



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 229 OF 2016

CHARLES MACHOGU.....1ST PLAINTIFF

GLADYS KWAMBOKA MACHOGU.....2ND PLAINTIFF

=VERSUS=

CONSOLIDATED BANK OF KENYA.....DEFENDANT

JUDGMENT

BACKGROUND

1. By a Complaint dated and filed herein on 12th August 2016, Charles Machogu and Gladys Kwamboka Machogu (the Plaintiffs) pray for Judgment against Consolidated Bank of Kenya (the Defendant) for:

- a) A declaration that the auction sale held on 20/11/2013 over Plot Title No. Kilifi/Mtwapa/1981 is null and void;***
- b) A declaration that the Defendant in exercising its statutory power of sale acted in bad faith to the detriment of the Plaintiffs;***
- c) A declaration that the Plaintiffs are entitled to compensation by the Defendant for the value of Kilifi/Mtwapa/1981 and for loss of use of the property since January 2014 till payment in full;***
- d) An order for payment of the value of Plot Title No. Kilifi/Mtwapa/1981 as at the time of Judgment;***
- e) An order for payment for loss of use of Plot Title No. Kilifi/Mtwapa/1981 at a rate to be determined by the Court since January 2014 till payment in full;***
- f) Interest in (d) and (e) above; and***
- g) Costs of the suit.***

2. The above prayers arise from the Plaintiffs' contention that prior to the year 2011, the 1st Plaintiff was the registered proprietor of the property and by dint of his marriage to the 2nd Defendant the law required the consent of the 2nd Plaintiff in the execution of any documents disposing of the 1st Plaintiff's interests in the suit property.

3. The Plaintiffs aver that sometime in the year 2012 or thereabouts the 1st Plaintiff guaranteed one Vincent Anyona to secure a financial facility from the Defendant using the suit property as security for the same. By a first Charge registered against the property, the said Vincent Anyona and or the 1st Plaintiff were under an obligation to settle the principle sum advanced by the Defendant together with accrued interest and Charges.

4. Thereafter it was alleged that the said Vincent Anyona fell into arrears and in the exercise of its statutory power of sale, the Defendant is said to have sold the suit property by public auction. The Plaintiffs assert that they were never notified that the said Vincent had fallen in arrears and that they were never served with the requisite statutory demand notices to foreclose the property by the Defendant.

5. Accordingly, the Plaintiffs aver that the entire process of the exercise of the statutory power of sale by the Defendant was null and void and every process and product flowing therefrom are equally a nullity. It is further their case that the Charge executed by the 1st Plaintiff,

Vincent Anyona and the Defendant was fatally defective for failure of consent by the 2nd Plaintiff as the Spouse of the 1st Plaintiff.

6. But in a Statement of Defence dated and filed herein on 18th October 2016, the Defendant Bank while admitting that the 1st Plaintiff guaranteed the said Vincent Anyona to secure a financial facility from itself avers that it is a stranger to the allegation that the 2nd Plaintiff is the 1st Plaintiff's Spouse and or that her consent was required as alleged or at all prior to the execution of any documents disposing of the 1st Plaintiff's interests on the suit property.

7. The Defendant avers that as a guarantor of the facility, the 1st Plaintiff was under an obligation to ensure that the said Vincent Anyona liquidated the loan facility as per the agreed terms. The Defendant further states that the requisite notices were duly served upon the relevant parties in compliance with all relevant legislation pertaining to the same.

The Plaintiffs' Case

8. At the trial herein the two Plaintiffs both testified in support of their case.

9. PW1- Charles Machogu is the 1st Plaintiff. Relying on his written Statement he told the Court that in 2011, his cousin Vincent Anyona approached him and informed him that he needed help to secure a bank loan from the Defendant. PW1 agreed to offer him his property- Kilifi/Mtwapa/1981 to use as security. He was later called to the offices of the Defendant's lawyers where he signed the Charge document.

10. PW1 testified that he later learnt that his cousin ultimately secured the loan. Sometimes in January 2014, he heard rumours that his property had been auctioned. He then wrote to the Defendant Bank asking to be supplied with information on the same. The Bank replied on 29th January 2014 confirming the sale. PW1 told the Court that he then started looking for his cousin only to learn that he had relocated to South Africa.

11. PW1 further testified that the Bank never gave him a copy of the Charge after he signed the same and that thereafter he never received any notice or any other form of communication from the Bank. It was only when the Bank wrote to him that he came to learn that the property had been auctioned on 20th November 2013 following an-advertisement placed in the Star Newspaper of 6th November 2013.

