



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJA.)

CIVIL APPEAL NO. 63 OF 2014

BETWEEN

STELLA MOKEIRA MATARA APPELLANT

AND

THADDUES MOSE MANGENYA FIRST RESPONDENT

FAMILY BANK LIMITED SECOND RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Kisii (Okongo, J.) delivered on the 14th day of March, 2014

in

HCCC ENVIRONMENT LAND CASE NO. 209 OF 2012)

JUDGMENT OF THE COURT

INTRODUCTION

1. The fundamental question that arose for determination before the trial court was whether the provisions of **sections 78 (1) and 79 (3) of the Land Act, 2012**, and **section 28 (a) of the Land Registration Act, 2012** are applicable in respect of charges that were drawn and registered prior to the enactment of the said Acts. **Section 79 (3) of the Land Act, 2012** provides that a charge over matrimonial home shall only be valid if executed by the chargor and any spouse of the chargor living in that home, or if such charge is consented to by such spouse or chargor. On the other hand, **section 28 (a) of the Land Registration Act** provides that all rights over registered land are subject to spousal rights over matrimonial property. The relevant charge in this appeal was drawn and registered sometimes in 2011.

THE APPELLANT'S SUIT

2. The appellant filed a suit before the Environment and Land Court at Kisii seeking, *inter alia*, a permanent injunction to restrain the respondents, their servants and/or employees from transferring or in any way interfering with her quiet possession of properties known as

3. The appellant also sought a declaration that the charge instrument registered against the suit properties is null and void and for an order for the cancellation of entry number 9 on the titles to the suit properties.
4. The suit was brought on the grounds that the appellant is the wife of the 1st respondent, who is the registered proprietor of the suit properties, that her matrimonial home is situated on the suit properties, and that without her consent and contrary to the provisions of **section 28 (a)** of the **Land Registration Act, 2012** and **section 78** of the **Land Act** the 1st respondent (*her husband*) charged the two properties to secure a loan facility that was advanced by the 2nd respondent to one **Ibrahim Manoti Michira** (“*the borrower*”).
5. The appellant further averred that the guarantee that was executed by the 1st respondent in favour of the 2nd respondent on the basis of which the 1st respondent executed the said charge over the suit properties was invalid for want of consideration, the same having been executed several months after the 2nd respondent had already advanced the loan to the borrower.
6. The appellant further contended that the 1st respondent did not obtain consent of the area Land Control Board to charge the suit properties to the 2nd respondent, contrary to the provisions of **section 6** of the **Land Control Act**. She added that the 2nd respondent did not serve the 1st respondent with a statutory notice and notification of sale, contrary to **section 74** of the **Registered Land Act** (*now repealed*). She became aware of the intended sale of the suit properties when an advertisement was carried by the “*Daily Nation*” Newspaper of 11th June, 2012 indicating that the sale by public auction was to take place on 26th June, 2012.

APPLICATION FOR INJUNCTION

7. Together with the plaint, the appellant filed an application seeking a temporary injunction to restrain the respondents from selling the suit properties or interfering with her occupation of the same pending hearing and determination of the suit. The application was premised on more or less the same grounds upon which the suit was premised.

THE 2ND RESPONDENT’S RESPONSE

8. The 1st respondent did not file any response to the appellant’s application. The 2nd respondent is the only one who opposed the application through a replying affidavit sworn by one **Zachary Gichia**, the 2nd respondent’s head of recoveries. The bank contended that the suit properties were registered in the name of the 1st respondent, who had lawfully charged the properties to it, that the appellant had no right to question the transaction, that the appellant had failed to establish spousal or matrimonial interest in the suit properties that could be protected by **section 28 (a)** of the **Land Registration Act, 2012**, and **section 78** of the **Land Act, 2012**.
9. The 2nd respondent stated that the 1st respondent obtained consent of the area Land Control Board to charge the suit properties, and that neither the 1st respondent nor the borrower had repaid the loan that was advanced to the borrower on the 1st respondent’s guarantee.
10. The 2nd respondent further contended that the charge over the suit properties was duly executed under the relevant provisions of the Registered Land Act and that the cited sections of the Land Act, 2012 and the Land Registration Act, 2012 were not applicable.

