



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELCA NO. 25 OF 2020

SNR.....APPELLANT

VERSUS

REMU MICROFINANCE BANK LIMITED.....1ST RESPONDENT

VIEWLINE AUCTIONEERS.....2ND RESPONDENT

HK.....3RD RESPONDENT

(Being an appeal from the Judgment of Hon. S. Ndegwa (P.M.) delivered

on 28th February, 2020 in Githongo E.L.C. No. 12 of 2017)

JUDGMENT

1. The appellant who was the plaintiff in the lower court, through an amended plaint dated **3rd January 2018** sued the respondent then the defendant over **Parcel No. Kiamuri "A"/xxx** registered in the name of 3rd respondent, who is his wife claiming spousal consent was never sought or obtained by the 1st respondent in advancing a second loan facility to his wife, whose default in repayment caused the 1st respondent to thereafter to exercise statutory power of sale. The appellant averred the further charge was illegal, null, void and that this being family/matrimonial land he had beneficial interests protectable by law hence sought for declaratory orders that the further charge was illegal, should be deregistered; permanent orders of injunction stopping the respondents from disposing of the suitland and costs of the suit.

2. Upon service with the summons, it appears the respondents did not file any defence despite leave to do so. The matter proceeded for hearing. In his evidence the appellant adopted his witness statement made on **16.10.2017** relied on list of documents and an affidavit sworn on **16.10.2017** produced **P. exhibit 1 was the search for the suitland, P. exhibit 2 a copy of the title deed, p. exhibit 3 the redemption notice, P. exhibit 4 the notification for sale, P. exhibit 5 a copy of marriage certificate and p. exhibit 6 a bank statement.**

3. He told the court he came to know of the second charge in **September 2017** after a redemption notice was sent, though he admitted to have been aware of the 1st loan facility granted in 2012 which had been fully repaid by **26th March 2013**. He further testified **P. exhibit 2 showed the 1st charge of 24.8.2012**. Concerning the entry of **11.4.2013** for Kshs.700,000/= in his **P. exhibit 6** the appellant denied knowledge of the same and maintained that if indeed his wife was ever given that loan he was not notified nor did he consent to the property being charged. The appellant confirmed being aware his wife had sued the bank in Meru **ELC No. 11 of 2017**. He told the court they were in good relationship with the 3rd respondent though it had been strained by the bank loan. According to the appellant the process giving rise to the 2nd loan and eventual charge was illegal hence prayed for the prayers in the amended plaint since the suit was undefended. The witness was stood down for cross – examination by the 1st and 3rd respondents on 16.9.2019. In cross examination the appellant stated he had initially bought the suit land and caused it to be transferred to his wife though he did not have any such documents in his list of documents. He confirmed that he had an account with the 1st respondent; he only consented to the 1st loan of Kshs.600,000/= which was transferred to him as per the bank statement of the initial loan; he did not consent to the 2nd loan of 11.4.2013; he received Kshs. 660,000/= from the wife from her account which received the loan to purchase for her some goods but disputed that the proceeds were the loan as she had other monies in her account coming from her various businesses. The appellant denied that the loan was taken on his behalf and he was a guarantor. He maintained that unlike in the 1st loan, the 1st respondent did not summon him to sign any documentation in support of that loan.

4. In re-examination, the appellant maintained he was not privy to the loan, the 3rd respondent had a textile shop, a grocery, a cafeteria shop and a matatu plying Meru- Nairobi route hence she had enough money and should not have taken the loan and in any event she had not informed him of her intention to take up a second loan. Further the appellant told the court his parents lived on the suit land and that he had a letter of offer given to the 3rd respondent and a statement stipulating the mode of payment. The appellant closed his case. There was no

defence offered by the respondents but written submissions were duly filed.

5. By submissions dated 25.9.2019 the appellant set out issues for determination as follows: if the plaintiff and 3rd defendant were a couple; if 3rd defendant is the registered owner of the suit land. If there was a charge created and registered in favour of 1st respondent; if the suit land is a family land; if spousal consent was given before the charge was created; whether and if no consent was given can the charge be reopened and declared a nullity abinitio.

