



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT NAKURU

ELC CASE NO. 001/2021

AP NDEGE, SPM

JANE WANJIKU CHEGE..... PLAINTIFF

VERSUS

PETER NJUGUNA WACHIRA.....1ST DEFENDANT

FAMILY BANK LTD.....2ND DEFENDANT

JUDGMENT

1. In the Complaint filed on 6/01/2021, the Plaintiff prayed for the main order that a declaration that the charging of parcel of land known as ***DUNDORI/MIRORENI BLOCK 2/398 (NDIMU)*** as security for the sum of Kshs. 835,000/- by the 1st Defendant herein to the 2nd Defendant, **FAMILY BANK LIMITED**, is illegal; and fraudulent for lack of spousal consent. She pleaded the particulars of fraud and illegality by the Defendants in paragraph 8 of the Complaint as follows:

- a. Failing to seek spousal consent in the dealing with the suit land in which the matrimonial home is erected.

- b. Breaching the provisions of section 93 of the Lands Act No. 3 of 2012
 - c. Forging the Plaintiff's signature
 - d. Illegally causing the charging of title No. Dundori/ Miroreni Block 2/ 398 (Ndimu).
 - e. Colluding to defeat the plaintiff's interest over the suit land
 - f. *Res Ipsa Loquitor*.
2. The plaintiff's attempt to have this court force the police to carry out investigations over the allegations of forgery etc. was dismissed on 19/09.2023 for lack of jurisdiction. Hearing of the matter nevertheless commenced before me on 29/04/2025. The plaintiff was the only witness in her case, while the 2nd Defendant Called its relationship manager, DW1, **JORIM OMONDI**, as its witness. Besides not entering Appearance nor filing a Defence, the 1st Defendant also did not participate in the trial. He is the spouse to the plaintiff.
3. As at the close of hearing, I find that the issue as to whether the suit parcel herein was a matrimonial property is no longer

an issue worth this court's determination. Evidence tendered herein is clear and uncontroverted that the plaintiff is a spouse to the 1st defendant.

4. The issues that arise for determination in this case are therefore evidently the following:

- a. Whether the 2nd Defendant lawfully obtained the title to the suit property, a matrimonial property for which the plaintiff is a beneficial owner and lawfully registered it as security (Charge) for the loan the subject of this suit.
- b. Whether therefore the Charge registered against the title is valid.

5. It is not in dispute that the 1st Defendant is the registered owner of the suit property known as Dundori/ Miroreni Block 2/398 (Ndimu). In her evidence in chief, the Plaintiff stated that she was surprised to learn, sometimes in March 2020, that the suit property had been utilized as security for a loan for a sum amount of Kshs. 850,000/- advanced to the 1st Defendant. She maintains that the affidavit of spousal consent that was produced and/or relied on as evidence herein was a forgery as she did not execute or swear the same.

DETERMINATION

6. Regarding the requirement for spousal consent before a Charge is registered, Section 79(3) of the Land Act provides as follows:

A charge of a matrimonial home, shall be valid 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.

7. On its part, Section 28(a) of the Land Registration Act, No. 3 of 2012 stipulates that:

Unless the contrary is expressed in the register, all registered land shall be subject 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.

8. The phrase “Matrimonial home” is then defined in the Land Act, 2012 to mean ‘***any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.***’

9. The requirement that consent of the spouse be provided before matrimonial property may be charged was addressed by The Court of Appeal in the case of ***Stella Mokeira Matara vs Thaddeus Mose Mangenya & Another, Court of Appeal at Kisumu [2016] eKLR***. In this case, proof that the Plaintiff reside on the suit property as 'matrimonial home' was not controverted, as DW1 confirmed in cross-examination that the 2nd Defendant may have acted without proper diligence. I nevertheless find that under these circumstances, the Charge was subject to the Land Act of 2012 and that Spousal consent was therefore required and the issue is whether the consent relied on herein was validly and voluntarily given by the plaintiff herein. this is because parties are bound by their pleadings and must succeed or fail within the confines of their pleadings.

10. Regarding the Plaintiff's allegation that her signature claimed to have been appended on the various documents was forged, as aforesaid, I do find that the allegation cannot stand since she had the liberty to hire a document examiner to assess the signatures and file a Report to confirm to the Court

that the signature was indeed a forgery. Despite bearing the burden of proving her said allegations, the Plaintiff did not take this option. How then is the Court supposed to verify that the signature was a forgery in the absence of any expert opinion on the issue? The Plaintiff does not even allege that she lodged a complaint with the police for investigations.

11. Regarding burden of proof, Section 107, 108 and 109 of the Evidence Act provide as follows:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence,

unless it is provided by any law that the proof of that fact shall lie on any particular person.

12. I also cite the Court of Appeal decision in the case of ***Kinyanjui Kamau v George Kamau [2015] eKLR***, in which it held as follows: ***'It is trite law that any allegation of fraud must be pleaded and strictly proved in case where fraud is alleged'***.

13. A party alleging fraud must therefore, besides specifically pleading the particulars of fraud, also and specifically lead evidence to prove such allegations. This was also the holding in the other Court of Appeal case of ***Vijay Morjaria v Nansign Madhusihn Darbar & Another [2000] eKLR***, where the following was stated:

It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

14. As regards the standard of proof, the Court of Appeal in the case of ***Kinyanjui Kamau v George Kamau (supra)***, guided as follows:

It is trite law that any allegations of fraud must be pleaded and strictly proved. (See Ndolo v Ndolo [2008] 2 KLR (G & F) 742 wherein the court stated that: -

“.....We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases

15. In view of the foregoing, except in few specified circumstances, which this case is not, the general rule is that the burden of proof always lies on the Plaintiff. It is therefore the Plaintiff who will fail in this case if the Court is left in a position where it is unable to conclusively resolve which of the conflicting sets of facts presented is the true position. For that reason, I find that the Plaintiff has failed to demonstrate that

she did not voluntarily consent to or authorize the registration of the Charge against the title deed to the suit property.

FINAL ORDERS

16. In the end, I rule against the Plaintiff and find that the Charge was valid. The upshot of my findings above is that this suit is dismissed with costs to the 2nd Defendant.

DELIVERED, DATED AND SIGNED AT NAKURU THIS...25TH

.... DAY OF ...SEPTEMBER...2025

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

Delivered in the presence of:

...Mwangangi h/b Chege.....for the Plaintiff

...Orende.....for the 2nd Defendant

Court Assistant: Janet

Orende: Praying for a certified copy of the judgment.

CT: Certified copy of the judgment be supplied to the counsel upon payment of the requisite fee.