



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 209 OF 2012

STELLA MOKEIRA MATARA PLAINTIFF

VERSUS

THADEUS MOSE MANGENYA..... 1ST DEFENDANT

FAMILY BANK LIMITED 2ND DEFENDANT

RULING

1. The plaintiff brought this suit on 19th June 2012 seeking the following reliefs:-

- I. **A permanent injunction restraining the 1st and 2nd defendants whether by themselves or through their agents, servants and/or employees from in any way selling, transferring or in any way dealing with title number Wanjare/Bogiakumu/2828 and title number Wanjare/Bogiakumu/2826.**
- II. **A permanent injunction restraining the 1st and 2nd defendants whether by themselves or through their agents, servants and/or employees from in any way interfering with the plaintiff's quiet possession of title number Wanjare/Bogiakumu/2828 and title number Wanjare/Bogiakumu/2826.**
- III. **A declaration that the charge instrument registered against title number Wanjare/Bogiakumu/2828 and title number Wanjare/Bogiakumu/2826 is null and void.**
- IV. **An order for the cancellation of entry number 9 on the titles of Wanjare/Bogiakumu/2828 and Wanjare/Bogiakumu/2826.**
- V. **The costs of the suit and any other relief that the court may deem fit to grant.**

2. The suit was brought on the grounds that the plaintiff is the wife of the 1st defendant who at all material times was and still is the registered owner of all those parcels of land known as **LR No. Wanjare/Bogiakumu/2826** and **LR No. Wanjare/Bogiakumu/2828** (hereinafter both referred to as **“the suit properties”**). The plaintiff averred that her material home is situated on the suit properties and that without any notice or consent from the plaintiff the 1st defendant caused the suit properties to be charged to the 2nd defendant to secure a loan facility that was advanced by the 2nd defendant to one, **Ibrahim Manoti Michira** (hereinafter referred to only as **“Michira”**). The plaintiff averred that she was not aware of this charge that was created by the 1st defendant in favour of the 2nd defendant until her attention was drawn to an advertisement in the Daily Nation Newspaper of 11th June, 2012 where the suit properties were advertised for sale by public auction on 26th June 2012. The plaintiff averred that the said charge was executed by 1st defendant in favour of the 2nd defendant without her consent contrary to section 28 of the Land Registration Act, 2012 and section 78 of the Land Act, 2012. The plaintiff averred further that the guarantee

that was executed by the 1st defendant in favour of the 2nd defendant on the basis of which the 1st defendant executed the said charge over the suit properties in favour of the 2nd defendant was invalid in law for want of consideration the same having been executed several months after the 2nd defendant had already advanced the loan to Michira. The plaintiff averred further that the 1st defendant did not obtain consent of the area Land Control Board to charge the suit properties to the 2nd defendant contrary to the provisions of section 6 of the Land Control Act, Cap 302 Laws of Kenya. The plaintiff averred further that the 2nd defendant did not serve the 1st defendant with a statutory notice and notification of sale contrary to the provisions of section 74 of the Registered Land act, Cap 300 Laws of Kenya (now repealed) (hereinafter referred to only as “the RLA”). The plaintiff averred further that the advertisement notice of the suit properties in the Daily Nation newspaper aforesaid offended the provisions of the Auctioneers Rules 1997. For the foregoing reasons, the plaintiff contended that the intended sale of the suit properties by the 2nd defendant is unlawful, baseless and without any foundation. It is on account of the foregoing that the plaintiff sought the prayers that I have set out hereinabove.

3. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated 19th June, 2012, seeking a temporary injunction to restrain the 1st and 2nd defendants from selling, transferring, interfering with occupation of and/or in any other manner whatsoever dealing with the suit properties pending the hearing and determination of this suit. The plaintiff’s application was supported by the affidavit and further affidavit of the plaintiff sworn on 19th June 2012 and 7th December 2012 respectively. The plaintiff’s application was brought to a large extent on the same grounds on which the suit herein was instituted which grounds I have already highlighted above in detail. The only grounds which the plaintiff did not raise in the plaint and which have been raised in the affidavit in support of the application herein are that; the plaintiff contributed to the purchase of the suit properties and in the construction of the matrimonial home standing thereon and that the 1st defendant fraudulently offered the suit properties to the 2nd defendant to be charged to secure loan advances made to Michira, a third party who is not related to them for the purchase of a bus. The plaintiff contended also that she would suffer huge loss if the sale of the suit properties is not stopped by this court pending the hearing and determination of this suit. The plaintiff attached to her two affidavits in support of the application, copies of the title deeds for the suit properties, a copy of an advertisement by Legacy Auctioneering services in the Daily Nation Newspaper of 11th June 2012, copies of certificates of official search in respect of the titles of the suit properties dated 29th May 2012, a copy of agreement for sale of motor vehicle dated 19th January 2011 between the 1st defendant and Michira, a copy of the notification of sale dated 24th April 2012, a copy of certificate of marriage between the plaintiff and the 1st defendant dated 5th November 1988 and a copy of an obituary carried in the Daily Nation Newspaper of 8th December 2007.
4. The plaintiff’s application was opposed by the 2nd defendant through a replying affidavit that was sworn by one, Zachary Gichia the 2nd defendant’s head of recoveries on 24th July 2012. The 2nd defendant contended that the plaintiff has no known interest in law in the suit properties on the basis of which she can seek the orders sought herein. The 2nd defendant contended that the suit properties were at all material times registered in the name of the 1st defendant who held unfettered right to deal with the same. The 2nd defendant contended further that the plaintiff was not a party to the transactions between the 2nd defendant, Michira and the 1st defendant and as such has no right or basis to bring into question the validity or otherwise of the loan that was advanced by the 2nd defendant to Michira and the guarantee that was executed by the 1st defendant to secure the same. The 2nd defendant contended further that the plaintiff had failed to establish spousal or matrimonial interest in the suit properties that could be protected by the statutes relied on by the plaintiff namely, the Land Act, 2012 and the Land Registration Act, 2012. The 2nd defendant contended that the suit properties were lawfully charged to the 2nd defendant by the 1st defendant and that the 2nd defendant was within its rights in law to sell the same by public auction. The 2nd defendant explained that; Michira approached the 2nd defendant for a loan sometimes in September, 2010. Michira’s application for a loan facility was approved by the 2nd

defendant who issued to him a letter of offer of the said loan dated 15th February 2011. The 1st defendant by a letter dated 21st February 2011 offered to provide the suit properties to be charged as a security for the said loan facility that the 2nd defendant had offered to Michira. Michira accepted the loan offer by the 2nd defendant and the 1st defendant executed a letter of indemnity and a charge over the suit properties in favour of the 2nd defendant to secure the said loan that the 2nd defendant advanced to Michira. The 1st defendant obtained consent of the Land Control Board to charge the suit properties to the 2nd defendant contrary to the claim by the plaintiff that no such consent was obtained. The 2nd defendant contended that neither Michira nor the 1st defendant as his guarantor paid the loan that was advanced by the 2nd defendant to Michira in accordance with the agreement which the 2nd defendant had entered into with them. The 2nd defendant served demand notices upon Michira and the 1st defendant to pay up the said loan which demand was not complied with. The 2nd defendant was left with no alternative but to put up the suit properties for sale by public auction in exercise of its rights under the charge aforesaid. The 2nd defendant contended that all necessary procedures leading to the advertisement of the suit properties for sale were followed by the 2nd defendant. The 2nd defendant contended that the charge over the suit properties were executed by the 1st defendant in favour of the 2nd defendant under the RLA and that the provisions of the Land Act, 2012 and Land Registration Act, 2012 on which the plaintiff's suit herein is based are not applicable. The 2nd defendant contended that the plaintiff's application does not meet the basic threshold for granting of the orders sought and as such the same should be dismissed. The 2nd defendant annexed to its replying affidavit; a copy of a letter of offer of additional loan facility to Michira dated 15th February 2011, a copy of a letter dated 21st February 2011 by the 1st defendant authorizing the 2nd defendant to charge the suit properties to secure the loan that was advanced by the 2nd defendant to Michira, a letter of consent of land Control Board dated 21st February 2011 authorizing the 1st defendant to charge the suit properties to the 2nd defendant, a copy of the letter of guarantee dated 28th February 2011 executed by the 1st defendant in favour of the 2nd defendant, a copy of a charge dated 28th February 2011 executed by the 1st defendant in favour of the 2nd defendant over the suit properties to secure the loan that was advanced by the 2nd defendant to Michira, a copy of a statutory notice dated 19th October 2011, addressed to the 1st defendant and a copy of 45 days redemption notice dated 24th April 2012 addressed to Michira.

5. On 9th May 2013 the court directed that the plaintiff's application for interlocutory injunction be heard by way of written submissions. The plaintiff filed her written submissions on 4th June 2013 while the 2nd defendant filed its written submissions on 4th July 2013. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the 2nd defendant's affidavit in reply thereto. Finally, I have considered the written submissions by the parties advocates together with the case law cited. The following is the view that I have taken of the matter. The law on temporary injunction is now well settled. As was held in the case of, **Giella –vs- Cassman Brown & Co. Ltd (1953) E. A 358** an applicant for interlocutory injunction must establish a prima facie case with a probability of success and must also demonstrate that he stands to suffer irreparable harm unless the injunction is granted. If the court is in doubt as to the above, the court would determine the application on a balance of convenience. The plaintiff's case herein is primarily based on sections 79 (3) of the Land Act, 2012 and section 28 (a) of the Land Registration Act, 2012. Section 79 (3) of the Land Act, 2012 provides that a charge over matrimonial home shall only be valid if executed by the chargor and any spouse of the chargor living in that home or if such charge is consented to by such spouse of the chargor. On the other hand, section 28(a) of the Land Registration Act 2012 provides that all rights over registered land are subject to spousal rights over matrimonial property. The plaintiff's argument is that the charge herein over the suit properties is invalid because her consent was not obtained prior to the execution of the same. In order to establish a prima facie case, the plaintiff had a duty to prove that; she is the 1st defendant's spouse, she has her matrimonial home on the suit properties and that as at the date of execution of the charge in question, spousal consent was required as a

matter of law before a charge could be created over a matrimonial home. Although the marriage certificate produced by the plaintiff to prove her marriage to the 1st defendant has various alterations and spelling mistakes for common words which casts doubt on its authenticity, I would give the plaintiff the benefit of doubt and hold that the plaintiff proved that she is the 1st defendant's spouse. This takes us to the next issue namely, whether the plaintiff has her matrimonial home on the suit property. The plaintiff placed no evidence before the court to prove that her matrimonial home is situated on the suit property. I do not think that the mere fact that one is married to a registered owner of a property qualifies such property to be a matrimonial home. Matrimonial home is defined in the Land Act, 2012 as "*any property that is owned or leased by one or both spouses and occupied by the spouses as their family home*". A reading of section 79 (3) of the Land Act, 2012 gives me the impression that a home only qualifies to be termed a matrimonial home if the same is occupied by the spouses as such. The plaintiff had a duty therefore to demonstrate that the plaintiff and the 1st defendant occupied the suit properties as their family home. The plaintiff failed first, to show that there is a home on the suit properties and, secondly, that the plaintiff and the 1st defendant were occupying the alleged home on the suit properties as their family home.

6. Due to the foregoing, I am unable to find that the plaintiff has a matrimonial home on the suit properties. It is the matrimonial home that would have entitled the plaintiff to an overriding interest in the suit properties which interest would have imposed an obligation on the 1st defendant under the provisions of the law cited above to obtain the plaintiff's consent before the suit properties were charged to the 2nd defendant. Even if the plaintiff had established that she has a matrimonial home on the suit properties, the plaintiff had a duty also to prove that under the law that was applicable as at the time the charge over the suit properties was executed, a consent of a spouse was required prior to the execution of such a charge. I am in agreement with the 2nd defendant's submissions that the law that is applicable to the charge that was executed over the suit properties as concerns the form and content thereof is the Registered Land Act, Cap. 300, Laws of Kenya (RLA). The charge herein was executed on 28th February 2011 under the RLA. The Land Act, 2012 and the Land Registration Act, 2012 on which the plaintiff has based her spousal consent argument commenced on 2nd May 2012. The RLA under which the charge herein was created was repealed by the Land Registration Act, 2012. It is now the Land Registration Act, 2012 that deals with the registration of interests in land. This is the Act that must be used as a point of reference when considering the rights and interests that were acquired and those that had accrued under the repealed RLA. As submitted by the 2nd defendant, section 107 (1) of the Land Registration Act, 2012 provides that unless the contrary is provided for in the said Act, any right, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the said Act shall continue to be governed by the law applicable to it immediately prior to the commencement of the said Act. That position finds support in section 23(3) of the Interpretation and General Provisions Act, Cap. 2 Laws of Kenya. There is nothing in the Land Registration Act, 2012 which provides that the said Act shall apply to the charges created before its date of commencement. It follows therefore that the law that is applicable to charges created under the RLA prior to the commencement of the Land Registration Act 2012 as to the form and content of such charges is the RLA.
7. I agree with the submission by the plaintiff that section 78(1) of the Land Registration Act 2012 extends the general provisions of that Act relating charges which includes the requirement of spousal consent to the charges that were created before the commencement of that Act. I am of the opinion however that the application of the provisions of the Land Act, 2012 to charges executed prior to the coming into effect of that Act would not extend to the formal requirements and content of such charges. This is because, the parties executing charges prior to the commencement of that Act could not be expected to comply with the requirements of a law that was then not in existence. To give section 78(1) of the Land Act, 2012 an interpretation that extends its operation to the formal requirements and content of charges created before the commencement of that Act would make the said Act inconsistent with the provisions of Article 40 (2) (a) of the Constitution of Kenya, 2010 as it would take away property interests of chargees under such charges arbitrarily. I therefore hold that the applicable law on the form and content of the charge that was created herein is the RLA and that the provisions of section 79(3) of the Land

- Act, 2012 does not apply to charges created prior to the commencement of that Act. Since spousal right to matrimonial property was not an overriding interest under the RLA and spousal consent was not required under the said Act when the charge herein was created, the 1st defendant did not require the consent of the plaintiff before he could charge the suit properties to the 2nd defendant.
8. In addition to lack of spousal consent, the plaintiff had raised other issues such as lack of Land Control Board consent and lack of valid consideration as invalidating the charge that was executed by the 1st defendant in favour of the 2nd defendant. The plaintiff had also challenged the intended sale of the suit properties on the grounds that the statutory notice was not served upon the 1st defendant by the 2nd defendant and that the advertisement for sale of the suit properties that was put in the Daily Nation Newspaper did not meet the requirements of Rule 11 of the auctioneers rules, 1997. I have already held above that the plaintiff had no known interest in law over the suit properties when the charge was created over the same in favour of the 2nd defendant. The plaintiff therefore has no right to challenge the validity of the said charge. The plaintiff does not also have a right to challenge the process through which the suit properties were put up for sale. The foregoing notwithstanding, I am satisfied from the material before me that there was consideration for the charge that was created over the suit properties and that the 1st defendant was duly served with a statutory notice under section 74 of the Registered Land Act. I have noted however that the advertisement of the suit properties did not strictly comply with the provisions of rule 11 of the Auctioneers Rules 1997. A major error in the said advertisement which was not taken up by the plaintiff was that the registered owner of the suit properties was given in the advertisement as **Ibrahim Manoti Michira**. That was not correct because the suit properties are registered in the name of the 1st defendant.
9. I am unable to grant the orders sought on the basis of these irregularities in the advertisement alone. This is partly because, the plaintiff was granted interim injunction which put off the sale that was the subject of the advertisement complained of herein by the plaintiff. If the 2nd defendant wishes to put up the suit properties for sale again, it will have to put up a new advertisement which I hope would comply with the aforesaid rules and will also contain the correct name of the registered owner of the suit properties.
10. Due to the foregoing, it is my finding that the plaintiff has failed to establish a prima facie case against the defendants with a probability of success. With this finding, I am not obliged to consider whether the plaintiff stands to suffer irreparable harm unless the order sought is granted. The upshot of the foregoing is that the plaintiff's application dated 19th June 2012 lacks merit. The same is hereby dismissed with costs to the 2nd defendant.

Delivered, dated and signed at Kisii this 14th day of March 2014.

S. OKONG'O

JUDGE

In the presence of:-

Mr. Nyanchoga holding brief for G. Masese for the Plaintiff

N/A for the Defendants

Mobisa Court Clerk

S. OKONG'O

JUDGE