



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MATRIMONIAL PROPERTY CAUSE NO. 1 OF 2019

MWNAPPLICANT

VERSUS

ANOA1ST RESPONDENT

EQUITY BANK (K) LIMITED.....2ND RESPONDENT

ROBERT WAWERU MAINA T/A

ANTIQUA AUCTION AGENCIES.....3RD RESPONDENT

RULING

1. The Applicant MWN filed the Originating Summons (OS) herein dated 22.1.19 against ANOA, Equity Bank (K) Limited and Robert Waweru Maina t/a Antiqua Auction Agencies, the 1st, 2nd and 3rd Respondents respectively, seeking certain orders from this Court. Contemporaneously with the OS, the Applicant filed an application of even date seeking in the main, a temporary injunction restraining the Respondents by themselves, their agents, servants, workers, employees, proxies and/or any other person howsoever acting through them from advertising for sale, disposing of, selling by auction and /or private treaty L. R. No. Mombasa/MN Block x/xxx (the property) and/or in any other manner howsoever interfering with the Applicant's possession and quiet enjoyment thereof pending the hearing and determination of the OS.

2. The Applicant averred that she was married to the 1st Respondent on 16.8.95. They however judicially separated on 2.8.18. She further averred that the property is matrimonial property, a share of which she is entitled to, having contributed to the acquisition and improvement thereof. She stated that the 1st Respondent took a loan from the 2nd Respondent of KShs. 2,500,000/=, ostensibly to complete the construction of the 2nd floor of the property. She alleged that she was not informed of the loan and did not give her informed consent for the charge of the property to secure the same. She got to know about the charge over the property loan after the judicial separation. The loan was also secured by a deed of assignment of the rental income from the property and M/s Njihia Muoka Rashid Co. Ltd were appointed as the 2nd Respondent's agent.

3. The Applicant alleged that the 1st Respondent in violation of the deed of assignment has been collecting the rental income. As a result, the 2nd Respondent issued a statutory notification for the sale of the property by the 3rd Respondent, to recover the outstanding amount. She alleges that this has all along been the intention of the 1st Respondent who has been threatening that she would lose her matrimonial home. She alleges that the 1st Respondent had planned to covertly sell the property thereby leaving her homeless. Unless the orders sought are granted, the property will be sold occasioning her irreparable harm.

4. In a replying affidavit sworn on 21.2.19, by James Gakundi, the Credit Manager of the 2nd Respondent, averred that the loan taken by the 1st Respondent was secured by a charge of the property and that the Applicant freely and willingly gave her spousal consent thereto. He further asserted that upon registration of the charge over the property, the 2nd Respondent's interest superseded that of any other party including the Applicant. According to the 2nd Respondent, the allegations by the Applicant are untrue and baseless. The 1st Respondent cannot sell the property as it is charged to the 2nd Respondent which is holding the original title documents. The Application is therefore only meant to delay the exercise of the 2nd Respondent's statutory power of sale of the property to recover the amount owed.

5. It was further averred that the 1st Respondent filed CMCC No. 2618 of 2018 against the 2nd Respondent seeking similar orders sought herein and obtained injunctive orders pending the hearing and determination of an application dated 27.12.18. To the 2nd Respondent, both suits are delaying tactics by the Applicant and the 1st Respondent. The loan was to be repaid by 60 monthly instalments of KShs. 66,570/=. The monthly rental income collected by the bank's agent falls short of the amount agreed. The Application is frivolous and vexatious and an abuse of the Court process and ought to be dismissed with costs.

6. In its grounds of opposition, the 2nd and 3rd Respondents contend that the Application is an abuse of the Court process as the 1st Respondent obtained injunctive orders against the 2nd and 3rd Respondents in Mombasa Civil Suit No. 2618 of 2018. The 2nd and 3rd Respondents further contend that this Court lacks jurisdiction to hear this matter as the 2nd Respondent's interest supersedes that of the Applicant.

7. For his part, the 1st Respondent averred that the property consists of residential apartments cum commercial shops for rent. He denied that the Applicant contributed to the acquisition and improvement of the property. He further averred that the Applicant gave her spousal consent to the charge after the same was explained to her. Her allegation to the contrary is a lie under oath. According to the 1st Respondent, the Applicant has come to Court with unclean hands. Following the judicial separation order that directed the 1st Respondent to pay monthly maintenance of Kshs. 30,000/=, the Applicant is after the only income earning property of the family. The rental income in addition to paying the loan, takes care of all other family needs, to which the Applicant makes no contribution. The 1st Respondent further stated that he has already obtained injunctive orders in Mombasa CMCC No. 2618 of 2018, which suit is pending in Court. He accused the Applicant of colluding with the 2nd Respondent to deprive him of his right to property rather than joining hands with him to protect the same.