THE TRIAL COURT’S FINDINGS

11. In his considered ruling, the learned judge summarized the issues for determination in the application as follows:

“In order to establish a prima facie case, the plaintiff had a duty to prove that; she is the 1st defendant’s spouse, she has her matrimonial home on the suit properties and that as at the date of execution of the charge in question, spousal consent was required as a matter of law before a charge could be created over a matrimonial home.”

12. Dismissing the application for interlocutory injunction, the learned judge found, *inter alia*; that:

i. **the appellant was the 1st respondent’s spouse,**

ii. **the appellant had not proved that her matrimonial home is situated on the suit properties,**

(iii) the appellant had not proved that under the law that was applicable at the time the charge over the suit properties was executed spousal consent was required prior to execution of the charge,

(iv) although section 78 (1) of the Land Registration Act, 2012 extends the general provision of that Act relating to charges which includes the requirement of spousal consent to the charges that were created before the commencement of that Act, the application of the provisions of the Land Act, 2012 to charges executed prior to the coming into effect of that Act would not extend to formal requirements of the content of such charges,

(v) section 79 (3) of the Land Act, 2012 does not apply to charges created prior to the commencement of the Act,

(vi) the appellant had no right to challenge the validity of the charge or the process through which the suit properties were put up for sale.

THE APPEAL

13. Aggrieved by the aforesaid decision, the appellant preferred an appeal to this Court. The appeal challenges almost all the learned judge’s findings as stated above, except the first one, that the appellant was the 1st respondent’s spouse. **Mr. Masese**, the appellant’s learned counsel, made brief submissions in support of the grounds of the appeal and urged the court to allow the appeal.

14. The 1st respondent simply left the matter to the Court’s discretion. He said that he made a mistake by guaranteeing the borrower, who had since defaulted in repayment of the money advanced to him by the 2nd respondent.

15. **Miss. Kisaka**, learned counsel for the respondent, opposed the appeal. She reiterated that the appellant was not obliged to grant spousal consent since the charge in issue was drawn and executed on 28th February, 2011 whereas the **Land Act, 2012**, which provides for spousal consent over matrimonial properties, came into effect on 2nd May, 2012. The 2nd respondent could not therefore have been expected to obey a law that was not in force when the charge was drawn since a law cannot operate retrospectively.

16. We have considered the entire record of appeal as well as the submissions by counsel. In determining this appeal, we must bear in mind that the appeal arose from an interlocutory ruling and the substantive hearing is still pending before the High Court. We shall therefore restrain ourselves from making definitive findings on a number of issues to avoid embarrassment to the trial court or prejudice to either of the parties in dispute. See **BP (Kenya) Limited V Kisumu Market Service Station, Civil Appeal No. 25 of 1992** and **David Kama Gakuru V National**

Industrial Credit Bank Limited, Civil Appeal No. 84 of 2001.

17. Grant or refusal of an interim injunction is an exercise of judicial discretion. An appellate court will not normally interfere with the exercise of such discretion unless it is satisfied that the decision is clearly wrong because the trial court misdirected itself or it acted on matters it ought not to have acted on or it failed to take into consideration matters which it should have taken into consideration and in so doing arrived at a wrong conclusion. See **Mbogo V Shah [1968] E.A.93.**

18. It is in the backdrop of the above principles that we shall proceed to determine whether in dismissing the application for interim injunction the learned judge exercised his discretion judicially.

19. The learned judge was not satisfied that the appellant had established a prima facie case with a probability of success. In **Mrao Limited V First American Bank of Kenya Limited & 2 Others [2003] KLR 125 at 138, Bosire, JA.** stated that:

“[A] prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

20. It was not sufficient for the appellant to merely raise issues or arguments as to why the 2nd respondent should not have been allowed to exercise its statutory right of sale of the suit properties, she was under an obligation to demonstrate that there had been infringement of her rights and that she was most likely going to succeed in her suit against the respondents.

