



Case Number:	Civil Application 1654 of 1984
Date Delivered:	11 Dec 1984
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Abdul Majid Cockar
Citation:	Muniu v Itotia [1984] eKLR
Advocates:	-
Case Summary:	<p><b>Muniu v Itotia</b></p> <p>High Court, at Nairobi December 11, 1984</p> <p>Cockar J</p> <p>Civil Application No 1654 of 1984</p> <p><b>Family law</b> - husband and wife - ownership of property – husband registered proprietor of premises - husband obtaining charge over premises - exercise of statutory power of sale by chargee over premises - wife’s claim of entitlement to half share of the premises held in trust by husband - whether wife’s occupation of and development of suit premises entitling her to claim of ownership and stoppage sale.</p> <p><b>Mortgages and Charges</b> - land - charge - chargee’s statutory power of sale - exercise of - land charged by husband without knowledge of wife - exercise of statutory power of sale by chargee - chargor’s wife claiming entitlement to part of the land held in trust by chargor - whether wife’s</p> <p>occupation of and development of suit premises entitling her to claim of ownership and stoppage of</p>

*sale-whether chargee was under obligation to inform chargor's wife of creation of charge.*

The first defendant was registered as the sole proprietor of the suit premises, against the title to which a charge in favour of the second defendant, a finance company, was registered to secure a loan of Kshs. 150,000 advanced by the second defendant to the first defendant. Owing to a failure in the repayment of the loan, the second defendant gave notice of demand the default of which led it to seek to exercise its statutory power of sale by auction of the suit premises.

On the day before the advertised date of sale, the plaintiff, who was the wife of the first defendant, applied *ex parte* by way of originating summons for a declaration that the first defendant held a half share of the suit premises in trust for her. On the same day, the plaintiff obtained, by way of chamber summons, an *ex parte* injunction restraining the second defendant from proceeding with the sale.

The chamber summons application came up for hearing *inter partes*. The plaintiff supported her claim of ownership of half share of the suit premises with an affidavit stating, among other things, that she had contributed half the purchase price but it had been agreed that the suit premises would be registered only in the name of the first defendant, her husband; that she had since been in occupation of the premises; that she had personally developed the premises; that she had no knowledge of the charge over the premises and she had not consented to it and, finally, the second defendant had not made any enquiries about her occupation of the suit premises.

**Held:**

1. The plaintiff's bare allegation in the affidavit of co-ownership of the suit premises was unacceptable as *prima facie* evidence of that claim and there was no evidence given to support it. There was no document such as a salary slip or a savings account abstract to lend credibility to the allegation that the plaintiff had contributed half of the purchase price.

	<p>2. The plaintiff's occupation, her work and labour in the alleged developments were as a result of her being a member of the first defendant's family. An occupation of such a nature did not give rise to ownership over her husband's (the first defendant's) property.</p> <p>3. Under normal circumstances, it is reasonable for a lender to presume that only members of the family of the registered owner would be residing and working on the property involved in the transaction and if the courts were to start paying heed to such considerations which have no legal basis then the right of a registered owner to raise a loan on the security of his immovable property would be undermined.</p> <p>4. As the second defendant had ascertained the first defendant's ownership of the premises and that it was free from encumbrances, obtained the consent of the Land Control Board to the transaction and otherwise complied with the requirements of the Registered Land Act (cap 300), was under no obligation to inform any other party of the intended advance of the loan under the charge.</p> <p>5. The plaintiff's chamber summons application was completely devoid of merit.</p> <p><i>Plaintiff's application dismissed.</i></p> <p><b>Cases</b></p> <p>No cases referred to.</p> <p><b>Statutes</b></p> <p>1. Registered Land Act (cap 300)</p> <p>2. Civil Procedure Rules (cap 21 Sub Leg) order XXXIX rules 1, 2</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-

Case Outcome:	Plaintiff's application dismissed.
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.	

