



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 6 OF 1997

M S K.....PETITIONER

VERSUS

S N K.....RESPONDENT

(CONSOLIDATED WITH HCCC NO. 160 OF 1997 (OS))

M S K.....PETITIONER

VERSUS

S N K.....RESPONDENT

AND

PRIME BANK LIMITED.....OBJECTOR

RULING

1. The Motion dated 26th July 2011 is brought at the instance of the objector. It would like stay of proceedings herein to the extent that they relate to the Notice to Show Cause dated 3rd February 2011. It also seeks that a property known as LR No. [Particulars withheld] Nairobi South C be excluded from attachment and sale registration of prohibitory orders against its title and or in any other mode of execution of the decree herein till the banking facilities secured by the charge dated 16th November 2009 and registered on 27th November 2009 over the property are repaid in full and the property discharged by the objector.

2. The factual background to the application is stated in the affidavit in support sworn on 26th July 2011 by a legal manager at the objector bank. The objector claims a chargee's interest in the subject property. A company in which the petitioner and respondent had interest was offered credit facilities by the objector to the tune of Kshs. 15, 000, 000.00, secured by several facilities including LR No. [Particulars withheld] Nairobi South C. The charge was thereafter registered over the title of that property which is now the subject of the Notice to Show Cause. It is averred that the debt secured is yet to be repaid. Copies of the documents relating to the transaction are attached to the affidavit.

3. The objector on the same date lodged at the registry a notice of objection to execution, of even date, founded on the same grounds as the Motion.

4. The petitioner herein responded to the application through her affidavit sworn on 16th September 2011. She essentially pleads that the said charge over the subject property was created in blatant disregard of orders that had been made in this matter on 10th May 2005 and by the Court of Appeal on 13th October 2006 in CA No. 277 of 2005. She avers that that was done deliberately with a view to alienate the property and make it difficult for her to execute the decree. She states that the interests of the objector could be addressed at the settling of terms by the court. She states further that the bank was aware of the divorce proceedings as some of its officers testified in the matter.

5. The objector swore an affidavit on 24th October 2011 in reply to the petitioner's affidavit through its legal manager. She states that prior to the creation of the charge the bank conducted a search in 2009 over LR No. [Particulars withheld] Nairobi South C which did not reveal registration of the court order in favour of the petitioner. It is the objector's case that the court orders in favour of the applicant were registered in the title in January and February 2010, while the charge was registered in January 2009. She asserts that in view of that the objector had no notice of the decrees in favour of the petitioner. She concedes that the objector's officers did testify in the proceedings but with respect to matter that had nothing to do with the property in question, and in any event they were unaware of eventual outcome of the matter. She insists that the interest of the objector ranks in priority over that of the petitioner.

6. Directions were given on 8th March 2012 that the said application be disposed of by way of written submissions to be highlighted. There was compliance with the filing of written submissions, which were highlighted on 19th July 2012.

7. From the record it is clear to my mind that the charge in question was created over the property after this court had issued a decree over the subject property in favour of the petitioner. I also note that the objector was involved in the proceedings as its officers testified in the matter; however the testimony of the officers had nothing to do with the property. The objector was not party to the proceedings and therefore it had no interest in the outcome of the proceedings. It could only get know of the outcome upon being served with the decree or upon chancing upon a copy lodged against the title. It is not contested that the decree was lodged against the title after registration of the charge, so I am persuaded that the objector did not have notice of the decree at the time it created the charge.

8. It is pleaded that the debt has not been settled, an allegation which has not been controverted. I note that the objector's interest is statutory, while that accruing to the petitioner is a creature of a court order. The disposal of the subject property through the court would necessitate that the court settles the terms of sale. I agree with the submission that the objector's interests can be taken into account at the settlement of the terms of sale of LR No. [Particulars withheld] Nairobi South C.

9. In the end, I decline to grant the orders sought in the application dated 26th July 2011. The execution proceedings should go ahead, but at the settlement of the terms of sale of LR No. [Particulars withheld] Nairobi South C the Deputy Registrar shall take into account the interests or claims of the objector herein. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 12TH DAY OF MAY, 2017.

W. MUSYOKA

JUDGE