REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 32 OF 2018

(Formerly Eldoret ELC No. 75 of 2013)

FIDELIS MUSIKO OKONGA.....PLAINTIFF

VERSUS

RONALD INYANGALA.....1ST DEFENDANT

BETTY MUGANDA.....2ND DEFENDANT

EVALYNE INYANGALA.....3RD DEFENDANT

BARCLAYS BANK OF KENYA LIMITED.....4TH DEFENDANT

JUDGMENT

[1] This suit was instituted by the Plaintiff, **Fidelis Musiko Okonga,** vide his Plaint dated **27 October 2005.** His contention was that, in or about the month of **April 1997**, the 1st Defendant, who at all times material to this suit was the Managing Director of **Viva Pharmaceuticals Ltd,** approached him in the company of a manager of the 4th Defendant with a request to furnish a guarantee in favour of **Viva Pharmaceuticals Ltd** (hereinafter, the Company). Thus, it was his case that he was asked to avil his title deed for a loan, which the 4th Defendant was ready and willing to give to the Company.

[2] At paragraphs 7 and 8 of the Plaint, the Plaintiff mentioned that the foregoing arrangement was on the understanding that the 4th Defendant would, in turn, give him a loan for a startup after his retirement. He further averred that the meeting took place at the Railway Club; and that he did not have any knowledge of the consequences or implications of surrendering his title deed to the 4th Defendant's Eldoret Branch Manager. It was further his assertion that the said manager prevailed upon him to sign some documents whose contents were not explained to him. He explained that the title deed was in respect of his property in Eldoret Town, known as **Eldoret Municipality/Block 5/428** (hereinafter, **the suit property**).

[3] The Plaintiff further averred that, on or about **2 August 1997**, about three months after he presented his withdrawal of the guarantee to the 4th Defendant, the 4th Defendant gave a **Kshs. 300,000/=** loan to the 1st, 2nd and 3rd Defendants' company, **Viva Pharmaceuticals Ltd**, in spite of his protests; and that it was not until **September 2002** that he was informed by his tenant**, Joseph M. Thubuku**, that he had been evicted by an employee of the 4th Defendant, one **Charles Kinyanjui**, who claimed to have purchased the property at a public auction. He added that he was so shocked by this development that he suffered a stroke, as this was the only property he had invested in for his retirement. He added that he had no hopes of buying another house as he had already retired.

[4] It was the assertion of the Plaintiff that the Company was in operation for only two years; and that by **2000** it had already folded up; and two of its directors, the 2nd and 3rd Defendants, had already left the country. He therefore averred that the 1st, 2nd and 3rd Defendants had a fraudulent intent in obtaining a loan from the 4th Defendant. For these reasons, he asked for the lifting of the corporate veil with a view of holding the three directors personally liable to him for his loss, in respect of which he contended that the sale of the suit property was unlawful, and therefore a nullity. Accordingly, the Plaintiff prayed for:

[a] Mesne profits in respect of the residential premises on land parcel number **Eldoret Municipality Block 5/428** from **1 September 2002** to the date of Judgment or date of possession;

[b] A declaration that the Guarantee instrument between him and the 4th Defendant on behalf of **Viva Pharmaceuticals Ltd** is null and void for lack of proper execution and authentication.

[c] That the corporate veil for **Viva Pharmaceuticals Ltd** be lifted and that the 1st, 2nd and 3rd Defendants be ordered to clear the loan advanced to the Company by the 4th Defendant; and that the security furnished by the Plaintiff be accordingly discharged.

[d] Costs of the suit

[e] Interest on (a) and (d) above.

[5] Contemporaneously, the Plaintiff filed an application dated **27 October 2005** along with his Plaint seeking, inter alia, that:

[a] That the corporate veil of **Viva Pharmaceuticals Ltd** be lifted and the 1st, 2nd and 3rd Defendants be held jointly and/or severally liable for the loan taken by the said Company from the 4th Defendant;

[b] That the 4th Defendant, its agents or servants be restrained by way of temporary injunction from selling, transferring, collecting rent, wasting, damaging or in any other way dealing with the Plaintiff's leasehold property known as **Eldoret Municipality Block 5/428** pending the *inter partes* hearing of the application and thereafter pending the hearing and determination of the suit;

[c] That the Court be pleased to make an order of inhibition inhibiting the registration of any dealing in respect of the Plaintiff's leasehold property known as **Eldoret Municipality Block 5/428** pending the hearing and final determination of the suit;

[d] That an order do issue requiring the 4th Defendant to discharge the Plaintiff from any obligations concerning **Viva Pharmaceuticals Ltd**; and that the 1st, 2nd and 3rd Defendants be held liable for the loan taken by the said Company;

[e] That the Defendants be condemned to pay the costs of the application.