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPLICATION NO. 1654 OF 1984**

**MUNIU.....PLAINTIFF**

**VERSUS**

**ITOTIA.....DEFENDANT**

**RULING**

Briefly the facts are that the suit premises are registered in the name of the first defendant as the sole proprietor thereof. On December 12, 1982 a charge in favour of the second defendants was registered against the title of the suit premises to secure a loan of Kshs 150,000 advanced by the Finance Co to the first defendants. Prior to the registration of the said charge, Land Control Board's consent to the said transaction was duly obtained. On November 26, 1983 the Finance Co that is the second defendants, duly gave notice of demand which was not complied with and the second defendants proceeded to exercise their statutory right to sell the suit premises in order to recover the unpaid loan. The suit premises were advertised for sale by auction on June 16, 1984 in *Kenya Times* dated May 30, 1984.

On June 15, 1984 the plaintiff, who is the wife of the borrower and the registered owner of the suit premises, that is the first defendant, applied *ex parte* by way of originating summons for, *inter alia*, a declaration that the first defendant is holding half share in the suit premises in trust for the plaintiff. On the same day she obtained an *ex parte* injunction order restraining the second defendants from proceeding with the sale of the suit premises. The chamber summons application through which the above *ex parte* order was obtained was for some reasons never heard *inter partes*, until on November 16, 1984 the second defendants' advocates applied under a certificate of urgency for it to be heard *inter partes* and the same was then heard *inter partes* on November 27, 1984.

Coming now to the plaintiff's claim of being owner of half share in the suit premises, she has based the same on the following grounds as stated in her affidavit accompanying the application:

1. That in 1967, at the time of the purchase of the suit premises, she had contributed half the purchase price but it was agreed that the suit premises would be registered in the name of the husband, the first defendant, only.

2. That since then she had been in occupation of the suit premises.

3. That she had personally brought about the development of the suit premises including 13,000 tea plants, 3 grade cows, wattle and blue gum trees, vegetables etc, and a semi permanent house.

4. That she had no information about the suit premises being charged by the first defendant to secure a loan, nor had she given consent thereto.

5. That the second defendant never made any inquiries about her occupation of the suit premises.

As regards the first ground, the affidavit of the plaintiff is completely lacking in any evidence supporting the claim that the plaintiff had contributed half the purchase price. From where did the plaintiff get that money" Was she employed or had she inherited that money" There is not a single document such as a salary slip or a savings account abstract or any other such evidence to lend credibility to the allegation that the plaintiff had contributed half the purchase price. There is not even an affidavit from the husband that is the first defendant, to support the said claim of the plaintiff. No court with interests of justice at heart will accept such a bare allegation as *prima facie* evidence of the claim of co-ownership through purchase that is alleged in the affidavit. I am not in the least impressed by this bare allegation that the plaintiff had contributed half the purchase price and reject it.

In view of the above finding, there is no merit in ground 2, 3 and 5 enumerated above. The plaintiff's occupation and her work and labour in the alleged developments were as a result of her being a member of the first defendant's family. An occupation of such a nature does not give rise to an ownership over the husband's property. Under normal circumstances it is reasonable for a lender to presume that only members of the family of the registered owner would be residing and working on the immovable property involved in the transaction. If the courts were to start paying heed to such considerations which have no legal basis then that will be the beginning of the end of the right of a registered owner to be ever able to raise a loan on the security of his immovable property.

As to the 4th ground that the plaintiff had no information about the first defendant raising a loan on the security of the suit premises the second defendants are not in any way concerned with that. The second defendants had ascertained that the first defendant was the registered owner of the suit premises and that the same was free from any encumbrances. Consent of the Land Control Board had also been obtained. Having complied with the requirements of the Registered Land Act (cap 300), the second defendants were under no obligation to inform any other party of the intended advance of the loan on the security of the suit premises under a charge.

The chamber summons application dated June 15, 1984 under order XXXIX rules 1 and 2 is absolutely devoid of any merit and is dismissed. Costs of this application and all costs incurred in the aborted sale by auction scheduled for June 16, 1984 are awarded against the plaintiff and the first defendants jointly and severally.

**Dated and Delivered at Nairobi this 11<sup>th</sup> day of December, 1984**

**A.M. COCKAR**

.....

**JUDGE**



While the design, structure and metadata of the Case Search database are licensed by [Kenya Law](#) under a [Creative Commons Attribution-ShareAlike 4.0 International](#), the texts of the judicial opinions contained in it are in the [public domain](#) and are free from any copyright restrictions. Read our [Privacy Policy](#) | [Disclaimer](#)