21. The gravamen of the appellant’s appeal was that the learned judge erred in his interpretation of **section 79 (3) of the Land Act, 2012 and section 28 (a) of the Land Registration Act, 2012.**

22. **Section 79 (3) of the Land Act** states 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.”

The appellant’s contention was that she had neither executed the charge nor assented to it.

23. **Section 28 (a) of the Land Registration Act** 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.”**

24. The learned judge found that the appellant had proved that she was the 1st appellant’s spouse but failed to prove that together with the 1st respondent they had their matrimonial (*as defined by the Land Act, 2012*) in the suit properties. The judge held:

“The plaintiff had a duty therefore to demonstrate that the plaintiff and the 1st defendant occupied the suit properties as their family home. The plaintiff failed to show that there is a home on the suit properties and, secondly, that the plaintiff and the 1st defendant were occupying the alleged home on the suit properties as their family home.”

25. The appellant had stated at paragraph 5 of her affidavit in support of the application for interim injunction that together with her husband, the 1st respondent, and their children were residing on the suit properties as their matrimonial home. In its replying affidavit, the 2nd respondent stated that the appellant's deposition at paragraph 5 was hollow and unsupported.

26. By way of a further affidavit filed in response to the 2nd respondent's replying affidavit, the appellant reiterated that the suit properties were the only matrimonial property they owned with her husband, even their daughter, **Jemima Moraa Matara**, had been interred there. She annexed to her affidavit their late daughter's obituary and burial permit. That deposition was not controverted at all.

27. "*Matrimonial home*" is defined by 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.*"

Taking into account the above definition, the learned judge held that the appellant had failed to show, firstly, that there is a home on the suit properties and, secondly, that together with the 1st respondent they were occupying the alleged home. Perhaps photographs of the home, if at all, or a valuation report containing appropriate description of the suit properties would have sufficed. In the circumstances, we cannot fault the learned judge for the conclusion that he arrived regarding absence of proof of existence of a matrimonial home on the suit properties.

28. But even if the appellant had shown that their matrimonial home was situated in the suit properties, the appellant still had to prove that her consent to charge the properties was by law required and was not obtained, considering that the charge in issue was drawn and executed before the **Land Act, 2012** and the **Land Registration Act, 2012** that espouse spousal consent were enacted.

29. **Section 78 (1)** of the **Land Act, 2012** stipulates that:

"(1) This Part applies to all charges on land including any charge made before the coming into effect of this Act and in effect at that time, any other charges of land which are specifically referred to in any section of this Part."

Regarding applicability of the above quoted provision of the law to charges executed prior to enactment of the **Land Act, 2012**, the learned judge held that the provisions cannot be extended to the formal requirements of and content of such charges because:

"... the parties executing charges prior to the commencement of that Act could not be expected to comply with the requirements of a law that was not in existence. To give section 78 (1) of the Land Act, 2012 an interpretation that extends its operation to the formal requirements and content of charges created before the commencement of that Act would make the said Act inconsistent with the provisions of Article 40 (2) (a) of the Constitution of Kenya, 2010 as it would take away property interests of charges under such charges arbitrarily."

30. Though at this stage we must restrain ourselves from making a definitive finding on the true interpretation of **section 78 (1)** above, which the 2nd respondent submitted was not meant to apply retrospectively, we must bear in mind what the Supreme Court of Kenya held in **S. K. Macharia & Another V Kenya Commercial Bank & Others [2012] eKLR** that:

"Retrospective law is not unconstitutional unless it:

- i. **is in the nature of a bill of attainder;**
- ii. **impairs the obligation under contracts;**
- iii. **divests vested rights; or**
- iv. **is constitutionally forbidden."**

31. While the question as to whether **section 78 (1)** of the **Land Act, 2012** operates retrospectively or not must await determination by the trial court, all we can say at this juncture is that the appellant did not establish that the learned judge exercised his discretion erroneously in rejecting her contention that her consent was required before the suit properties could be charged to the 2nd respondent.

32. All in all, we find this application lacking in merit and dismiss it with costs to the 2nd respondent.

DATED and delivered at Kisumu this 4th day of March, 2016.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR