



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL APPEAL NO. 12 OF 2017**

**JOSEPH KIPNGENO KIRUI.....1<sup>ST</sup> PLAINTIFF**

**LIZA CHEBET CHUMO.....2<sup>ND</sup> PLAINTIFF**

**- VERSUS -**

**FAULU MICROFINANCE BANK LTD.....1<sup>ST</sup> DEFENDANT**

**ROBERT WAWERU MAINA**

**T/A ANTIQUE AUCTIONS AGENCIES.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*(Being an appeal from Ruling of the Chief Magistrate's Court at Milimani by Hon. D.A Ocharo (SRM) dated 11<sup>th</sup> September 2017 in Civil Suit No. 3074 of 2017)*

1. The appellants **JOSEPH KIPNGENO KIRUI** (Joseph) and **Liza Chebet Chumo** (Liza) have filed this appeal against the Ruling of 11<sup>th</sup> September 2017 of **Hon D.A. Ocharo**, Senior Resident Magistrate.

2. Although Joseph and Liza have raised 12 grounds of appeal the main issues to determine in this appeal are: whether the legal charge executed by Joseph was in compliance with the law, that is whether Joseph at the time of executing the charge was explained his right and the chargee's remedies; secondly whether a spousal consent was obtained by the charge.

3. The appellants filed a case before the Chief Magistrate's court seeking inter alia a permanent injunction restraining the 1<sup>st</sup> respondent **FAULU MICROFINANCE BANK LIMITED** (FAULU) from advertising for sale or selling or interfering with the property known as Title No. **L.R. NAIROBI/BLOCK/111/666** (the suit property). Further the appellants sought, by that suit, a declaration that the charge created over suit property invalid and void. The appellants finally prayed for an order that FAULU be ordered to return to them the certificate of Title of the suit property.

4. The appellants filed before the Chief Magistrate's Court an interlocutory application for injunction to restrain the sale of the suit property by the 2<sup>nd</sup> Respondent, Robert Waweru Maina, the auctioneer under the instructions of FAULU.

5. The learned trial Magistrate Hon. D.A Ocharo by his considered Ruling dismissed the application for interlocutory injunction and hence this appeal against that Ruling.

**ANALYSIS**

6. It is necessary for me to recall that this appeal arises from an interlocutory Ruling and the hearing of the main suit is yet to be entertained before the trial court. I shall for that reason restrain myself from making definitive findings. Further it is to be noted until parties have submitted viva voce evidence a court should not decide issue of fact. The court of appeal in the case **MBUTHIA V JIMBA CREDIT FINANCE CORPORATION & ANOTHER (1988) eKLR** had this to say on how courts should handle interlocutory applications:

***“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits”***

7. It is also essential to be mindful of the fact that this appeal relates to the trial court's exercise of judicial discretion. The court of appeal in the case **STELLA MAKEIRA MATARA V THADDUES MOSE MANGENYA & ANOTHER (2016) eKLR** discussed under what circumstances an appellate court can interfere with the exercise of such discretion, thus:

***“Grant or refusal of an interim injunction is an exercise of judicial discretion. An appellate court will not normally interfere with the exercise of such discretion unless it is satisfied that the decision is clearly wrong because the trial court misdirected itself or it acted on matters it ought not to have acted on or it failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong conclusion. See Mbogo V Shah [1968] E.A.93.”***

8. The case before the trial court as filed by the appellants, Joseph and Liza, is that Joseph is the registered owner of the suit property. The suit property is the matrimonial home of Joseph and Liza and their four children. It is pleaded that **Robert Simiyu Khanuli** (Simiyu), a director of Khanuli Information Technology Solutions Ltd (the firm), approached and requested Joseph to guarantee the firm for financial facility. A few days later Joseph released the title documents of the suit property to Simiyu. Joseph by his plaint pleaded that he did not hear from Simiyu again until the FAULU summoned him when he was notified that Simiyu had defaulted in his repayment of the debt. That FAULU through the auctioneer, 2<sup>nd</sup> appellant issued Joseph with a notification of sale of the suit property.

9. Joseph's plea before trial court is that the legal charge, in favour of FAULU, is null and void because he did not appear before an advocate when he executed it, but that rather Simiyu brought to him blank document which he signed as he sat in Simiyu's car. Further Joseph pleaded that Liza, his spouse, did not consent to the charge over the suit property.

10. FAULU'S case is that Joseph executed the charge and the guarantee, before an advocate, as security for financial facility afforded to the firm. That that charge received the consent of Joseph's spouse by the name of Jane Kaptich. That the firm having defaulted in the repayment of the loan FAULU was entitled to exercise its statutory power of sale by selling the suit property.

11. The learned trial Magistrate by his Ruling stated in part:

***“I note that the 1<sup>st</sup> plaintiff (Joseph) is not an illiterate man from the village in Bomet. He is a person who owns a home in Nairobi in which by his own admission he has resided since 1989. It is therefore not convincing when he says that he met the loanee a Mr. Robert Simiyu in Bomet town, who gave him certain forms to sign whose tenor and effect he did not understand. I do not think that the charge document executed by the plaintiff/applicant does not satisfy the requirements of section 56 of the Land Registration Act, Cap 300(sic). On whether or not the 1<sup>st</sup> plaintiff's spouse did not give spousal consent as required by section 79(3) of the Land Act (No. 6 of 2012), the 1<sup>st</sup> Plaintiff failed to show that the lady whose signature is on the charge document and whom the 1<sup>st</sup> defendant (FAULU) states was present to them by the 1<sup>st</sup> plaintiff, is not his wife. Customary marriages are potentially polygamous. Jane Kaptich whose signature is on the charge document would as well be the 1<sup>st</sup> plaintiff's wife. I am satisfied that there is nothing to suggest that the 1<sup>st</sup> plaintiff/applicant did not validly execute the charge document. His argument that he did not know the documents he was signing inside Robert Simiyu's car must be rejected.”***

12. I have considered the interlocutory application before the trial court, the affidavits in support and in opposition to and the parties' submissions. I find that Joseph and Liza have raised in their suit and the interlocutory application matters relating to Joseph's execution of the charge instrument and to lack of Liza's spousal consent to the charge.

13. Joseph contends that he signed a document presented to him by Simiyu. He signed it in Simiyu's car. What that means is that if indeed that was how the charge was executed there was breach of section 56 (11) of the **Land Registration Act No 3 of 2012**. That section is in following terms:

***(1) A proprietor may by an instrument, in the prescribed form, charge any land or lease to secure the payment of an existing, future or a contingent debt, other money or money's worth, or the fulfillment of a condition and, unless the chargee's remedies have been by instrument, expressly excluded, the instrument shall, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, the persons attesting the affixation of the common seal. (emphasis mine)***

14. FAULU presented in this case the charge instrument. That instrument shows an acknowledgment that the chargor's rights and obligations were explained and there does appear a signature next to that acknowledgment. What I presume to be Joseph's signature, in that charge instrument, was witnessed by the advocate acting for FAULU in the loan transaction. The said advocate, Charles Murigi Ngugi, swore an affidavit and confirmed that Joseph and Jane Kaptich appeared before him and executed the charge. This is what that advocate deposed:

***“That we prepared the charge instrument which was executed before me at our offices by Joseph Kipngeno (hereinafter referred to as the charger) and by one Jane Kaptich as the spouse of the charger who swore an affidavit of spousal consent.”***

15. Whereas on a prima facie basis looking at the charge there is an acknowledgment as required under section 56 (1) of the Land Registration Act, it will need to be determined at the trial. That is whether FAULU's advocate could be sufficiently independent to advise Joseph. But the main issue for determination is the spousal consent and whether it met the legal standard. As stated before, what is before me is an appeal against an interlocutory application. I cannot therefore make final determination on that issue.

16. Section 79 (3) of the Land Act No. 6 of 2012 provide a starting point of consideration of what is required when what is being charged is matrimonial property. That section provides:

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

17. Looking at that section it becomes clear that the section requires the spouse, living in the matrimonial home, to execute either the form used to apply for the charge or another document evidencing that the charge has been assented to by the spouse.

18. Joseph's and Liza's case is that Liza is only wife of Joseph, they reside and has resided on the suit property with Joseph since 1989 and their four children reside with them on that property.

19. Was there investigation made by FAULU to confirm who was Joseph's spouse that was residing on the suit property. That in my view is an issue that would need to be dealt with at full hearing of this case. Another issue for determination at the trial is whether the spousal affidavit FAULU relied did indeed evidence the charging of the suit property by FAULU.

20. FAULU provided two affidavits sworn by Jane Kaptich. The two affidavits are dated 6<sup>th</sup> April 2015, which related to the charge of the suit property to Kenya Women Microfinance Bank Limited, the second is dated 3<sup>rd</sup> December 2015, which affidavit was sworn in support of the charge of the suit property to FAULU. Both affidavits are a replica of each other and I will reproduce the same as follows:

*“AFFIDAVIT*

*I, JANE KAPTICH of post office Box Number 119-20400 Bomet in the Republic of Kenya hereby solemnly make oath and state as follows:*

- 1. THAT I am an adult of sound mind and holder of Kenyan National Identity Card Number 1163516 and therefore competent to swear this affidavit.*
- 2. THAT I am the spouse of JOSEPH KIPNGENO KIRUI, being the CHARGOR herein.*
- 3. THAT neither the Chargor nor the Chargee have used any compulsion or threat or exercised undue influence on me to induce me to execute this affidavit of consent.*
- 4. THAT I acknowledge that I have been advised to take and have taken independent legal advice regarding the nature, remedies and effect of this charge.*
- 5. THAT I understand the nature and effect of this charge, the effect of Section 90 of the Land Act and the chargee's remedies under the charge.*
- 6. THAT I hereby agree that the Chargee's rights under Sections 82 and 83 of the Act and the restrictions under Section 87 of the Act and Section 59 of the Land Registration Act should be noted against the title to the premises.*
- 7. THAT I hereby give my full consent to the creation of the within written Charge.*
- 8. THAT I make this Affidavit pursuant to the provisions of the Land Act, 2012 and the Land Registration Act, 2012.*
- 9. THAT the facts deponed to herein are all true.”*

