



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 700 OF 2012

MARGARET ADHIAMBO ODHIAMBO.....PLAINTIFF

VERSUS

JOHN ODHIAMBO NYADERA.....1ST DEFENDANT

ECO BANK LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiff's Notice of Motion was dated 16th April 2012 and filed in Court on the same day. It was brought under the provisions of Order 40 Rules 1 and 4 of the Civil Procedure Rules, Rule 3 of the High Court (Practice and Procedure) Rules and all other enabling provisions of the law. Prayers (1), (2) and (3) are spent.
2. The application sought the following remaining orders:-
 1. Spent.
 2. Spent.
 3. Spent.
 4. That pending the hearing and final determination of this suit the Defendants by themselves their agents, servants and/or employees be restrained from selling advertising for sale or in and/or in any way interfering with the Plaintiff ownership and/or possession of the property known as LR NO NAIROBI/BLOCK – 11/256.
 5. That the Defendants be condemned to pay the costs of the summons.
3. The grounds under which the said application was based were as follows:
 - a. That the Applicant and 1st Respondent got married in 1982 under Luo customary law and solemnised their marriage on 7th June 1995.
 - b. That the above mentioned property was acquired and/or developed during the subsistence of the marriage with money deducted from the 1st Defendant's salary but with a large contribution from the Plaintiff herein.
 - c. That though the 1st Defendant was the one who made the direct payments for the property, he had in the meantime left all responsibility for the maintenance and care of the children of the marriage to the Applicant and did not contribute to the same.
 - d. The suit property was the matrimonial home of the Plaintiff and if not protected she and her

children would be rendered homeless and destitute.

- e. **That the 1st Defendant had charged the property to the 2nd Defendant which could sell the said property to recover the money due to it or alternatively the 1st Defendant could sell the house in order to avoid the sale by the 2nd Defendant.**

AFFIDAVIT EVIDENCE

4. The said application was supported by the affidavit of Margaret Adhiambo which was sworn and filed on 16th April 2012. She deponed that the 1st Defendant was registered as proprietor of plot number NAIROBI/BLOCK NO 111/250 (hereinafter referred to as “the subject property”) which had a residential house which she referred as a matrimonial home.
5. She said that the 1st Respondent purchased the subject property through NSSF with payment having been deducted from his salary. She said that in 2003, she took a loan of Kshs 150,000/= which she used to repair the said property. It was also her averment that as the 1st Defendant was paying off the mortgage, she supported him by buying food, clothes and catering for all the financial needs of the family.
6. It was her contention that the 1st Defendant took a loan using the subject property as security but he defaulted in payment of the loan. She further stated that on 6th March 2012 some people came to the subject property to value the same while others who were potential purchasers also went to see the said property.
7. She expressed the view that the action was the 1st Defendant’s way of getting her out of the subject property, sell it and use the proceeds for himself. She therefore asked the court to preserve the said subject property and that the same be registered jointly in her name and that of the 1st Defendant failing which she and her children would be rendered homeless and destitute.
8. The 1st Defendant swore his Replying Affidavit on 24th May 2012. The same was filed on 25th May 2012. In the said Replying Affidavit, the 1st Defendant confirmed that he was the owner of the subject property. He was categorical that the Plaintiff had not demonstrated how her rights and/or interests would be affected to warrant the issuance of the orders she had sought.
9. He denied that he had abrogated his duties towards his children as had been alleged by the Plaintiff and infact denied that she had paid the educational expenses for the children or repaired the subject property.
10. He admitted that he was underpaying the loan and was emphatic that he had the right to use the said property to obtain financial accommodation or to dispose of the same as it was his property.
11. He averred that the Plaintiff had not met the required threshold to be granted the orders herein and prayed that her application be dismissed.
12. The 2nd Defendant filed a Replying Affidavit on 13th June 2013. It was sworn by Noah Nyachae, the 2nd Defendant’s Branch Manager of Eco Towers Branch on the same date. He explained that on or about 2005, the 1st Defendant sought and was granted financial facility by the 2nd Defendant’s predecessor, East African Building Society which was secured by a Charge created over the subject property.
13. He deponed that there was an outstanding sum of Kshs 549,999.24 which was due and owing to the 2nd Defendant and that the Plaintiff had confirmed the said property was owned by the 1st Defendant in which case the contractual relationship between the 1st and 2nd Defendants was not influenced by the relationship between the Plaintiff and the 1st Defendant.
14. It was his contention that the Plaintiff had not met the requirement to show the nature of interest she had in the said property. The 2nd Defendant therefore also asked that the Plaintiff’s application be dismissed as it was without merit.
15. In her Further Affidavit sworn and filed on 25th June 2012, the Plaintiff reiterated that the 1st Defendant never supported the children and that she should not be made to suffer due to the 1st Defendant’s financial mess, which was indicated as “**the Plaintiff’s financial mess**”.