6. On **issue No. 1** a marriage certificate was produced together with a copy of the title deed. Therefore it was the appellant's submissions that such property could not be dealt with without consent of the spouse.

7. On **issue No. 2** the appellant produced P. Exhibit 6, which showed the loan was repaid by 26.3.2013 hence the title ought to have been discharged and according to him and as per P. Exhibit 1, there was no second charge registered for the alleged loan hence there was need for discharge on account of repayment of the 1st loan. Further it was submitted that keeping the charge after loan repayment and without a second charge the same was illegal. The appellant relied on **Section 79 (3) of the Land Act, Section 93 (3) (4) of the Land Registration Act** to void the process.

8. Regarding **issue No. 3** it was the appellant's submission that since there was no charge registered for the alleged second loan with a fully lawfully obtained spousal consent, and given the 1st loan had been repaid in full, this was against **Section 57 (3) of the land Registration Act** hence the court must step in and void the same.

9. Lastly the appellant submitted since there were no defences filed against his claim, or any evidence in rebuttal his claim ought to be allowed. He buttressed his submissions with the *Esther Njeri Mwangi vs Equity Bank Ltd and another (2017) eKLR, Edith Nyambura Mwenjera vs Symon Mwanjera Ndara and 2 others 2014; Susan Anna Karauda vs Lenon Towers Ltd (2014) eKLR; Goerge Mahugu Wanjira vs Joseph Mwongeri (2018) eKLR.*

10. The 1st and 2nd respondents made submissions dated 9th October 2019 admitting there was no defence on record and had called no evidence. They took the view that two issues for determination were; whether the charge created over the suit property was contra-statute for lack of spousal consent and secondly if the applicant had proved his case to warrant issuance of the orders sought.

11. Regarding the 1st issue the 1st and 2nd respondent submitted the applicable law was **Sections 79 (1) (22) and (3) of the land Act and Section 57 (2) of the Land Registration Act 2012.**

12. The 1st and 2nd respondents submitted that since the appellant had submitted knowledge of the 1st loan of 2012 he could not deny existence of the second facility since a day after disbursement he was sent Kshs.660,000 by 3rd respondent. Similarly the 1st respondent submitted the appellant in cross examination gave no satisfactory explanation to the contrary about what and where this colossal amount came from if not the loan facility advanced a day before, hence he was merely being mischievous and dishonest in denying the 1st respondent recovery of the advanced loan on account of the 3rd respondent's default in repayment.

13. The 1st and 2nd respondents urged the court to invoke the doctrine of estoppel against the appellant for he enjoyed the benefit of the loan and cannot therefore seek to have it invalidated.

14. On whether the appellant had proved his case to deserve the prayers sought the 1st and 2nd respondents submitted the appellant had failed to discharge his burden of proof per **Sections 107 and 108 of the Evidence Act** especially on the fact of allegedly being unaware of the 2nd loan yet he was the main beneficiary of the loan facility hence concluded the suit disclosed no unknown cause of action.

15. The learned trial magistrate drew out the issues for determination as follows:

(a) Whether section 28 and 93 (3) of the Land Registration Act with regard to spousal consent provides a blanket cover to the appellant.

(b) Whether the appellant's consent which was required under the said section was obtained.

(c) Whether the 3rd respondent secretly had the charge over the land registered.

(d) Whether there are intervening circumstances with regard to conduct of the appellant and the 3rd respondent.

16. This being a first appeal it behooves this court to re-hear, review and re-appraise the entire pleadings, evidence tendered and re-assess whether the findings and decision thereof is grounded on facts and law bearing in mind that the trial court had benefit to listen to the witnesses. This is the holding in *Musele vs Mwechesi and another (2007) KLR.*

17. It is trite law that issues for determination flow from pleadings and a party is bound by his or her pleadings. Similarly it is trite law that a court can only determine issues as flowing from the pleadings which have been drawn by either the court or by the parties and or have arisen out of the evidence and left out by the parties so as to be determined by the court.

