



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 102 OF 2019

FATMA HASSAN HADI..... PLAINTIFF

VERSUS

DIAMOND TRUST BANK (K) LTD.....DEFENDANT

RULING

(Application for injunction; principles to be considered; property charged to the defendant; plaintiff claiming to be wife of chargor and claiming that she never gave spousal consent; plaintiff displaying her marriage certificate; person who is said to have given spousal consent being another woman and not the plaintiff; prima facie case established; preliminary objection that this court has no jurisdiction and the suit is sub judice dismissed; injunction issued stopping the bank from selling the property until the suit is finalized)

1. This suit was commenced through a plaint which was filed on 13 June 2019. The plaintiff has claimed that she is the wife of one Khalil Hud Ahmed and that they got married on 3 September 1999 in Mombasa under Islamic law. She has pleaded that in the year 2008, she and her husband purchased the property known as CR No. [.....] LR No. [.....] Section I Mainland North (the suit land) where they established their matrimonial home and have resided since then. She has pleaded that on 30 May 2019, she was surprised to see through a newspaper advertisement that the suit land is due for sale by public auction on 14 June 2019. She made inquiries and was informed that her husband had guaranteed a loan with the suit land as security and had the suit land charged to the defendant bank. She has pleaded that she never gave any consent to charge and thus the attempt to exercise the chargee's statutory power of sale is illegal. In the suit, she wants orders to have the defendant permanently restrained from selling the suit land.

2. Together with the plaint, the plaintiff filed an application seeking to have the defendant restrained by way of an injunction pending hearing and determination of this suit. It is that application which is the subject of this ruling. To the supporting affidavit, the plaintiff has annexed a copy of a Certificate of Marriage dated 18 December 2002. She has deposed that in the year 2012 she moved to the United Kingdom to take care of her sick mother and left her husband to take care of the family business and house. On 30 May 2019, she received a call from a family friend who informed her of the newspaper advertisement for the public auction. She has reiterated that she never gave consent to charge and thus the entire charge is illegal.

3. The defendant filed a replying affidavit sworn by Lwanga Mwangi its Debt Recovery Officer. He first deposed that this court has no jurisdiction given the decision in *Cooperative Bank vs Patrick Kangethe (2017) eKLR*. He further deposed that this application is sub judice as the same issues are the subject matter of the case *Mombasa HCCC NO. 131 of 2014, Khalid Hud Mohamed vs Diamond Trust of Kenya*. He stated that Khalil Hud Mohamed (Mr. Khalil) did charge the suit land on 16 November 2012 to guarantee some money loaned to Siyama Company Limited. The money was not paid and the defendant moved to exercise its statutory power of sale. Mr. Khalil then filed the case Mombasa HCCC NO. 131 of 2013 and sought an injunction. A ruling was delivered on 30 July 2015 by Kasango J, where she inter alia held that the borrower had defaulted; that spousal consent was obtained; but found that the statutory notice was not properly issued as it was not served upon his spouse and stopped the bank from selling until one was properly issued. He has averred that a good statutory notice was served and was copied to the person they consider to be Mr. Khalil's wife, one Faiza Brek Said. He has contended that spousal consent was obtained from the said Ms. Faiza. In the year 2016, the bank yet again acted to sell the property and Mr. Khalil filed another application for injunction within the suit Mombasa HCCC NO. 131 of 2014 claiming that he has not been served with the statutory notices. This application was dismissed by Justice P.J Otieno through a ruling delivered on 5 June 2018. The main suit however still subsists. He has deposed that the bank is not aware of how many spouses Mr. Khalil has. He believes that this suit is an abuse of the process of court.

4. I invited both Mr. Mutubia for the plaintiff and Mr. Janju for the defendant to file written submissions which they did. I also allowed them to make some brief oral submissions at the inter partes hearing of the application. I have taken all these into account.

5. Mr. Janju submitted that the plaintiff aims to stop the bank from selling the suit land and he submitted that the said sale constitutes a disposition of land and not use of land, and thus this court has no jurisdiction. He thought that the matter should have been filed at the High Court Commercial Division. He further submitted that this application offends Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya, which bars a court from proceeding with a matter already pending, and he pointed at the suit Mombasa HCCC No. 131 of 2014 as one which

was pending. On whether a prima facie case has been established, he submitted that the plaintiff's case is based on lack of spousal consent, but that consent was obtained from Ms. Faiza who Mr. Khalil disclosed as his lawfully wedded wife at all material times. He stated that Mr. Khalil has never mentioned another wife. He referred me to Section 79 (3) of the Land Act, Act NO. 6 of 2012 which inter alia provides that a charge of a matrimonial home shall be valid if the documents are executed by the chargor and any spouse. He pointed to the deposition of the plaintiff that she has been in the UK and submitted that it is the spouse who was living with Mr. Khalil who signed the documents. He otherwise thought that even the balance of convenience tilts in his favour.

