



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 55 OF 2017

MARY WANJIRU NJUGUNA.....PLAINTIFF

VERSUS

PETER WERU KABUI.....1ST DEFENDANT

CONSOLATA KAMENE NJOROGE.....2ND DEFENDANT

KENYA WOMEN MICROFINANCE BANK LIMITED.....3RD DEFENDANT

JUDGMENT

By a Plaintiff filed in Court on **8th February 2017**, the Plaintiff sought for Judgment against the Defendants herein for the following orders:-

- a. That the 3rd Defendant be ordered by this Honourable Court to surrender title deed in land parcel No. L.R 4953/2838 forthwith.**
- b. That the 1st and 2nd Defendant be ordered to seek an alternative collateral in place of L.R 4953/2838.**
- c. That all the Defendants be ordered to pay the costs of the suit.**

The Plaintiff had averred that the 1st and 2nd Defendants jointly without her knowledge in collusion with her husband, who is the registered owner of the suit property, borrowed a loan from the 3rd Defendant in **2015**. She further averred that the 3rd Defendant acted in breach of the **Banking Act**, by securing a loan to a second party without the involvement of the **spouse** of the registered owner. The Plaintiff also contended that she has on several occasions written to the 3rd Defendant to terminate the said terms and requested the 1st and 2nd Defendants to seek for an alternative collateral as security and surrender the family title deed, but they have declined to do so.

The suit is contested and the 3rd Defendant filed a statement of Defence dated **7th March 2017**, and averred that the 1st and 2nd Defendants borrowed money from it and it had no knowledge of any collusion. It was its contention that prior to Charging the suit property, the same was charged with **Equity Bank Limited** Vide a Charge dated **3rd May 2014**, which had been registered on **14th August 2014**, which information the Plaintiff has not disclosed.

The 3rd Defendant denied flouting any law and further averred that the Plaintiff has no reasonable cause of action against it, since the Chargor, **Moses Macharia Githongo**, has conveniently been left out of the suit. It was its contention that the security documentations were properly and lawfully done and that no demands or notices to sue had been made.

The matter proceeded by way of **Viva voce** evidence wherein the Plaintiff gave evidence for herself and called no witness and the Defendant called two witnesses.

PLAINTIFFS CASE

PW1 Mary Wanjiru Njuguna, adopted her witness statement dated **8th February 2017** as part of her evidence. It was her testimony that **L.R 4953/2838**, is developed and that is, where she resides with her family. She further testified that she purchased the suit property together with her husband **Moses Macharia Githongo (Deceased)** and that they have grown up children. That her husband died on **8th March 2018**, and he had filed an Affidavit in Court which she produced as evidence. She urged the Court to look at the documents in her Application for stay and consider them as her exhibits.

Further that she was the only wife to Moses, and that she was married under Kikuyu Customary Law. She further testified that she knew about the Charge when an official from **Kenya Women Finance Trust**, informed her that her property would be sold. She denied that her husband had charged the suit property and that even though the property was charged, it was not by her or her husband. She also denied giving spousal consent and that she was not involved in Charging of the suit property.

DEFENCE CASE

DW1 Bernard Kiprotich, the Legal Officer for **Kenya Women Finance Trust**, adopted his witness statement dated **26th February 2018**, as his evidence in Court. He further produced his bundle of documents as Exhibit 1.

It was his testimony that that the 1st and 2nd Defendants applied for a loan facility from the Bank of **Ksh.3,000,000/=** and were granted the said loan that was secured by **L.R 4953/2338**, registered in the name of **Moses Macharia Githogo**. That part of the loan was used to pay a loan at Equity Bank. He further testified that the borrowers defaulted in the said loan repayment and the bank exercised its Statutory Power of Sale. That the Bank instructed an Auctioneer to sell the property and that the Auctioneer did what was procedurally required of them.

Further that the Plaintiff was not a party to the Charge and that the Chargor was the sole owner of the suit property and the spousal consent was executed. That they relied on the affidavit provided by the Chargor that was confirmed by the Bank.

That the Plaintiff was also not a party to the transaction and she was not present when the Charge was executed but was relying on the Affidavit of the Chargor that is part of the Charge documents.

DW2 Maryanne W. Kiogora an Advocate of the High Court of Kenya practicing privately in the Law Firm of **Hunja & Kiogora Advocates**, and adopted her witness statement dated **31st January 2020**. She further produced her list of documents as Exhibit 1.

She testified that on **7th May 2015**, the Law Firm received instructions to create a legal charge over the property **L.R No. 4953/2838**, wherein the registered owner was **Moses Macharia Githogo**. That at that time the property was charged to **Equity Bank Kenya Limited**. That the property was discharged after the necessary undertaking was availed to Equity Bank. That the Law Firm prepared a legal Charge in which the Chargor **Moses Macharia Githogo**, signed, and the borrower were **Consolata Kamene Njoroge** and **Peter Weru Kaburu**. The Charge was also executed by the Legal Director of the 3rd Defendant.

She further testified that she prepared an Affidavit of consent of spouse annexed to the legal charge and the same was executed by **Faith Wangechi Macharia**, who was introduced as the wife of the Chargor by the said **Moses Macharia Githogo**. That the said **Faith Wangechi Macharia** had Identity Card **No. 24149312**, and she did not have reason to doubt that the said **Faith Macharia** was the wife of **Moses Macharia**. It was the same lady who had executed the Charge in favour of Equity Bank Ltd.

That after the execution of the Charge, it was registered at the Nairobi Lands Registry on **26th June 2015**, and the documents were returned to the 3rd Defendant and they proceeded to fulfill the undertaking to Equity Bank Limited. The balance of the money was disbursed to the borrower. She testified that the spousal consent was executed in her presence and the said **Faith** produced her original Identity Card at the time of Identification.

She acknowledged that **Mary Wanjiru Njuguna** did not appear before her, but Chargor appeared with his wife **Faith Macharia**, and she had no reason to doubt it.

After close of viva voce evidence, the parties filed written submissions which the Court has carefully read and considered. The Court finds the issues for determination is whether the Plaintiffs is entitled to the orders sought.

It is not in doubt that the suit property is registered in the name of **Moses Macharia Githogo**. It is further not in doubt that the suit property has been charged to the 3rd Defendant as security to the loan facility that was advanced to the 1st and 2nd Defendants herein, who did not enter appearance or defend the suit. It is the Plaintiff's contention that she is the wife to the late **Moses Macharia Githogo** and she was not aware that the suit property had been Charged to the 3rd Defendant. That her **consent** was never sought before the suit property was charged. It is the Plaintiff's contention that the suit property is her matrimonial home, and that is the place where she has been living with the family.

In her testimony, the Plaintiff urged the Court to consider the documents she had annexed in her Affidavit. The Court notes that the said documents are part of the pleadings and that the Defendants did not object to the production of the said documents and therefore the Court will consider the said documents in the interest of Justice.

However, on the other hand the 3rd Defendant contends that the 1st and 2nd Defendants had borrowed **Kshs. 3,000,000/=** from it and that since the suit property was already charged to **Equity Bank Limited**, the 3rd Defendant's Advocates had to give an undertaking to the said bank to pay the monies owed to it upon which a legal charge was created in its favour. It is the 3rd Defendant's further contention that with regards to the loan that was advanced to the 1st and 2nd Defendants, part of it was used to offset the loan owed to Equity Bank Limited and the rest was disbursed to them.

DW2, the 3rd Defendant's Advocate also testified that she prepared the Charge in favour of the 3rd Defendant and that the said **Moses Macharia Githogo** appeared before her together with one **Faith Wangechi Macharia** whom he presented as his wife and who further signed the **spousal consent** upon producing her National Identification card. It is the 3rd Defendant's contention that the Plaintiff has not

produced any evidence to the effect that she was the wife of the said **Moses Macharia** and that the documents that had been produced seems to be an afterthought, in a bid to help her in this suit as the said documents were procured just over a month from the date the suit was filed

What is in dispute is whether the Plaintiff is the wife of **Moses Macharia**, who is the registered owner of the suit property. The Plaintiff testified that she was married to the said **Moses Macharia Githogo**, through the **Kikuyu Customary Marriage** and that together they have children. To support her claim, the Plaintiff produced in evidence a letter from the Assistant Chief dated **16th November 2016**, indicating that indeed the two were husband and wife. Further, the Plaintiff produced in evidence an NHIF data entry registration made on **4th July 2017**, indicating that indeed she is the Spouse to the said **Moses Macharia Githogo**.

Though the 3rd Defendant claimed that the said assertions are not true, it did not rebutted the evidence by the Plaintiff. The Court takes **Judicial Notice** that in most cases, more precisely in case of a party seeking to Administer the Estate of a deceased's, the Court usually rely on the Chief's letter to determine whether or not a person is a wife or a beneficiary and unless the confirmation by the Chief is rebutted and evidence placed before the Court to prove otherwise, the Court has no reason to doubt the said Letter. Therefore, this Court finds and holds that as per the Assistant's chief letter dated **16th November 2016**, produced in court as evidence and the other documentations, the Plaintiff has been able to prove that she was the wife of the said **Moses Macharia Githogo**.

Having held that the Plaintiff was the wife of the late **Moses Macharia Githogo** who is the registered owner of the suit property, the Court must then determine whether the suit property is matrimonial and therefore required spousal consent.

The **Matrimonial Property Act**, defines what a “matrimonial home” is and also what “matrimonial property” is. A “matrimonial home” is defined in Section 2 as follows :-

“matrimonial home” means 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;

Whereas “matrimonial property” is defined in Section 6 of the Act as follows :-

1. For the purposes of this Act, matrimonial property means—

(a) The matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

2. Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

3. Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

4. A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if:-

The Plaintiff testified that she lived on the suit property and that the said property is her matrimonial home. The Plaintiff further produced in evidence a sale agreement that indicates that she bought the suit property together with her husband. The evidence by the Plaintiff has not been controverted in any way. Therefore, it follows that the suit propriety was matrimonial property and the consent of the spouse was required. It is the Court's considered view that this could even be the reason why the spousal consent was obtained by the 3rd Defendant.

What further remains in dispute is whether only the signature of the said **Faith Wangechi Macharia** who signed the spousal consent was enough for the charge to be proper, This is so because the charge was executed in **2015** and it is evident that at that time any property owned by any spouse had to have spousal consent before it was charged or sold and more so if it was matrimonial property.

The Charge herein was created in **2015**, the **Land Registration Act 2012** under section **28 (a)** provided that spousal rights over matrimonial property were overriding interests. **Section 2** of the said Act provided that matrimonial property means any interest in land or lease that is acquired by a spouse or spouses during the subsistence of the marriage. Further **Section 93 (3) (b)** then provided that:-

“Where a spouse who holds land or a dwelling house in his name undertakes individually a disposition in that land the transferee shall if that disposition is a transfer of land be under a duty to inquire of the transferor of whether the spouse(s) has consented to that transfer.... ”

In this case, it is not clear whether the said **Faith Wangechi** was a spouse to the said **Moses Macharia Githogo**, as in his Affidavit sworn on **23rd February 2018**, the said **Moses Macharia** had he averred that he was not asked for a spousal consent thus denying knowing **Faith wangechi Macharia**. However, the 3rd Defendant through its Advocate testified that indeed the said **Faith Wangechi** appeared before her .

Be it as it may, the Court has already held and found that the Plaintiff was a spouse to the said **Moses Macharia Githogo**, and from the evidence produced in Court the suit property is matrimonial property where the Plaintiff lives. It then follows that her consent was required before the suit could be charged. In the case of **EKN ...Vs... AS & 2 others [2019] eKLR** the Court held that;

“The difficult question in this matter is whether one spouse can proceed to sell matrimonial property, or part of matrimonial property, without the consent of the other spouse. The issue in this case is in fact a little bit more complicated than the above question, because the registered owner of the property is polygamous, and a new and more pronounced question now arises as to whether in such union, all spouses have to give consent to sale of matrimonial property, or whether consent from any spouse will be sufficient, or indeed, whether a case of no consent at all will still allow the proprietor to dispose of the property.

27. Section 12 of the Matrimonial Property Act, attempts to address this situation, albeit partly, for it provides as follows :-

Special provisions relating to matrimonial property

(1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.

(2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.

(3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.

(4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—

(a) on the sale of any estate or interest in the matrimonial home in execution of a decree;

(b) by a trustee in bankruptcy; or

(c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.

(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

28. I have set out the whole of Section 12, to put it into context, but it will be seen that only Section 12 (1) is relevant, in determining the question whether a spouse must give consent for the sale of matrimonial property. However, the same only makes provision for a monogamous union, and in such instance, there needs to be consent of both spouses for matrimonial property to be alienated including an alienation by way of sale. I have not seen any explicit provision in the Matrimonial Property Act that relates to the sale of matrimonial property in a polygamous union. Probably this is a lacuna that Parliament needs to address so that the issue is clear and not left in doubt.

29. If we were dealing with a case of a monogamous union, then I would not have hesitated to hold as a starting point, that consent of the spouse was needed before the sale could be completed. But I am dealing with a case of a polygamous marriage and the provisions of Section 12 (1) cannot apply. We therefore need to ask ourselves the difficult question whether consent of any spouse is sufficient, or whether consent of all spouses is required, or whether no consent at all is required.

30. The easy and safe view to take, being an analogy from the provision of Section 12 (1) , is to state that if it is the case that where there is one spouse, consent from such spouse is required, then in a polygamous union, consent of all spouses will be required. I say easy, because the dynamics of a polygamous union can be a bit complex. As demonstrated in this case, in some polygamous unions, one house may have absolutely no interest in some property that is in possession of the other house. For example in this case, it has emerged that the 3rd wife lives in her own land and the 1st and 2nd wives have absolutely no interest in that land. Now, if her (3rd wife) or their common husband, wishes to sell part of it, will consent from the 1st and 2nd wife be needed? It has also emerged that the 3rd wife has no interest in the Kericho and Rongai land in dispute, but is her consent needed if either 1st or 2nd wife wish to dispose of such properties?

31. It will of course be well and good if all spouses consent to any sale, but what if one of the spouses does not consent to the sale yet the other/s have no problem; or one spouse who on the face of it does not appear to have any interest in such property, refuses to give consent to the other spouse to sell?

32. I am alive to these difficult questions. My own interpretation of the law is that if it is the position that consent is required of the other spouse in a monogamous union, then by analogy, consent would be required of all spouses in a polygamous union, unless there is clear demonstration that the property does not constitute matrimonial property, or that through custom, because customary law is applicable under Section 11 of the Matrimonial Property Act, or other legal provision, the other spouses cannot have any recognizable interest in such property and their consent is thus not necessary.”

In this instant case whether or not the said **Faith Wangechi** was a spouse of the Chargor **Moses Macharia**, the Plaintiff herein also being a wife needed to give spousal consent before the suit property could be charged. The Plaintiff has testified and in her letter to the 3rd

Defendant, she indicated that she was informed by one of the 3rd Defendant's officer that her suit property was being sold. This allegation has not been rebutted by the 3rd Defendant thus making the Court wonder how the 3rd Defendant's officer knew the Plaintiff or her whereabouts. The above allegations thus necessitates the court to conclude that had the 3rd Defendant done its due diligence, it would have been able to discover this fact.

Having carefully considered the available evidence, the Court finds that the Plaintiff has proved her case on the required standard of balance of probabilities. Her consent was required before the Charge could be created and since she did **not** give such consent, and she had an overriding interests over the suit property, then the Charge in issue is a nullity.

Consequently, the Court enters Judgment for the Plaintiff against the Defendant jointly and severally in terms of **prayers no. (a) (b) and (c)** of the Plaint and thus Plaintiff is entitled to the Costs of the suit.

It is so ordered.

Dated, signed and Delivered at Thika this 12th day of November 2020

L. GACHERU

JUDGE

12/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consents of and virtual appearance via video conference – Microsoft Teams Platform

Plaintiff Mary Wanjiru Njuguna present in person

M/s Rashima for 3rd Defendant

No appearance for the 1st and 2nd Defendants

L. GACHERU

JUDGE

12/11/2020