21. That affidavit sworn, ostensibly, to support FAULU's charge was commissioned by the advocate acting for FAULU. It is difficult to understand how an advocate acting for FAULU could give independent legal advice to the chargor's wife, as stated in above affidavit. But perhaps of greater concern is that the two affidavits sworn on two different occasions as stated above seem to have two different signatures as though signed by two different people. If that is so it would render the charge of FAULU invalid and no lawful sale of the charged property could proceed under the strength of such a charge.

22. Further in my examination of the documents presented by the parties I have noted that FAULU on 11<sup>th</sup> April 2016 made a demand, a three months' demand, as required under section 90 of the Land Act, but that demand was addressed to Kanuli Information Technology, the firm and was copied to Joseph. Section 90(1) of the Land Act specifically requires the demand made to the chargor when there is a default. It is debatable if copying a letter to one can be said to be the same as addressing the letter to such one.

23. In this regard I will refer to the case **TRUST BANK LTD V EROS CHEMIST LIMITED & ANOTHER 2000**, which although was decided by the court of appeal under the now repealed Section 69A (1) of the Indian Transfer Property Act, is relevant to the present situation when considering the rights of the chargor. The court of appeal stated in that case as follows:

*“In our judgment, the heart of this appeal lies in the central question as to what constitutes a valid notice under section 69(A) (1) of the Transfer of Property Act.....*

*The law clearly intended to protect the mortgagor in his right to redeem and warn of an intended right of sale. For that right to accrue the statute provided for a three months' period to lapse after service of notice. In our judgment, a notice seeking to sell the charged property must expressly state that the sale shall take place after the three months' period.“*

24. What I get as being useful in the above decision is that there ought to be an understanding that the statutory notices served on mortgagor/chargor are intended to give notice of the impending sale of the charged property and secondly that those notices are intended to protect the chargor's rights to redeem the charged property.

25. In this present case FAULU will need to prove that it has met the above standards. That is they will have to prove that copying the statutory notice was the same as serving Joseph with statutory notices as the law requires.

26. Joseph and Liza were required to prove the principles of granting an injunction enunciated in the case **GIELLA V CASSMAN BROWN CO. LTD [1973] EA . 358** as follows:

***“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable harm which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.”***

27. Having reconsidered the application and the affidavit evidence, and as can be seen from my above discussion, I am satisfied that the appellants have adequately met the first principle of granting an injunction. They have shown a prima facie case with probability of success.

28. On the second principle of granting an injunction, where the appellants needed to show they would suffer irreparable harm which cannot be compensated in costs, will depend on my finding in the first principle. In the first principle I have found on prima facie basis that Joseph was not served with statutory notices as required by law. Whereas that can be remedied by FAULU being ordered to serve fresh notices: See **NATIONAL BANK OF KENYA LTD V SHIMMERS PLAZA LIMITED (2009) eKLR** : that cannot be said in respect where there is doubt that the spousal consent to the charge was given. If indeed the trial court does find that there was no spousal consent the charge will be nullified. It is because of that that I find FAULU cannot be permitted to proceed with the sale of the suit under what may turn out, after the trial, to be an invalid charge. Such a sale would be against the provisions of the Land Act.

29. It is in view of the above finding that I find this court should interfere with the trial court's exercise of its judicial discretion whereby it dismissed the application for interlocutory injunction.

30. It is for the above reasons that I find the appeal before me is merited. The costs of the appeal and of the trial court will be awarded to the appellants.

## **CONCLUSION**

31. The judgment of this court is:

*a. The Ruling delivered on 11<sup>th</sup> September 2017 is hereby set aside.*

*b. Pending the hearing and determination of Milimani CMCC No. 3074 of 2017 an interlocutory injunction is hereby issued restraining FAULU MICROFINANCE LTD either by itself or its servant or agent from selling either by public auction or otherwise, transferring, alienating, disposing or in any other way interfering with the appellants' ownership or possession of **TITLE NUMBER NAIROBI/BLOCK 111/666**.*

*c. The costs of this appeal and the costs of the Notice of Motion dated 4<sup>th</sup> May 2017 in Milimani CMCC No. 3074 of 2017 are awarded to the appellants to be paid by FAULU MICROFINANCE BANK LTD.*

*d. This case shall be heard by any other magistrate other than Senior Resident Magistrate Hon. D. A. Ocharo.*

**DATED, SIGNED and DELIVERED at NAIROBI this 3<sup>RD</sup> day of JUNE 2020.**

**MARY KASANGO**

**JUDGE**

## **ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **3<sup>rd</sup>** day of **June, 2020**.

**MARY KASANGO**

**JUDGE**