18. In the instant case, the learned trial court correctly and rightfully captured issues arising both from the pleadings as well as the evidence tendered. In accordance with the above principles it is my considered view that this appeal turns on the following issues:

(a) Whether or not the lower court established correctly the facts as pleaded by the parties.

(b) If the learned trial magistrate applied the applicable law to the facts in issue and if so reached the correct decision as per applicable.

Analysis and findings

19. The facts as pleaded by the appellant were that the property in issue belonged to the third respondent to which they took a loan initially in 2012, allowed their property to be charged, cleared the debt but did not cause the discharge of charge to be registered and collect the title deed from the 1st respondent. The appellant testified the 3rd respondent allegedly behind his back, and in conjunction with the 1st respondent caused a further facility to be extended in 2013 and which led to a further charge. According to his pleadings and evidence the appellant stated his beneficial interests were not taken into account by way of seeking and obtaining his spousal consent prior to the release of any funds and registration of the further charge. The appellant testified he acquired the suit property and subsequently transferred it to his wife, which it is their matrimonial home, on 30.7.2017 he discovered existence of the further charge and an impending auction hence rushed to court to forestall the auction sale.

20. It is no disputed that the 3rd respondent was granted a loan by the 1st respondent in 2012 and subsequently sought another facility in 2013. No party has availed, either the old or the new charge for the court to ascertain the exact terms and conditions of the same. Even if the charge or further charge was not available this court would have expected at the very least copies of the letter of offer. The trial court appears to have determined the issue as to whether the charge or further charge was executed with the knowledge or full consent of the appellant. Unfortunately there were no documentary evidence for which the court would base its findings on.

21. There was no specific pleadings on illegality or breach of the law on the part of the respondents. The appellant in his testimony did not give any specific details including dates, when the charge or further charge was executed and or registered. The only evidence he led was production of P. Exhibit 1. The said documents do not show if there was another charge. The appellant did not disclose how he came to know there was a further charge which he has based his evidence and pleadings on. He did not exhibit any complaint letter to the 1st respondent and or any correspondence for that matter in which it was confirmed there was a further charge. The onus and burden of proof is always on the party who wants the court to find in his or her favour concerning a certain fact or event.

22. It cannot be left to the court to speculate and or infer. The reason why this factual evidence in my considered view was material is that the new land laws came into operation on 2nd May 2012 almost the same time the 1st loan facility was extended. If at all the appellant acquired any spousal rights and for that matter beneficial interest over the suit land, this could only have been after 2nd May 2012.

23. Consequently if the charge to the first loan was made before the law came into effect and the loan was repaid fully my considered view is that the said charge could not be extended to cover the 2nd loan without involvement of the appellant. The appellant had to lay a firm basis for that, make clear pleadings and lead evidence to that effect including documentary evidence of existence of the second charge.

24. Though this claim is neither based on the **Matrimonial Property Act** nor **Order 38 of the Civil Procedure Rules**, to assert any trust as required by law, the appellant testified he is duly married to the 3rd respondent and that they reside and occupy the suit land as their matrimonial home.

25. **Section 93** of the Land Registration Act provides;

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses and all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act”.

26. **Section 2 of the Land Act** defines matrimonial home as any property that is owned or leased by one or both spouses and occupied by the spouses as their family home.

27. **Section 6 of the Matrimonial Property Act No. 49 of 2013** defines matrimonial property.... *“The matrimonial home or homes”.*

28. **Section 2 of the Land Act** defines matrimonial home as

“Any property that is owned or leased by one or both spouses and occupied by the spouses as their family home. The Matrimonial Property Act came into force on 16.1.2014. The charges are alleged to have happened in 2012 and 2013, though the appellant discovered the letter in 2017 when he came to court.

29. In **Mugo Muiru Investments Ltd vs EWB and 2 others (2017) eKLR** the court held thus

“Even before the Land Registration Act came into force on 2nd May 2012, the equitable beneficial interest of a spouse in a such matrimonial home occupied by such spouse was an overriding interest and therefore transfer of the title deed to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property.”

30. It did not matter in my view the second loan was transferred to the appellant. That may have been so but the bottom line is that the law

ought to have been followed to ensure that spousal consent was sought and obtained from the appellant. There must have been nexus between the 1st respondent, the third respondent and the appellant herein.