6. Mr. Mutubia submitted that this court has jurisdiction. He submitted that what is before court is not a commercial transaction as his client has no contract with the bank. On res judicata, he submitted that this will only apply if the parties are the same which is not the case. He pointed out that his client's case is grounded on her right as spouse.

7. I have considered the matter.

8. First on jurisdiction, I do hold that this case is properly before this court. What is before court is not an interpretation of any commercial transaction between the parties. The issue before this court is on the validity or otherwise of the charge, the contention being whether or not the charge is valid for want of spousal consent. The jurisdiction of this court is elaborated in Section 13 of the Environment and Land Court Act. Section 13 (2) (d) provides that the court is empowered to hear disputes "*relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.*"

9. I do not need to belabour the point that a charge is an instrument granting an enforceable interest in land meaning therefore that this court has the jurisdiction to hear disputes relating to charges. Moreover, a charge is an instrument created under the Land Registration Act, Act No. 3 of 2012, and the Land Act. Both of these statutes provide that the court with jurisdiction is the Environment and Land Court. I do not therefore see where the argument is coming from that this court has no jurisdiction in this suit. The dispute at hand is on the validity of the charge and that is a dispute that is squarely within the jurisdiction of this court. I do not see the need of saying more because I have in a more elaborate ruling, in the case of *Lydia Nyambura Mbugua vs Diamond Trust Bank Kenya Limited, Nakuru ELC Case No.296 of 2013 (2018) eKLR*, spelled out the jurisdiction of this court in relation to charges and the exercise by chargee of the power of sale. I held in that case that this court would have general jurisdiction where the instrument of the charge is in question and also jurisdiction in the supervision of the manner in which the chargee is exercising its power of sale. I have not been persuaded to depart from that reasoning. I have been referred to the case of *Cooperative Bank vs Kangethe* which I have read, but I am not persuaded that the Court of Appeal was holding that this court would need to drop its tools when the word "charge" is mentioned. What the Court of Appeal thought was that the dispute in that case was one of accounts, which could then be heard by the High Court.

10. The other issue is the argument that this suit is sub judice. I am not persuaded. I have not seen all of the pleadings in the said case but I have read the rulings on the applications for injunction which were annexed by the bank and they reveal to me the nature of the dispute in that case. I have seen that the plaintiff therein is Mr. Khalil and the defendant is the bank. From the ruling of Kasango J, delivered on 30 July 2015, I have seen that Mr. Khalil sought to stop the bank from selling the property because he had not been served with statutory notices or statements of accounts, and he also mentioned that the property is matrimonial property and if it is sold then he and his family will suffer irreparably. Kasango J, faulted the statutory notice for the reason that it was not copied to Mr. Khalil's spouse and she thought that Mr. Khalil's spouse had given consent to charge. The issue of who Mr. Khalil's spouse is, was never canvassed in that case.

11. The issue in this case is clearly distinct from the issues in the case Mombasa HCCC No. 131 of 2014. In this case, it is a person claiming to be the spouse of Mr. Khalil who contests the charge for lack of spousal consent. This suit is therefore not sub judice the case Mombasa HCCC No. 131 of 2014.

12. Turning now to the issue of whether or not an injunction should be granted, it is trite that one needs to demonstrate a prima facie case with a probability of success; show that she stands to suffer irreparable loss; and where the court is in doubt, it will decide the matter on a balance of convenience.

13. The plaintiff has displayed her marriage certificate. This has not been challenged by the defendant. On the face of it therefore, she is the spouse of Mr. Khalil. There is no question that spousal consent is needed before matrimonial property can be subjected to a charge. The bank does not pretend that it got the consent of the plaintiff before charging the suit land. I am of the view that the plaintiff has established a prima facie case with a probability of success. On irreparable loss, it is clear that if the property is sold, then it will be lost, and the plaintiff stands to lose her matrimonial home. There certainly is danger of the plaintiff suffering irreparable loss. Even if I was to consider the balance of convenience, it tilts towards preserving the property until this case is heard and determined.

14. Given the above, I am persuaded to issue the order of injunction. I issue orders stopping the bank from offering for sale, selling, or entering into any disposition in respect of the suit land. I also issue an order stopping any registration of any disposition in the register of the suit land until this case is heard and finalized.

15. The plaintiff shall also have the costs of this application.

16. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 13th day of November 2019.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Wafula holding brief for Mr. Mutubia instructed by Sherman Nyongesa & Mutubia Advocates for the applicant.

Ms Oluoch Wambi holding brief for Mr Janju instructed by M/s Mohamed Madhani & Company Advocates for the respondent.

Court assistant; David Koitamet.