

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPLICATION NO. 1654 OF 1984

MRS. HELEN WAMBUI MUNIU.....PLAINTIFF

AND

WELLINGTON MUNIU ITOTIA.....DEFENDANT

RULING

Briefly the facts are that the suit premises are registered in the name of the 1st defendant as the sole proprietor thereof. On 3.12.82 a charge in favour of the 2nd defendants was registered against the title of the suit premises to secure a loan of shs.150,000 advanced by the Finance Co. to the 1st defendants. Prior to the registration of the said charge Land Control Board's consent to the said transaction was duly obtained. On 26.11.83 the Finance Co. that is the 2nd defendants duly gave notice of demand which was not complied with and the 2nd defendants duly gave notice of demand which was not complied with and the 2nd defendants proceeded to exercise their statutory right to sell the suit premises in order to recover the unpaid loan. The suit premises were advertised for sale by auction on 16.6.84 in Kenya Times dated 30.5.84. On 15.6.84 the plaintiff who is the wife of the borrower and the registered owner of the suit premises, that is the 1st defendant, applied ex-parte by way of Originating Summons for inter alia a declaration that the 1st defendant is holding half share in the suit premises in trust for the plaintiff. On the same day she obtained an ex-parte injunction order restraining the 2nd defendants from proceeding with the sale of the suit premises. The chamber summons application through which the above summons application through which the above ex-parte order was obtained was for some reasons never heard inter parties, until on 16.11.84 the 2nd defendants' advocated applied under a certificate of urgency for it to be heard inter parties and the same was then heard inter partes on 27.11.84.

Coming now to the plaintiff's claim of being owner of half share in the suit premises she has based the same on the following grounds as stated in her affidavit accompanying the application:

1. That in 1967, at the time of the purchase of the suit premises she had contributed half the purchase price but it was agreed that the suit premises would be registered in the name of the husband, the 1st defendant, only.
2. That since then she had been in occupation of the suit premises.
3. That she had personally brought about the development of the suit premises including 13,000 tea plants, 3 grade cows, wattle and blue gum trees, vegetables etc, and a semi permanent house.
4. That she had no information about the suit premises being charged by 1st defendant to secure a loan, nor had she given consent thereto.
5. That the 2nd defendant never made any inquiries about her occupation of the suit premises.

As regards the first ground the affidavit of the plaintiff is completely lacking in any evidence supporting the claim that the plaintiff had contributed half the purchase price. From where did the plaintiff get that money? Was she employed or had she inherited that money? There is not a single document such as a salary slip or a savings account abstract or any other such evidence to lend credibility to the allegation that the plaintiff had contributed half the purchase price. There is not even an affidavit from the husband that is the 1st defendant to support the said claim of the plaintiff. No court with interests

of justice at heart will accept such a bare allegation as prima facie evidence of the claim of co-ownership through purchase that is alleged in the affidavit. I am not in the least impressed by this bare allegation that the plaintiff had contributed half the purchase price and reject it.

In view of the above finding there is no merit in ground 2, 3 and 5 enumerated above. The plaintiff's occupation and her work and labour in the alleged developments were as a result of her being a member of the 1st defendant's family. An occupation of such a nature does not give rise to an ownership over the husband's property. Under normal circumstances it is reasonable for a lender to presume that only members of the family of the registered owner would be residing and working on the immovable property involved in the transaction. If the courts were to start paying heed to such considerations which have no legal basis then that will be the beginning of the end of the right of a registered owner to be ever able to raise a loan on the security of his immovable property.

As to the 4th ground that the plaintiff had no information about the 1st defendant raising a loan on the security of the suit premises the 2nd defendants are not in any way concerned with that. The 2nd defendants had ascertained that the 1st defendant was the registered owner of the suit premises and that the same was free from any encumbrances. Consent of the Land Control Board had also been obtained. Having complied with the requirements of the Registered Land Act, Cap. 300, the 2nd defendants were under no obligation to inform any other party of the intended advance of the loan on the security of the suit premises under a charge.

he Chamber summons application dated 15.6.84 under Order 39 rules 1 and 2 is absolutely devoid of any merit and is dismissed. Costs of this application and all costs incurred in the aborted sale by auction schedule for 16.6.84 are awarded against the plaintiff and the 1st defendants jointly and severally.

A M COCKAR

JUDGE