[6] Going by the court record, it appears that the aforementioned application was never prosecuted; and that the *ex parte* orders given on **31 July 2006** were ultimately discharged on **31 October 2007**. By that time the Defendants had filed their respective Statements of Defence in opposition to the Plaintiff's suit. In their Defence dated **23 December 2005**, the 1st, 2nd and 3rd Defendants denied the Plaintiff's averments and put him to strict proof thereof. In particular, the 1st Defendant denied having exerted any pressure on the Plaintiff in cahoots with the 4th Defendant; or that he made any misrepresentations to the Plaintiff with a view of defrauding him. He asserted that the Plaintiff was at liberty to engage a lawyer to authenticate, attest and verify the facts and advise him on the transaction before execution of the Guarantee.

[7] It was further the averment of the 1st Defendant that if ever **Viva Pharmaceuticals Ltd** existed and was wound up, it was done legally and the Plaintiff ought to have lodged his claim to the liquidator. According to him, the loan was obtained in good faith by a legal entity that is distinct and separate from its directors and agents; and therefore the Plaintiff had no valid reasons for seeking the lifting of the corporate veil. Hence, it was the prayer of the 1st Defendant, on behalf of the 2nd and 3rd Defendants, that the Plaintiff's suit against them be dismissed with costs.

[8] The 4th Defendant's Defence was filed on **16 May 2006** by **M/s Waruhiu K'owade and Ng'ang'a,** and their stance was that the Plaintiff executed the Charge as well as the Guarantee and Indemnity voluntarily without any coercion, promise or misrepresentation of any kind from the 4th Defendant. It was further the contention of the 4th Defendant that the Charge was executed before **Mr. Jones Nyachiro**, **Advocate**, while the instrument of Guarantee and Indemnity was signed by the Plaintiff before **Mr. Simon C. Lilan, Advocate**; and therefore that, on both occasions the Plaintiff had the benefit of legal advice to ensure he understood the nature and purport of the documents before signing them. It was further the assertion of the 4th Defendant that the effects of **Section 74** of the **Registered Land Act, Chapter 300** of the **Laws of Kenya** were therefore brought to the attention of the Plaintiff.

[9] Thus, the 4th Defendant denied the allegations of misrepresentation and fraud set out at paragraph 10(a) to (g) of the Plaint. It also denied that any withdrawal of the Guarantee was ever made by the Plaintiff or brought to its attention. It asserted that it was therefore entitled to exercise its statutory power of sale as it did and that in so doing, it complied with all the requirements of the applicable law. It pointed out in paragraph 15 of its Defence that the Plaintiff was duly notified of the sale and that this was conceded in paragraph 19 of the Plaint. In the premises, the 4th Defendant likewise prayed for the dismissal of the Plaintiff's suit with costs.

[10] A perusal of the court record reveals that there were two applications for amendment of the Plaint, dated **14 November 2007** and **19 December 2014**, but evidently filed on **18 December 2014**. In the first application, the Plaintiff sought to, *inter alia*, enjoin **Viva Pharmaceuticals Ltd** and **Wilfred Watunu Mwangi** as the 5th and 6th Defendants, and to supply the particulars of fraud alleged by him. Apparently, that application was never prosecuted to conclusion; and therefore, in its ruling dated **2 October 2015**, the Court (**Hon. Ombwayo, J.)** made the following finding of fact, as borne out of the court record:

"…This court observes that the application dated 14.11.2007 was withdrawn on the 18.12.2014 and therefore the argument by the defendant that the plaintiff was granted leave by the court on 31.10.2007 to amend his pleadings within 14 days appears to be misplaced. I have perused the court file and have not seen this order. I do find as a fact that the application dated 14.11.2007 was never prosecuted but was withdrawn on 18.12.2014…"

