realized. A person who owns property is entitled to charge it to secure loan from a bank or any other financial institution. The manner of charging the property, the interests of the spouses are provided for and so is the manner of selling the property in the event of default. In this case, petitioner does not dispute the fact that the Bank's statutory power of sale has crystallized. A plain reading of the Constitution and *Land Act, 2012* does not disclose any duty imposed on the Bank to provide shelter to the

children of borrowers nor provide grounds to interpose the exercise of that power by the rights of the child.

33. This is not to say that a bank may not shoulder certain responsibilities and in particular in respect of the negative duty not to harm or undermine the fundamental rights or freedoms of any person but this is not such a case.

Conclusion

34. The plaintiff has failed to establish her case for violation of the children's fundamental rights and freedoms. The petitioner and 1st respondent have parental responsibility which include providing shelter for the children. There is no basis implicating the Bank in their core responsibility as parents. As I have reached this conclusion, it is unnecessary to consider whether in fact there are other remedies under the **Land Act, 2012** as the threshold to establish a violation or breach of fundamental rights and freedoms set by **Anarita's Case (Supra)** has not been reached by the petitioner.

35. The petition is dismissed but with no order as to costs.

DATED and DELIVERED at NAIROBI this 17th day of JANUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Otieno instructed by Oluoch Awino and Company Advocates for the petitioner.

Mr Ojienda instructed by Ojienda and Company Advocates for the 1st respondent.

Ms Mugo instructed by J.K. Kibicho and Company Advocates for the 2nd respondent