12. PW1 told the Court that the 2nd Plaintiff is his wife but she did not accompany him when he went to sign the Charge. The suit property was a product of their joint investment but he could not recall if his wife had been called to sign any document.

13. On cross-examination, PW1 conceded that he was served with notice about the intended auction by Thaara Auctioneers on 15th May 2013. He was given 45 days to redeem the property. He told the Court the address he had given when he signed the Charge belonged to his cousin who was borrowing the money.

14. PW1 further conceded to the Court that he had not sued one Johnson Munyonge Wamuyu who was shown in the Memorandum of Sale to have bought the property. He told the Court that the auction was only advertised in the Star Newspaper which was not having a Countrywide circulation. He further testified that the suit property comprised of their matrimonial property even though he had not built his matrimonial house therein.

15. PW2- Gladys Kwamboka Machogu is the 2nd Plaintiff and the wife of the 1st Plaintiff. She testified that the suit property was their joint investment even though it was registered in the sole name of her husband. Sometimes in 2012, the 1st Plaintiff informed PW2 that his cousin Vincent Anyona needed to secure a loan from the Defendant. As a family, they agreed to assist him with the title deed as security but PW2 was never called upon to sign any document.

16. PW2 further testified that she was surprised in 2014 to learn from her husband that the property had been auctioned without their being notified. This was the family's matrimonial property and they used the same as a poultry and dairy farm.

17. On cross-examination, PW2 told the Court he had no objection to the charge as the husband wanted to help his cousin to secure a loan.

The Defence Case

18. On their part, the Defendant Bank called one witness in support of their case.

19. DW1- David Mwangi Ndirangu is the Bank's Assistant Development Manager stationed at its Nkrumah Road Branch, Mombasa. Relying on his Statement filed herein on 15th November 2018, DW1 testified that Vincent Omosa Anyona applied and was granted a loan facility of Kshs 2,500,000/- as per a Letter of Offer dated 29th September 2012.

20. DW1 further told the Court that the loan facility advanced to Vincent was secured vide a Charge created upon the suit property dated 3rd May 2012. The property belonged to the 1st Plaintiff who executed a guarantee and indemnity with the Bank. When Vincent defaulted in repayment, the Defendant issued him with a Statutory Notice dated 14th February 2015 notifying that he had 90 days within which to liquidate the loan failure to which the Defendant would exercise its right of redemption.

21. DW1 further testified that by the expiry of the notice Vincent had not liquidated the loan and this prompted the Defendant to instruct Thaara Auctioneers to sell the property by way of public auction to recover the amount then owing. The Auctioneer notified Vincent and the 1st Plaintiff of the sale vide a letter dated 15th May 2013.

22. DW1 told the Court that neither the 1st Plaintiff nor Vincent made any attempts to make good the sum owed and as a result, the property was sold by way of a public auction.

23. On cross- examination, DW1 told the Court that the facility was to last 36 months and that Vincent had upto the year 2015 to pay. He conceded that the Notice sent to Vincent was not copied to the 1st Plaintiff and that the address used by Thaara Auctioneers had an error. He however insisted that the notice was delivered to the 1st Plaintiff in person and that he had signed the same.

24. DW1 testified that he was not aware that the 1st Plaintiff had made any offer to the Defendant Bank to liquidate the outstanding amount. He was further unaware that the 1st Plaintiff had paid a sum of Kshs 500,000/- on 27th June 2013 to the Bank. He testified that the auction was done on 20th November 2013 and he was unaware if in between, the Bank had given any fresh notices to sell the property.

25. He further told the Court he had nothing to show that a Valuation was done before the sale. The suit property was sold for Kshs 3.2 Million.

Analysis and Determination

26. I have perused and considered the pleadings filed by the parties, the oral testimonies of the witnesses who testified before me and the evidence adduced by each side of the dispute at the trial. I have also had occasion to peruse the detailed submissions and authorities placed before me by the Learned Advocates acting for the parties herein.

27. It was not in dispute that the 1st Plaintiff was the registered proprietor of the parcel of land measuring 1.0 acres situated at Mtwapa within Kilifi County and more particularly known as Kilifi/Mtwapa/1981 (the suit property). Sometime in the year 2012, one Vincent Omosa Anyona whom the 1st Plaintiff describes as his cousin approached him and asked him to guarantee a loan which the said Vincent had applied for from the Defendant.

