



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 199 OF 2016**

**J J K.....PLAINTIFF**

**VERSUS**

**M ORIENTAL BANK (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**ONESMUS MACHARIA T/A**

**WATTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**J K B.....3<sup>RD</sup> DEFENDANT**

**RULING**

**J J K (hereinafter referred to as the plaintiff/applicant)** has come to court against **M Oriental Bank (K) Ltd, Onesmus Macharia t/a Watts Auctioneers** and **J K B**, claiming that she is the spouse of the 3<sup>rd</sup> defendant having married under the Marriage Act, Cap. 150 Laws of Kenya (repealed). She received parcel of land No. Kapsaret/Simat Block [particulars withheld] from her father and they established their matrimonial home thereon and have five children living thereon. She claims that the 3<sup>rd</sup> defendant has now deserted their matrimonial home and now lives in Eldoret where he has emerged in drinking and other escapades. She claims to have been unaware of the loan taken by the 3<sup>rd</sup> defendant as she was not consulted. The 1<sup>st</sup> defendant never bothered to confirm the spousal right of the plaintiff who is residing on the matrimonial home. She claims that charging the property being a matrimonial home without her consent was fraudulent and illegal.

In an application dated 12.7.2016, she prays for a temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from offering for sale, selling by public auction property to exercise the statutory power of sale, transferring, alienating or otherwise in any manner interfering with or dealing adversely with land parcel No. Kapsaret/Simat Block [particulars withheld], pending the hearing and determination of the suit. She prays for costs of the application.

The application is based on the supporting affidavit of the plaintiffs whose gist is that she is the sole wife of the 3<sup>rd</sup> defendant, having been married under the Marriage Act, Cap. 150 (now repealed) on 7.6.1991. That she received land parcel No. Kapsaret/Simat Block [particulars withheld] from her father and she and the 3<sup>rd</sup> defendant established a matrimonial home thereon and has so far sired 5 children thereon and where they have resided till sometimes in 2013, when the 3<sup>rd</sup> defendant deserted the matrimonial home and went to live in Eldoret town alone, where he engages in drinking and other escapades. That unknown to her, the 3<sup>rd</sup> defendant transferred the matrimonial home to his name on 21.1.2013 and had a charge registered on 10.4.2013 to secure a sum of Kshs. 6,000,000. That she was unaware of the loan being taken

and was not consulted; the 1<sup>st</sup> defendant never bother to confirm the spousal rights of which she resides on the matrimonial home.

She avers that the charging of the matrimonial home, being Kapsaret/Simat Block [particulars withheld] is fraudulent, void and has no legal basis whatsoever. That she obtained the offer letters from the 1<sup>st</sup> defendant and noted that:

***(a) By a letter dated 13.3.2013, the 3<sup>rd</sup> defendant offered an overdraft of Kshs.68,000,000 on condition that, inter alia:-***

***(i) There be fresh personal guarantee by property owner.***

***(ii) Certificates to the effect that the properties had as security are not family/matrimonial homes and/or.***

***(iii) That the spousal consent properties may be given a security have been given;***

***(b) That by a letter dated 28.1.2013, the 3<sup>rd</sup> defendant had been given an overdraft of Kshs.41,000,000 without the matrimonial home being security.***

***(c) That by another letter dated 26.9.2013, the 3<sup>rd</sup> defendant obtained another loans and overdraft of Kshs.177,150,000 where again the matrimonial home was offered for security with a rider that the spousal consent be obtained. None was obtained.***

The spousal consent was not obtained from her when she was married to the 3<sup>rd</sup> defendant on 17.6.1991 under the Marriage Act, Cap. 150, Laws of Kenya (now repealed). She therefore has a spousal rights over land parcel No. Kapsaret/Simat Block [particulars withheld] measuring 3.9000 Ha and valued at Kshs.38,000,000 in Mokombet area the same being matrimonial property which has a 3-bedroom matrimonial house, 2 servant quarters and stores. That the 3<sup>rd</sup> defendant gave land parcel Kapsaret/Simat Block [particulars withheld] as security and a legal charge was prepared without spousal consent from her, thereby making the charge *void ab initio*. That apparently, the 3<sup>rd</sup> defendant defaulted in paying the amount and a sum of an unknown amount is due and owing.