[11] And with that, the Court proceeded to allow the second application for amendment of Plaint filed on **18.12.2014**. The Amended Plaint

was then filed on the **15 October 2015**, whose purpose, as expressed on the face thereof, was to clarify the real issues in controversy between the parties. The salient features of the Amended Plaint include the averment in paragraph 16 thereof, that the value of the suit property was **Kshs. 1,200,000/=** as at **12 September 2002**. In terms of relief, the Plaintiff abandoned his prayer for mesne profits and the lifting of the corporate veil of **Viva Pharmaceuticals Ltd** for the following reliefs:

> **[a]** A declaration that no valid guarantee contract was concluded in favour of the 4th Defendant, that the charge is a nullity and of no consequence and that the sale of the property known as **Eldoret Municipality/Block 5/428** is a nullity;
>
> **[b]** In the alternative, and without prejudice to the foregoing, damages for the loss of property by the unlawful sale of the land parcel known as **Eldoret Municipality/Block 5/428** in the sum of **Kshs. 1,200,000/=** as of **12 September 2002** together with interest until payment in full;
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> **[c]** Costs of the suit;
>
> **[d]** Interest.

[12] The court record shows that only the 4th Defendant reacted to the Amended Plaint and filed its Amended Defence on **30 October 2015**. It denied the Plaintiff's averment that the sale of the suit property was unlawfully done and put the Plaintiff to strict proof thereof. It reiterated its contention that all the requisite statutory notices were duly served and that the Plaintiff was kept fully aware of the sale process as required by law. Thus, the 4th Defendant denied that the Plaintiff is entitled to the declaration or order for damages sought.

[13] In support of his case, the Plaintiff testified on **26 March 2019** as **PW1**. He adopted his witness statement dated **28 July 2014** and produced his List and Bundle of Documents herein as the **Plaintiff's Exhibit No. 1.** He told the Court that, at all times material to this suit, he was the registered proprietor of all that piece of land known as **Eldoret Municipality/Block 5/428;** and that on the property there was a permanent house which he had rented out to a tenant for a monthly income of **Kshs. 5,000/=.** It was the testimony of **PW1** that the 1st, 2nd and 3rd Defendants fraudulently tricked him into signing a guarantee agreement for a loan from the 4th Defendant. He was resolute that he never appeared before any Advocate for the purpose of being told the consequences of his signing the subject documents; and therefore that he was not aware that he was signing a guarantee contract or a charge instrument in respect of the suit property.

[14] It was further the evidence of the Plaintiff that he was never served with a statutory notice as by law required; and that whereas his postal address was P.O. Box 289, Turbo, the notices that were purportedly served on him by the 4th Defendant were addressed to P.O. Box 289, Eldoret. On that account he prayed for the sale to be declared a nullity; or in the alternative, he be compensated in damages for the value of property at the time of sale. The Plaintiff made specific reference to a copy of the Search Certificate, Memorandum of Sale, a Valuation Report and Lease Agreement that he relied on in support of his case. He also produced a letter from the Post Master of the Postal Corporation of Kenya, Eldoret to demonstrate that Post Office Box No. 289 Eldoret was not rented by him. These documents were accordingly marked as **the Plaintiff's Exhibits 1 to 5** herein.

[15] The 1st Defendant testified on **18 September 2019** as **DW1**. He did so on his own behalf and on behalf of the 2nd and 3rd Defendant. He conceded that they were co-directors of **Viva Pharmaceuticals Ltd** with the 2nd and 3rd Defendants who are his wives; and that the Plaintiff is his uncle. He relied on and adopted his witness statement which was filed herein on **28 January 2019**, as part of his evidence in chief. His testimony was that the Plaintiff willingly and voluntarily agreed to offer his title deed for land parcel number **Eldoret Municipality/Block 5/428** as collateral to guarantee a loan for **Kshs. 300,000/=** to **Viva Pharmaceuticals Ltd**; and that the title was consequently charged to the 4th Defendant.

[16] DW1 further told the Court that it was the duty of the Plaintiff and the 4th Defendant's advocate to verify the authenticity of the transaction and the documents related thereto. He added that, if indeed the transaction took place at the Railway Club then the circumstances under which the transaction was conducted are not binding because the Plaintiff was under the influence of alcohol and had no capacity to contract. He added that **Viva Pharmaceuticals Ltd**, being a limited liability company, is a separate entity for which the directors cannot be held personally liable. He accordingly urged for the dismissal of the Plaintiff's suit.

[17] On behalf of the 4th Defendant, **Mr. Samuel Njuguna (DW3),** its Legal Recoveries Officer, testified on **18 September 2019.** He, likewise, adopted his witness statement dated **23 March 2017** and produced, in support thereof, the List and Bundle of Documents marked as **the 4th Defendant's Exhibit No. 1**. He confirmed that, by a Charge dated **15 May 1997,** the Plaintiff secured the suit property in favour of the 4th Defendant in consideration of the 4th Defendant advancing a loan in the sum of **Kshs. 300,000/=** to **M/s Viva Pharmaceuticals Ltd**; and that the said Charge was executed by the Plaintiff before **Mr. Jones Nyachiro, Advocate,** voluntarily and without any coercion, pressure, persuasion or trickery of any kind on the part of the 4th Defendant.

[18] DW2 further testified that the Deed of Guarantee and Indemnity was also signed by the Plaintiff before **Mr. Simon C. Lilan**, **Advocate**, as further security; and added that, had there been any coercion and trickery as alleged, the Plaintiff would have done something about it during the period between **July 1999** and **September 2002,** when the suit property was sold. **DW2** also mentioned that, it was upon persistent default by the Borrower that the 4th Defendant resorted to exercising its statutory power of sale. According to him, the 4th Defendant complied with all the applicable stipulations of the law prior to the sale of the suit property by public auction. He drew the Court's attention to the notices that form a substantial part of the 4th Defendant's Bundle of Documents (at pages 6 to 24 thereof) to support the assertion that the 4th Defendant acted lawfully and within the confines of the law in realizing the securities.

[19] By way of closing submissions, Counsel for the Plaintiff pointed to **Section 74** of the repealed **Registered Land Act** as the provision guiding the exercise of the statutory power of sale at the time; and therefore that it was incumbent upon the 4th Defendant to demonstrate default on the part of the Borrower. He urged the Court to find, upon perusing the 4th Defendant's letter dated **26 June 2000** that the same

was written in utter disregard of **Clause 23** of the Charge; and therefore that it did not constitute a valid notice. Counsel further impugned the purported service of the notice contending that it fell short of the requirements of **Section 153** of the **Registered Land Act** in so far as no evidence of postage was availed by the 4th Defendant. Counsel relied on **Nyagilo Ochieng & Antoher vs. Fanuel B. Ochieng & 2 Others** [1996] eKLR and **D. N. M. vs. M. K. & 4 Others** [2014] eKLR to support this argument.

[20] The other arguments made by Counsel for the Plaintiff targeted the content of the notices and whether the Redemption Notice was issued by a licenced auctioneer for purposes of **Section 77(1)** of the **Registered Land Act** and **Rule 15** of the **Auctioneers Rules, 1997**. Counsel also urged the Court to find that the absence of a current valuation report before sale was indicative of bad faith and therefore a contravention of **Section 77(1)** of the **Registered Land Act**. The cases of **Harrischa Bhovanbhai Jobanputra & Another vs. Paramount Universal Bank Ltd & 3 Others** [2011] eKLR and **Susan K. Baur & Another vs. Shashikant Shamji Shah & 2 Others** [2017] eKLR were cited to buttress these arguments.

[21] On behalf of the 1st, 2nd and 3rd Defendants, **Mr. Soita** relied on his written submissions dated **19 November 2019** wherein he proposed the following issues for determination:

[a] Whether the Plaintiff has established a lawful ground to lift the corporate veil;

[b] Whether the Plaintiff willingly consented to having his title number **Eldoret Municipality/Block 5/428** charged to guarantee a loan to **Viva Pharmaceuticals Ltd;**

[c] Whether the Plaintiff was accorded legal advice during the execution process of the Charge and the Deed of Guarantee; and,

[d] Whether the process of sale was procedural.