28. The 1st Plaintiff agreed to the request and subsequently on 3rd May 2012, he executed a Charge created over the suit property with the Defendant upon which the Defendant proceeded to extend a loan facility of Kshs 2,500,000/- to Vincent. By the terms of the Charge, the said Vincent and or the 1st Plaintiff were placed under an obligation to settle the principle sum advanced by the Defendant together with accrued interest and charges.

29. As fate would have it, Vincent defaulted and the facility fell in arrears. The Defendant then decided to exercise its statutory power of sale and on 20th November 2013, the suit property was sold by public auction to one Johnson Munyoge Wamunya.

30. It is the Plaintiffs' case that the suit property comprised of their matrimonial property and that by law the consent of the 2nd Plaintiff as the 1st Plaintiff's spouse was required in the execution of any documents disposing off the suit property. The Plaintiffs further aver that they were neither notified that Vincent had fallen into arrears in repayments nor were they served with any notice of intention to foreclose, or any other statutory notices as by law required prior to the sale.

31. The Defendant on its part avers that it issued all the requisite notices as required by law to the said Vincent and the 1st Plaintiff. It is their case that the suit property was only sold after the two failed to honour their obligations as required under the Charge as executed by themselves. The Defendant denies that the suit property was matrimonial property as alleged or at all and asserts that it is a stranger to the 2nd Plaintiff herein.

32. Given its implications, this Court will first and foremost consider whether or not the suit property was matrimonial property. According to the Plaintiffs herein, the two of them are husband and wife. It was their case that the suit property was the product of their joint investment and that the same could not be disposed of without their joint consent.

33. Section 28 of the Land Registration Act recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent is therefore required before a spouse can sell matrimonial property and in the absence of such consent, the sale becomes null and void. In that respect, Section 79(3) of the Land Act provides as follows:

“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.”

34. What constitutes a matrimonial home on the other hand is defined under Section 2 of the Matrimonial Property Act, Act No. 49 of 2013 as:

“Any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”

35. As it were, the Plaintiffs before me did not lead any evidence in support of the contention that the two are married and that their matrimonial home is situated on the suit property. While the 2nd Plaintiff told the Court that they used the property for poultry and dairy farming, it was clear to me from the testimony of the 1st Plaintiff that the two had no residence on the property and instead lived far away in Matibo Village in Kisii County. It was accordingly my finding that the Plaintiffs had not established that the 2nd Plaintiff is a Spouse to the 1st Plaintiff from whom consent to Charge the property was required and secondly, that the suit property constituted their matrimonial

property under the ambit of Section 2 of the Matrimonial Property Act aforesaid. Indeed, even if the same constituted such matrimonial property, it was clear from her testimony that the 2nd Plaintiff had assented to the Charge created thereon.

36. The second issue raised by the Plaintiffs was that concerning the manner in which the Defendant had exercised its statutory power of sale. It was the Plaintiffs' contention that the Defendant herein had neither notified them of Vincent's default in the repayments nor served them with the requisite statutory notices.

37. As it were the contract between the parties herein had its terms spelt out in the Charge document executed on 3rd May 2012. The 1st Plaintiff's Postal Address given therein is P.O. Box No. 12227-80100, Mombasa. Under Clause 30.3 of the Charge, all notices under the Charge were deemed to have been properly served upon the Chargor when sent to the last known postal address. Thus while the 1st Plaintiff told the Court in his testimony herein that the said address belonged to his defaulting cousin, he was bound by the same as he did not give any evidence that he had provided any other address to the Defendant for use.

38. In their testimony before me, the Defendant through its sole witness produced a Statutory Notice dated 14th February 2013 (Dexh B1) issued pursuant to the provisions of Section 90 of the Land Act, 2012 to the Borrower (Vincent) and the Chargor (the 1st Plaintiff) on the same address of P.O. Box 12227-80100 Mombasa. A Certificate of Postage dated the same day was clear evidence that the same had been posted to the 1st Plaintiff and his cousin.

39. In addition, the 1st Plaintiff admitted in his testimony before the Court that he was served with the 45 days redemption notice dated 15th May 2013 by Messrs Thaara Auctioneers who were acting on behalf of the Defendant Bank prior to the auction. Pursuant to that notice, the Plaintiff told the Court that he made efforts to clear the arrears including the payment of an alleged sum of Kshs 500,000/- to forestall the auction. There was however no evidence that the Defendant had agreed with him to stay the auction.

40. Arising from the foregoing, I was not persuaded that there was any merit in the Plaintiffs' case. In the premises their suit is hereby dismissed with costs to the Defendant.

Dated, signed and delivered at Malindi this 24th day of July, 2020.

J.O. OLOLA

JUDGE