31. The 1st and 2nd respondents were given an opportunity to defend the suit. They did not do so. They did not equally call evidence other than cross examining the appellant herein and putting in written submissions.

32. The 1st and 2nd respondents did not defend the suit and clarify when the further charge was executed and registered.

33. The 1st and 2nd respondents preliminary objection dated 13th November 2017 alluded to **Meru High court ELC case No. 124 of 2016 Hellen Karinthoni vs Remu DTM Ltd & Viewline auctioneers** and admitted the appellant herein is the husband to the third respondent.

34. An order for inhibition was issued to which P. Exhibit 1 was displayed in that ELC case. The court however declined on 3.7.2019 to grant the respondents another opportunity to present their defence. Be that as it may be the appellant's testimony given the foregoing reasons remained unshaken. The learned trial magistrate therefore erred in law in finding that **Section 93(3)** did not define the mode of consent and inferring consent of the appellant and the 3rd respondent. As clearly demonstrated in these proceedings, the 3rd respondent did not participate in the proceedings.

35. There is no evidence that the court issued summons for her attendance and or that the appellant or the 1st and 2nd respondent were directed to serve her with hearing notices and she failed to attend upon service. The court nevertheless in the judgment at page 6, 7 & 8 went on to condemn her character without giving her an opportunity to be heard. Needless to say the court, if it indeed perused the said court file would have established the ELC court had indeed stopped the auction sale for non-compliance with the law.

36. Spousal consent ought to have been proved by the 1st and 3rd respondents and not through inference by the court of the character of the appellant and the third respondent. In absence of contrary evidence the learned trial magistrate erred in law and in fact in finding there was spousal consent by conduct of the appellant and the 3rd respondent through presumption.

37. Regarding the doctrine of equity vis a vis **Section 93 (3) of the Land Registration Act**, equity cannot defeat the law and should always come to the aid of law. It is not the other way round. There are clear legal rights given by the law stemming from **Article 45** of the **Constitution** that parties to a marriage have equal rights. The learned trial magistrate was clearly wrong in relying on equity in place of a clear stipulation of the law.

38. As to whether the charge could be re-opened **Section 105 and 106 of the Land Act** provides;

“The court may reopen a charge of whatever amount secured on a matrimonial home in the interests of doing justice between two parties”. This can be done on application by the chargor or chargee, or in there is prima facie evidence of unfair dealing or discrimination on account of their gender.

In re-opening the charge the court can direct the charge to be modified, repayment of loan be made, compensation be made and direct discrimination if any to cease”.

39. In considering whether to reopen the charge the court has to consider certain factors such as the age, gender, evidence and health of the chargor, his financial status, interest rates, risks involved and the importance of not undermining the confidence of reputable charges.

40. The evidence led by the appellant was clear the 1st respondent did not accord him an opportunity as a beneficial owner with regard to the 2nd charge. The evidence as said above was not challenged.

41. Failure to cause a spousal consent to be obtained cannot be a mere irregularity curable under **Article 159 of the Constitution** Justice is like the sword of Damacus which cuts both ways. The 1st respondent has an equal duty to do equity and act lawfully. It should not also circumvent the law. If the legislature intended spousal consent to be inferred through conduct it would have expressly stated so.

42. The appellant proved he had beneficial interest as a spouse to the third respondent, his interest were disregarded by the 1st and 2nd respondents. Despite an opportunity the 1st respondent has given no justification or explanation why the further charge did not require the spousal consent of the appellant yet the law required so.

43. I therefore come to the irresistible conclusion and finding that the learned trial magistrate erred and misconstrued both the facts and the law applicable. The lower court decision is hereby set aside and substituted with a finding that the appellant had proved his case to the required standard. The lower court case is hereby allowed. Costs for the appeal and the lower court are hereby awarded to the appellant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 13TH DAY OF OCTOBER, 2021 IN PRESENCE OF:

Mwirigi Kaburu holding brief for Mwititi for appellant

Miss Ngesa for respondents

Court Assistant: Kananu

HON. C.K. NZILI

ELC JUDGE