8. I have considered the Application, the rival affidavits, the grounds of opposition as well as the parties' counsel's oral submissions made at the hearing. It is noted that there was no appearance for the 1st Respondent at the hearing. The issues that emerge for determination are:

i) Whether the Applicant gave her consent to the charge of the property.

ii) Whether the application should be allowed.

Whether the Applicant gave her consent to the charge of the property

9. The Applicant contends that when the 1st Respondent charged the property, she did not give spousal consent. However, no submissions in this regard were made. The 2nd and 3rd Respondents submitted that the Applicant had full knowledge of the charge and signed the spousal consent. Her rights over the property are therefore superseded by those of the 2nd Respondent.

10. I have looked at the exhibited Charge document between the 1st and 2nd Respondents. The same contains a spousal consent duly signed by the Applicant. She stated therein that she is the spouse of the Chargor (the 1st Respondent). She also stated that she has full knowledge of the charge and understood the nature and effect thereof. The Applicant also indicated that neither the 1st nor 2nd Respondent had used any compulsion or threat or exercised any undue influence on her to induce her to execute the consent. She further acknowledged having taken independent legal advice regarding the nature, remedies and effect of the charge. The signature on this consent and that on the Applicant's affidavit herein are similar. Further, the Applicant did not refute the assertion by the 1st and 2nd Respondents that she was aware of the charge and that she did sign the consent. The Court notes that the Applicant's counsel made no submissions on this ground that she was not aware of the charge and that she did not give her consent thereto. Accordingly, I find that the material on record is sufficient to satisfy this Court that the Applicant was aware of the charge and did in fact willingly and freely give her consent thereto.

Whether the application should be allowed

11. It is the Applicant's submission that the property is matrimonial property and that in the suit herein, she is claiming her entitlement to the same. The proposed auction of the property will threaten her right to the property. It was argued that in the event the Court issues a decree in her favour the same will not be enforceable if the orders sought herein are not granted. It was further submitted that the property is the only source of family income. It is therefore fair and just that the property be preserved. The Applicant acknowledged that the 2nd Defendant is entitled to its statutory power of sale but contends that the same was exercised prematurely. It is the Applicant's contention that the 2nd Respondent should enforce the deed of assignment instead of exercising its statutory power of sale. The Applicant is willing to cooperate in respect of the deed of assignment in order to save the property. According to the Applicant, no prejudice will be suffered by the 2nd Respondent. The sale of the property on the other hand will defeat the interests of others who are not parties to the charge.

12. For the 2nd and 3rd Respondents, it was submitted that the 1st Respondent instructed the agent not to pay rent to the 2nd Respondent. It was further submitted that there are injunctive orders in place and the 2nd Respondent is complying with the same. If the Applicant has any issues with the 1st Respondent, she ought to have filed against him only.

13. In their respective affidavits, the Respondents averred that the 1st Respondent sought and obtained injunctive orders against the 2nd and 3rd Respondents in CMCC 2618 of 2018, by which they were restrained *inter alia* from advertising for sale and selling or dealing with the property to the detriment of the 1st Respondent pending the hearing and determination of the matter.

14. The Applicant moved to this Court in the OS against all 3 Respondents under the provisions of the Matrimonial Property Act. This act is an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes. It would appear to me that the intention of Parliament when enacting this law is that the same was to govern the dispute over properties between spouses and not third parties.

15. It has been demonstrated that the 1st Respondent has already obtained orders preserving the property pending the hearing and determination of the CMCC 2618 of 2018. Any claim the Applicant has against the 2nd and 3rd Respondents ought to be litigated in that matter and not in the OS herein which has been brought under the Matrimonial Property Act.

16. Further, and notwithstanding the foregoing, the reliefs sought herein are the same reliefs sought in CMCC 2618 of 2018, *to wit*,

injunctive orders over the property. The Applicants in both matters are spouses, though judicially separated and both have an interest in the property. Section 6 of the Civil Procedure Act provides:

“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.”

17. The issues in herein are directly and substantially in issue in CMCC 2618 of 2018 which was instituted prior to the matter herein. Accordingly, I find that this matter is *res subjudice* CMCC 2618 of 2018. As such, there is a statutory bar to this Court to proceed with the same.

18. In the circumstances, the Court finds that the Application dated 22.1.19 lacks merit and the same is hereby dismissed with costs to the 2nd & 3rd Respondents. Costs in respect of the 1st Respondent shall abide the outcome of the OS.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May 2020

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the 1st Respondent**

..... **for the 2nd & 3rd Respondents**

..... **Court Assistant**