LEGAL SUBMISSIONS BY THE PLAINTIFF

16. In her written submissions dated 10th December 2012 and filed on 14th December 2012, the Plaintiff listed the following as the issues for determination:-

- a. **Whether the parties were duly married at the time of filing the proceedings.**
- b. **Whether the property(s) were bought during the subsistence of the marriage.**
- c. **The parties measure of contribution as relates to the suit property.**
- d. **The parties share in the matrimonial property.**

17. She submitted that the subject property was matrimonial home and that her rights were protected under Section 68 (c) (ii) of the Constitution of Kenya and Section 17 of the Married Women's Property Act (1882). She argued that the court had wide and unfettered discretion to make such orders as are just taking into account the peculiar facts and circumstances of each case bearing in mind the principle of fairness.

18. She stated that although she was not privy to the contract between the 1st and 2nd Defendants, she was entitled to more than half share of her contribution in the matrimonial home, whether the same was direct or indirect.

19. She relied on Section 17 of The Married Women's Property Act, 1882 which provides as follows:-

“In any question between husband and wife as to the title to or possession of property, either party may apply by summons or otherwise in a summary way to any judge to the High Court of Justice . . . and the Judge . . . may make such order with respect to the property in dispute . . . as he thinks fit”.

20. Further she referred the court to Article 68 (c) (iii) of the Constitution which stipulates as follows:-

“Parliament shall- (c) enact legislation- (iii) to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage;”

21. It was her argument that Parliament enacted the legislation envisaged under Article 68 (c) (iii) of the Constitution of Kenya. This was the Land Registration Act, 2012, in which Section 28 of the Act stipulates as follows:-

“Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(a) spousal rights over matrimonial property;”

22. On informal charges, the Plaintiff referred the court to Section 79 (3) of the Land Act 2012 which states that:-

“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 charger and any spouse of the charger living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons”.

23. The Plaintiff therefore relied on the case of ZWN vs PNN [2012] eKLR where the Plaintiff therein discharged the burden of proof towards direct and indirect joint contribution of the purchase of the matrimonial property and Kivuitu vs Kivuitu (1991) 2 KAR 241 where the wife therein was awarded fifty (50%) per cent for direct and indirect contribution, as was in her case.

24. It was her submission that the 1st Defendant had benefitted from the said property and that the suit property ought to be protected against disposal by the 1st and 2nd Defendants.

25. It was her further submission that she contributed to the structural improvement of the subject

property and thus made out a *prima facie* case with high chances of success to warrant the orders she had sought as was stipulated in the case of **Geilla vs Cassman Brown Co Ltd [1973]**. She contended that she was likely to suffer irreparable loss that could not be compensated by way of damages if the orders were not granted.

LEGAL SUBMISSIONS BY THE 2ND DEFENDANT

26. The 2nd Defendant filed its written submissions dated 17th April 2013 on 19th April 2013. It argued that the 1st Defendant voluntarily authorised it to sell the subject property by public auction in the event he defaulted in repaying the loan facility.
27. It submitted that the Plaintiff had no registrable interest in the subject property and could therefore not maintain a cause of action against it. It contended that the Plaintiff had no *locus standi* to bring the suit against it. It relied on the cases of **Attorney General vs Kenya Commercial Bank Ltd (2003) eKLR**, **Agricultural Finance Corporation vs Lengetia (1985) KLR 765** in this regard.
28. It also referred the court to **Civil Appeal No 214 of 1996 Housing Finance Company of Kenya Ltd vs Faith Kimeria and Another (unreported)** where the holding was that the disputes between the husband and wife had nothing to do with the financial institution therein.
29. It said that in **Francis J. K Ichatha vs Housing Finance Co of Kenya Ltd (2005) eKLR**, the court held that the existence of a dispute of arrears, was not a valid ground for restraining the financial institution from exercising its statutory power of sale. The 2nd Defendant pointed out that the 1st Defendant admitted that he was not servicing the loan and that in any event there was no dispute as to the arrears.
30. It was therefore its case that the Plaintiff had failed to demonstrate that irreparable loss would be occasioned to her if the injunction was not granted and further that the balance of convenience tilted in favour of refusing the injunction than granting it.
31. It was emphatic that the provisions of Section 28 of the Land Registration Act, 2012 and Sections 78 and 79 of the Lands Act, 2012 could not act retrospectively in any event and that in any event spousal interest cannot be inferred to be protected in securities created under the Registered Land Act.