[22] Counsel for the 1st, 2nd and 3rd Defendants urged the Court to note that the Plaintiff conceded in cross-examination that he willingly gave his title deed as security for a loan of **Kshs. 300,000/=** to **Viva Pharmaceuticals Ltd**, an entity that is not a party this suit, yet it is a cardinal rule that a company is a separate legal person and is distinct from its members. He further submitted that no attempt was made by the Plaintiff to make a case for the lifting of the corporate veil of **Viva Pharmaceuticals Ltd**. In this regard, Counsel cited **Standard Chartered Bank Kenya limited vs. Intercom Services Ltd & 4 Others** [2004] 2 KLR 183 and **Michael Kyambati vs. Principal Magistrate, Milimani Commercial Courts, Nairobi & Another** [2016] eKLR as to the circumstances in which the corporate veil can be lifted, and to demonstrate that none of those circumstances are applicable to the facts herein.

[23] As to whether the Plaintiff was accorded legal advice, **Mr. Mogambi** relied on the security documents, namely the Charge and the Deed of Guarantee which on the face thereof show that they were executed before an Advocate and that the implications of **Section 74** of the **Registered Land Act** were duly explained to the Plaintiff. He relied on **Coast Brick & Tiles Ltd & Others vs. Premchand Raichand Ltd** [1966] EA 154 and **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] eKLR in urging the Court to find that validity of the security instruments is unquestionable. As to the propriety of the sale, Counsel relied on the documentation exhibited by the Defendants and submitted that there was full compliance with the applicable procedure; and that the notices were issued to and served at the addresses given by the Borrower and the Plaintiff as the Chargor.

[24] On his part, **Mr. Thiga** for the 4th Defendant proposed the following issues for determination:

[a] Whether the Charge in respect of **Eldoret Municipality/Block 5/428** and the Deed of Guarantee were validly executed by the Plaintiff;

[b] Whether or not the 4th Defendant complied with the laid down procedure in having the suit property sold by way of public auction;

[c] Whether there was any fraudulent dealing(s) in the whole transaction;

[d] Whether the Plaintiff is entitled to the remedies sought; and

[e] What order should be made as to costs.

[25] **Mr. Thiga** relied on **Levison vs. Patent Steam Carpet Cleaning Co. Ltd** [1977] 3 AllER 498 for the proposition that a party of full age and understanding is normally bound by his signature whether or not he read the document; and urged the Court to note that the Plaintiff did not deny that he signed the security documents. He submitted that the Plaintiff was unable to independently confirm that the documents were signed at the Railways Club, as opposed to the offices of the respective lawyers, **Mr. Jones Nyachiro** and **Mr. Simon C. Lilan**. He relied on **Mbuthia Macharia vs. Annah Mutua Ndwiga & Another** [2017] eKLR to demonstrate that the legal burden was on the Plaintiff to prove his assertions.

[26] Counsel further submitted that it is now trite that a party with a genuine and valid basis for challenging the validity of a security instrument is under obligation to do so as soon as possible, and not years after having enjoyed the fruits of the security. He cited the cases of **Al-Jalal Enterprises Ltd vs. Gulf Bank Ltd** [2014] eKLR and **King'orani Investments Co. Ltd vs. Kenya Commercial Bank Ltd & Another** [2007] eKLR. Furthermore, it was the contention of the 4th Defendant that this is not a case in which the defence of *non est factum* would apply, as the Plaintiff did not say what he intended to sign in place of the Charge and the Deed of Guarantee.

[27] On whether or not the 4th Defendant complied with the laid down procedure in realizing the securities, Counsel for the 4th Defendant

posited that sufficient material has been placed before the Court to prove that the relevant notices were supplied to the Plaintiff through his correct address, namely Post Office Box No. 289 Eldoret, as this was the address given in the Charge Instrument. Likewise, Counsel took the posturing that the Plaintiff's allegations of fraud were not proved to the requisite standard; and therefore that the Plaintiff is not entitled to the remedies sought.

[28] Having given careful thought to the pleadings, the evidence adduced herein by the parties and the written submissions filed by their Advocates, there is no dispute that the Plaintiff was the registered proprietor of all that piece of land known as **Eldoret Municipality/Block 5/428;** or that on the property there was a permanent house which he had rented out to a tenant for a monthly income of **Kshs. 5,000/=.** The parties are also in agreement that the 1st, 2nd and 3rd Defendants were at all times material to this suit, the directors of **Viva Pharmaceuticals Ltd**; and that the Company had approached the 4th Defendant for a loan in the sum of **Kshs. 300,000/=;** to which end, the 1st Defendant requested the Plaintiff to furnish the requisite guarantee, which would see his land parcel number **Eldoret Municipality/Block 5/428**, charged in favour of the 4th Defendant as security for the borrowing.