On 4.7.2016, the 2<sup>nd</sup> defendant on instructions of the 1<sup>st</sup> defendant advertised land parcel Kapsaret/Simat Block [particulars withheld] for sale by public auction on 15.7.2016, which information came to her knowledge on 5.7.2016. Prior to the advertisement on the Daily Newspapers on 4.7.2016, she was not aware that the matrimonial property had been charged as she did not sign any spousal consent. She was not aware that the 3<sup>rd</sup> defendant had defaulted as:

***(a) No notice had been issued indicating default and notification of sale as required under Rule 15(d) of the Auctioneers Rules 1997.***

***(b) As required under Section 90(1) and (2) of the Land Act, no notice was given to the extent of:***

***(i) The nature and extension of default of the chargor.***

***(ii) The amount that must be paid to rectify the default and the time being not less than three months, by the end of which the payment in default must have been completed.***

***(iii) If the default consists failure to perform any convent, the thing she must do to rectify the default and the time by which default must be rectified.***

***(iv) Consequences, if the default is not rectified within the specified time.***

***(c) She had not received notice of default and or redemption notice and notification of sale and none has been served on the 3<sup>rd</sup> defendant.***

Upon receipt of the information that the matrimonial is due for auction, she proceeded to the 1<sup>st</sup> defendant's office in Eldoret to confirm her indebtedness to enable her settle. However, the 1<sup>st</sup> defendant has failed to give the same to her citing customer – bank confidentiality. The actions of the 1<sup>st</sup> defendant amount to clogging the equity of redemption and thus negating/voiding the charge and is thus fraudulent. Given the above scenario even if he had the entire amount of the security, she cannot redeem the matrimonial property before the others redeem theirs hence his equity of redemption is totally clogged.

The respondent filed a replying affidavit whose import is that he is familiar with the facts of this case and that it is true that the 1<sup>st</sup> respondent advanced the 3<sup>rd</sup> respondent financial accommodation as has been alluded to by the applicant. That from the charge, it is clear that the 3<sup>rd</sup> respondent pledged Kapsaret/Simat/Block [particulars withheld] as security for the loan. That from the charge marked JG1 above, the 3<sup>rd</sup> respondent represented on oath to the 1<sup>st</sup> respondent that he was not married as is clear from the affidavit in the charge. That the 1<sup>st</sup> respondent acted on this representation to advance the loan herein.

The 3<sup>rd</sup> respondent failed to service the loan contrary to the contract between the parties and as at 30<sup>th</sup> June, 2016, the loan balance stood at Kshs.192,560,370. That as a result, the 1<sup>st</sup> respondent issued the 3<sup>rd</sup> respondent with the requisite statutory notice. The notice was duly served on the 3<sup>rd</sup> respondent through registered post to the last known address of the 3<sup>rd</sup> respondent as per the letter issued by the 1<sup>st</sup> respondent. That he knows of his own knowledge that at no time did the 3<sup>rd</sup> respondent suggest that he was married to anyone, let alone the plaintiff. That as a result, the 1<sup>st</sup> respondent could not have dealt with the plaintiff over the facility in dispute. That the 1<sup>st</sup> respondent has done all that is required of it in order to realize the security herein. That therefore, the current claim by the plaintiff cannot be a reason to delay the realization process as she was nowhere in the picture when the transaction was concluded.

That in any event, the certificate of marriage annexed mentions “**J K**” as the spouse to the plaintiff whilst the 3<sup>rd</sup> respondent goes by the names “**J K B**”. The two names are not the same. “**K**” is certainly different from “**K**” and “**B**” is not in the marriage certificate.

I have considered submissions by counsel herein and I do find that the plaintiff has satisfied that she has a prima facie case with the probability of success as the alleged wife of the borrower. I have seen the Marriage Certificate which, though subject to scrutiny during cross examination, is prima facie evidence that the plaintiff was married to the 3<sup>rd</sup> defendant. The charge was registered on 10.4.2013 about one year after the Land Registration Act had come into force of law. I do find that the plaintiff was satisfied that she was a prima facie case with a likelihood of success.

On irreparable loss, I do find that it is not controverted that the parcel of land is matrimonial property where the plaintiff's family resides and therefore, selling the same will cause irreparable loss to the family as they are likely to be evicted. The balance of convenience towards maintaining *status quo* which favours the plaintiff.

Ultimately, application is allowed in terms of an order that a temporary injunction is hereby issued restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from offering for sale, selling by public auction property to exercise the statutory power of sale, transferring, alienating or otherwise in any manner interfering with or dealing adversely with land parcel No. Kapsaret/Simat Block [particulars withheld], pending the hearing and determination of the suit. Orders accordingly.

**Dated and delivered at Eldoret this 26<sup>th</sup> day of January, 2018.**

**A. OMBWAYO**

**JUDGE**