



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 47 OF 2018**

**STANDARD CHARTERED BANK LTD.....APPELLANT**

**VERSUS**

**IO.....1<sup>ST</sup> RESPONDENT**

**SJO.....2<sup>ND</sup> RESPONDENT**

**[Being an appeal from the Ruling and Order of the Honourable W.K. Onkunya (SRM)**

**Delivered on 24<sup>th</sup> May 2018 in Kisumu CMCC ELC No. 270 of 2018]**

**JUDGMENT**

By an order dated 24<sup>th</sup> May 2018 the trial court granted an Interlocutory Injunction restraining the Appellant, **STANDARD CHARTERED BANK LIMITED**, from selling the suit property **L.R. NO. KISUMU/KANYAKWAR “XXX**

1. The injunction restrained the Appellant, (hereinafter “*the Bank*”) from entering into, remaining in, trespassing upon or in any other manner, shape or form, interfering with the Plaintiff’s peaceful user and occupation of the suit property.
2. It is common ground that the Plaintiff, **IOO**, was, at all material times, the wife of the 1<sup>st</sup> Defendant, **SJO**.
3. It is further common ground that the suit property was registered in the name of **SJO** as the sole proprietor.
4. The 1<sup>st</sup> Defendant, (hereinafter “*S*”) was a customer of the Standard Chartered Bank Limited, and in that capacity he borrowed a loan from the bank.
5. As a security for the financial facilities provided to him by the bank, *S* charged the suit property in favour of the bank.
6. It is not in dispute that *S* did not remit the repayment instalments in terms which were agreeable to the bank.
7. As far as the bank was concerned, the defaults by *S* led to the accumulation of arrears, and the bank decided to exercise its statutory powers of sale.
8. The bank issued the requisite Notices to *S*, indicating that it was proceeding with plans to auction the suit property.
9. On 11<sup>th</sup> May 2018 a suit was filed at the Chief Magistrate’s Court Kisumu, by **IOO** (hereinafter “*I*”).
10. She claimed to be a beneficial owner of the suit property, by virtue of the fact that it was her Matrimonial Home, with *S*.
11. It was *I*’s case that she and *S* established their Matrimonial Home on the suit property in the year 2004.
12. However, it was not until 2014 that *I* learnt of the fact that *S* had charged the suit property to the bank, to secure a loan of Kshs 10,000,000/=.
13. At paragraph 7 of her Plaint *I* stated that *S* had charged the property to the bank without her knowledge or consent.

14. I intends to persuade the Court to issue a Permanent Injunction to restrain the Defendants from entering into, remaining in, trespassing upon or in any other manner, shape or form interfering with her peaceful user and occupation of the suit property.
15. She said that she resides within the suit property, together with her 4 children. The said 4 children are the products of the marital union between her and S.
16. Therefore, by virtue of being S's wife, and because she resides in the suit property, I believes that she will eventually persuade the Court to order that the charge which S registered in respect to the suit property, be discharged.
17. She also hopes to persuade the Court to award her compensation for the distress caused to her, when S and the bank interfered with her peaceful occupation of the suit property.
18. Alongside the Plaint, in which I sought the foregoing reliefs, the Plaintiff also sought and was granted an interlocutory injunction pending the hearing and determination of the suit.
19. The bank was dissatisfied with the decision to restrain it from exercising its statutory powers of sale, hence this appeal.
20. When determining the application before her, the learned magistrate held that the Plaintiff had established a prima facie case that;
  - (a) *The suit land was her matrimonial home;*
  - (b) *The bank failed to prove that it obtained I's consent or approval, to have the suit property charged as security for the loan which the bank gave to S.*
  - (c) *The bank had infringed I's rights in the suit property, by taking steps to have it auctioned.*
21. The learned magistrate also made a finding that if the suit property was to be sold-off by the bank, [Particulars withheld] would suffer irreparable loss, as the said property was the only home she and her children know.
22. Finally, the learned magistrate held that the balance of convenience tilted in favour of the Plaintiff, as she was currently residing in the suit property with her children.
23. When canvassing the appeal, the bank submitted that I had never established a prima facie case.
24. As far as the bank was concerned, it had tendered evidence to prove that I had given her consent, to have the suit property used as a security for the loan which the bank had given to S.
25. This Court was asked to take into account the fact that although I had been aware of the document containing her consent, she had never reported to the police that the signature purporting to be hers was a forgery.
26. That is a relevant factor. However, it does not appear to have been canvassed yet. Therefore, at this stage, when determining an interlocutory appeal, I cannot introduce a new factor about which I have no idea how the learned magistrate would have been influenced.
27. I find that by taking into consideration, the issue concerning the circumstances in which I is alleged to have executed the spousal consent, the learned magistrate took into account a relevant factor.
28. Indeed, the question regarding the manner in which the advocate identified I, at the time when she is said to have signed the spousal consent, is a key issue in determining the substantive suit.
29. The learned magistrate stated that she was not supposed to make a definitive finding on that issue, as the parties still need to lead evidence on it.
30. I hold that the learned magistrate made the correct pronouncement, about the need to refrain from making a finding on a matter which ought to be determined after a full trial.
31. The fact that S and I had already started having problems in their marriage, prior to the date when S offered the suit property as security, is another relevant factor.
32. Currently, there appears to be spousal consent, which was given by I, if the document embodying it is taken at face value.
33. But it is equally significant that I has categorically denied ever having appended her signature on the document.
34. The said denial appears to be completely at odds with the evidence tendered by Advocate Peter Daniel Onyango, when he said that he witnessed I executing the Spousal Consent.
35. In the circumstances, I find that it was only through a full trial that the Court could make an informed conclusion based upon a tested

piece of evidence.

36. When it is decided that the legal charge is valid, it would not matter that the suit property was matrimonial property. The issue of validity, alluded to herein, includes the presence of a spousal consent.

37. If the bank obtained spousal consent, that would imply that both I and S cannot complain if the bank should take steps to realize the security.

38. I therefore find that the learned magistrate was right to have issued an injunction at the stage, as that serves to safeguard the subject matter of the substantive suit.

39. On the other hand, if the bank were allowed to proceed to sell the suit property before the court determined conclusively whether or not the Plaintiff had given her spousal consent, the property would no longer be available, and thus the beneficial interests of the Plaintiff may well have become completely defeated.

40. In the circumstances, I find that the learned magistrate cannot be faulted for having granted the Interlocutory Injunction, as the said Order safeguards the subject-matter of the suit which is yet to be heard.

41. However, I also appreciate the fact that any delay in determining the substantive suit would be prejudicial to all the parties to this case.

42. Therefore, I dismiss the appeal, but direct the trial court to give priority to the hearing and determination of the suit.

43. The costs of the appeal shall abide the outcome of the main suit, so that the party who is unsuccessful, shall also pay the costs of this appeal.

**DATED, SIGNED and DELIVERED at KISUMU This 17<sup>th</sup> day of September 2019**

**FRED A. OCHIENG**

**JUDGE**