LEGAL ANALYSIS

32. Although this court requested the parties to highlight their respective submissions, counsel for the Plaintiff and the 2nd Defendant insisted that they did not wish to highlight the said submissions. This ruling is therefore based on the affidavit evidence and written submissions as filed by the Plaintiff and the 2nd Defendant herein. The 1st Defendant neither filed any written submissions nor attend court the few times this matter was listed.
33. This matter was filed in the Family Division on 16th April 2012 and the affidavits by the Plaintiff and 1st Defendant allude to a dispute as to who supported the children of the marriage and contributed to the purchase of the subject property. In view of the fact that this matter was transferred to the Commercial & Admiralty Division at Milimani Law Courts by consent of the parties on 1st November 2012 which order was recorded by Mugo J, this court will therefore deal with the family and commercial aspects of the case.
34. It is an undisputed fact that the 1st Defendant took a financial facility from the 2nd Defendant using the subject property as security. It is also not in dispute that the said property was registered in the 1st Defendant's name and that he admitted that he had not been servicing the loan. What is in contention is whether or not the Plaintiff contributed to the purchase of the subject property, directly or indirectly and if so whether the said property could be deemed as jointly owned by the Plaintiff and the 1st Defendant and therefore shut out the 2nd Defendant from exercising its statutory power of sale.
35. Perusal of "MAO 4" attached in the Plaintiff's Supporting Affidavit shows that there were divorce proceedings instituted in 2000. It is not clear to this court what the status of the marriage between the Plaintiff and the 1st Defendant is at the moment as the ruling of Ang'awa J who was hearing the matter advised the parties to obtain the Registrar's Certificate. From those proceedings, it is

- evident that the children are now aged 31, 29 and 26 years of age and cannot be deemed to be children within the strict meaning of a child who is any person under the age of eighteen (18) years.
36. The Certificate of Lease attached to the said Supporting Affidavit marked "MAO 2" shows that the property was registered in the Plaintiff's name in 1992. The Certificate of Marriage marked "MAO 1" indicates that the Plaintiff and the 1st Defendant got married on 7th June 1995, although the Plaintiff said that they entered into a Luo customary marriage in 1982.
 37. The court has observed hereinabove that it could not for a fact say what the marital status of the Plaintiff and the 1st Defendant is currently. Neither of them addressed the court in respect of this issue. It would therefore be speculative for the court to answer the issue of whether or not they were married at the time of filing the proceedings herein raised by the Plaintiff as per the issue that, for determination. This is the Plaintiff's case and it was incumbent upon her to have provided sufficient evidence in this regard to enable the court arrive at a conclusive determination.
 38. He who alleges must prove. An allegation remains just that unless it is supported or proven by facts. The Plaintiff was required to discharge her burden of proof that she customarily got married to the 1st Defendant in 1988. Consequently, in the absence of such proof, this court can only rely on the Certificate of Marriage as the Plaintiff did not provide any evidence to show that she got married to the 1st Defendant in a Luo customary marriage in 1988.
 39. As regards the issue of whether the property was bought during the subsistence of the marriage, the court observes that the 1st Defendant purchased the subject property about three (3) years before he got married to the Plaintiff. This court can only come to one (1) conclusion, which is, that the subject property was not purchased during the subsistence of the marriage.
 40. Having found that the said subject property was not purchased during the subsistence of the marriage, the question of contribution by the Plaintiff would not arise. It would therefore not be correct for her to have contended that she largely contributed to the purchase of the said property through making substantial contributions as the event had since passed before she contracted a marriage with the 1st Defendant.
 41. However, if the court were to assume that the Plaintiff made the said contributions whether directly or indirectly, she would have been expected to provide proof of the same. There is no evidence of the sum of Kshs 150,000/= that she said she borrowed to improve the subject property or proof that she met the educational expenses of the children.
 42. On his part, the 1st Defendant furnished the court with copies of receipts of educational expenses. While the Plaintiff denied his claims in her Further Affidavit, she did not furnish this court with any proof that it is she, and not the 1st Defendant, who supported the children to amount to indirect contribution towards the improvement, if at all of the subject property.
 43. The cases relied upon by the Plaintiff show that a wife could claim a share a property that was acquired during marriage. They are distinguishable from the facts of this case as the court has found that the subject property was not acquired during the subsistence of the marriage and the Plaintiff has not shown that she contributed directly or indirectly in the purchase of the said property before it was registered in 1992.
 44. The court finds itself more persuaded by the 2nd Defendant's submissions that its rights superseded those of the Plaintiff. Indeed, Section 81 of the Land Act, 2012 recognises any first charge over subsequent charges. It cannot therefore be that unregistered interests would take precedence to defeat the interests of a chargee.
 45. It is correct as the Plaintiff has submitted that Section 78 of the Land Act, 2012 envisages that Part VII applies to any charge made before the coming of the Act. However, the issue of spousal rights over the matrimonial property are covered under that part. These rights are contained in Section 28 of the Land Registration Act, 2012.
 46. It was expressed in the register that the 2nd Defendant's had rights over the subject property and it is unlikely that any contrary view was expressed therein. This court is again persuaded by the 2nd Defendant's submissions that spousal rights are not applicable herein as the Acts cannot be applied retrospectively. In any event, if it was the intention of Parliament that spousal rights superceded those of a Chargor, nothing would have been easier than for Parliament to have included spousal rights over matrimonial property in Part VII of the Land Act, 2012.
 47. The argument that the charge herein had not been executed by the Plaintiff is misplaced as Section

- 79 of the Land Act, 2012 only became applicable in 2012, way after the charge herein was executed between the 1st and 2nd Defendants. The 1st Defendant admitted his indebtedness to the 2nd Defendant. Hence, the marital strife between the Plaintiff and the 1st Defendant cannot be visited upon the 2nd Defendant.
48. It is the view of this court that Section 28 of the Land Adjudication Act, 2012 does not and cannot operate in a vacuum. Section 79 of the Land Act, 2012 requires spousal consent be obtained to avoid a situation where a Chargor gets financial accommodation and the spouse rushes to court to stop such sale when such a Chargor defaults in his or her obligations under a Charge.
49. If the position was that a Chargor could default in meeting his or her obligations and his or her spouse could get injunctive orders, it would not make any commercial sense for lenders to advance monies to married persons because that would be bad business. Indeed, single or unmarried persons would be a better bet in advancing monies as there would be no spouse to claim overriding interests that are not registered when such statutory power to sale crystallised. This court does not find this to have been the intention of Parliament.
50. The court has considered the Plaintiff's submissions and finds that she would not have been entitled, under Section 17 of the Married Women's Property Act, 1882, to claim joint ownership for having failed to show direct or indirect contribution to the purchase of the subject property and she could also not interfere with a contract which she was not privy too. This court finds that the Plaintiff has not established a *prima facie* case particularly because the 1st Defendant who is the registered owner of the subject property had admitted being indebted to the 2nd Defendant and also argued that the Plaintiff was not entitled to the injunctive orders that she had sought.
51. The 1st Defendant has not said how he intends to pay the outstanding monies due to the 2nd Defendant. Similarly, the Plaintiff has not given proposals of how the outstanding sum is to be liquidated. The 1st Defendant put up the subject property in the market once he executed the charge and was well aware of the consequences of default in paying the loan which means that an injunction sought by the Plaintiff cannot be granted.
52. Having considered the facts of this case, the affidavit evidence, the submissions of the parties and the case law, the court is not persuaded that the Plaintiff has satisfied the criteria set out in the case of **Geilla vs Cassman Brown Co Ltd** (Supra). In other words, she has not demonstrated that she established a *prima facie* case, that she will suffer irreparable loss which cannot be compensated by way of damages if the injunction is not granted or convinced the court that an injunction should be granted on a balance of convenience.

DISPOSITION

53. For the reasons foregoing, this court finds no merit in the Plaintiff's Notice of Motion application dated and filed on 16th April 2012 and the same is hereby dismissed with costs to the 2nd Defendant.
54. Orders accordingly.

DATED SIGNED and DELIVERED at NAIROBI this 4th day of March 2014

J. KAMAU

JUDGE