[29] A copy of the Charge, dated **15 May 1997**, was produced at pages 1 and 2 of the 4th Defendant's Bundle of Documents. The Deed of Guarantee and Indemnity, was also exhibited by the 4th Defendant at pages 3 to 5 of its Bundle of Documents. There is no dispute that the Plaintiff signed the Charge as the charger; as well as the Deed of Guarantee and Indemnity as one of the Guarantors to **Viva Pharmaceuticals Ltd;** or that the loan was disbursed to the Company. The 1st Defendant expressly conceded, and he did so on behalf of the 2nd and 3rd Defendants as well, that the Company was unable to satisfactorily service the loan; and therefore there is no controversy that it was on that account that the 4th Defendant caused the suit property to be sold at a public auction, conducted on **12 September 2002** by **Rowama Enterprises.** The property was knocked down to **Wilfred Watunu Mwangi** for **Kshs. 300,000/=**. The Memorandum of Sale to that effect was produced by the Plaintiff and marked the **Plaintiff's Exhibit 2** herein.

[30] In the premises, and granted the contention by the Plaintiff that the nature and implication of the security documents were not explained or made known to him, and therefore that the 1st, 2nd and 3rd Defendants fraudulently tricked him into signing a guarantee agreement for a loan from the 4th Defendant, one of the two issues that arise for determination herein is the question whether the Plaintiff **willingly consented** to having his title number **Eldoret Municipality/Block 5/428** charged to guarantee a loan to **Viva Pharmaceuticals Ltd.** The Plaintiff also challenged the sale process and raised questions as to compliance with **Section 74** of the **Registered Land Act** that was the applicable law at the time. His assertion was that he never appeared before any Advocate for the purpose of being told the consequences of his signing the subject documents; and therefore that he was not aware that he was signing a guarantee contract or a charge instrument in respect of the suit property. Hence, the second issue is whether the 4th Defendant complied with the laid down procedure when it sold the suit property. The answers to the foregoing questions will, naturally, determine whether the Plaintiff is entitled to the remedies sought; and who is entitled to costs.

[a] <u>On whether the Plaintiff knowingly and willingly signed the Charge and the Deed of Guarantee and Indemnity</u>:

[31] It was recognized in **Section 65(1)** of the **Registered Land Act** (now repealed) that:

> "**A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal."**

[32] Section 74 of the **Registered Land Act** on the other hand provided that:

> **(1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.**
>
> **(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the chargee may –**
>
> **(a) appoint a receiver of the income of the charged property; or**
>
> **(b) sell the charged property:**
>
> **Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.**

[33] As was correctly pointed out by counsel for the 4th Defendant, the general rule is that a party of full age and understanding is bound by his signature to a document, whether or not he reads it before appending his signature thereon. (See **<u>Levison vs. Patent Steam Carpet Cleaning Co Ltd</u> [1977] 3 All ER 498).** The evidence adduced herein does show that the Charge dated **15 May 1997** was signed by the Plaintiff as the Chargor on the same date of **15 May 1997** in the presence of **Mr. Jones Nyachiro**, **Advocate**. The document further shows that the Plaintiff freely and voluntarily executed the instrument and that he understood the contents thereof. More importantly, the document has a declaration therein to the effect the Plaintiff, as the Chargor, understood the effect of **Section 74** of the **Registered Land Act**. Similarly, the Deed of Guarantee and Indemnity shows that the said document was signed by the Guarantors, the Plaintiff included, in the presence of **Mr. Simon C. Lilan**, **Advocate**, on **27 May 1997.**

[34] In the premises, the contention by the Plaintiff that he signed the documents at the Railways Club without knowing the exact nature or the implications thereof cannot stand muster. Nothing prevented the Plaintiff from seeking and obtaining independent legal advice on the subject documents before appending his signature thereto. In this regard, I find the expressions of **Hon. Kwach, JA** in **the Mrao Ltd Case** (supra) pertinent. He was of the view that:

> **"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal…"**

[35] Secondly, the Plaintiff did not state the date when he allegedly signed the documents at Railways Club. He likewise did not avail any evidence to corroborate his assertions in this regard. While avowing that he did not know he was signing a Charge and a Guarantee, the Plaintiff utterly failed to explain the exact nature of the documents he willingly appended his signature to. Thus, the plea of *non est factum* cannot avail the Plaintiff in the circumstances. It is instructive that in **Halsbury's Laws of England, Fourth Edition, Vol. 9(1),** it was opined thus in respect of the doctrine of *non est factum*:

> **"The ancient common law defense of *non est factum* originally appeared as a defense by one who could not read (whether through blindness or illiteracy) to a claim based on a promise made under seal; but, by the nineteenth century, it had been extended to persons who could read and to all kinds of signed contracts. The basis of the defense is that the signatory is mistaken as to the nature of the transaction. Now the general rule is that a person is estopped by his signature thereon from denying his consent to be bound by the provision contained in that deed or other agreement. Where, however, the plea of *non est factum* is available, the promises contained in the document are completely void as against the signatory entitled to plead the defense, no matter into whose hands the documents may come. The reason is said to be that the mind of the signatory did not accompany his signature, so that the mistake renders his consent, as represented by his signature, a complete nullity. In most cases in which *non est factum* has been successfully pleaded, the mistake has been induced by fraud; but the presence of fraud is probably not a necessary factor."**

[36] Hence, **in Saunders vs. Anglia Building Society**, which was cited with approval in **Jospehine Mwikali Kikenye vs. Omar Abdalla Kombo & Another** [2018] eKLR, the view was expressed thus with regard to the plea of *non est factum*:

> **"…a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, i.e. more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used— "basically" or "radically" or "fundamentally" … To this general test it is necessary to add certain amplifications. First, there is the case of fraud. The law as to this is best stated in the words of the judgment in Foster v Mackinnon (1869) LR 4 CP 704 at 711 where it is said that a signature obtained by fraud:**
>
> **"… is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended."**
>
> **In other words, it is the lack of consent that matters, not the means by which this result was brought about. Fraud by itself may do no more than make the contract voidable. Secondly, a man cannot escape from the consequences, as regards innocent third parties, of signing a document if, being a man of ordinary education and competence, he chooses to sign it without informing himself of its purport and effect. This principle is sometimes found expressed in the language that "he is doing something with his estate" … but it really reflects a rule of common sense on the exigency of busy lives. Thirdly, there is the case where the signer has been careless, in not taking ordinary precautions against being deceived."**

[37] More importantly, the Plaintiff conceded in cross-examination that he knowingly signed the Charge as well as the Deed of Guarantee and Indemnity; and that he did so before an Advocate. Here is what he had to say in cross-examination by **Mr. Soita**:

> **"…I admit that I signed the Charge as the Chargor. The document was also signed on behalf of Barclays Bank of Kenya, the 4th Defendant. I also signed the Guarantee and Indemnity. I signed it before Advocate Simon C. Lilan. I willingly offered by property as a security for a loan to the 1st, 2nd and 3rd Defendants. I signed the security documents in 1997…At some point I wanted to pull out for the 1st Defendant to look for another Guarantor. I do not have any documents here to prove that I wrote to the Bank to communicate my intention to withdraw as a Guarantor…"**

[38] The Plaintiff made the same admissions under cross-examination by **Mr. Thiga** for the 4th Defendant. The court record shows thus at pages 63 to 64 of the handwritten proceedings:

> **"I admit that I signed the Charge and Guarantee. I signed the documents in the presence of the 1st, 2nd and 3rd Defendants and a person who Ronald told me was the Manager of the Bank…When I signed the security documents I was aware of the consequences. My land could only be sold if I was unable to pay. I was not called upon to pay…I was only informed by a tenant that the property had been sold…I was not forced to provide security. I did so out of my own volition. The 1st, 2nd and 3rd Defendants convinced me to provide security. They could not be given the loan without security.**

[39] Indeed, in an affidavit sworn by the Plaintiff on **24 July 1997** and filed as an annexure to the Affidavit in Support of his first application herein, the Plaintiff averred that:

"3. That I guaranteed VIVA PHARMACEUTICALS LIMITED CO. loan of Shs. 300,000/- at Barclays Bank Limited Eldoret Branch on 15th April 1997.

4. That I handed over to Barclays Bank Limited Eldoret Branch the certificate of the said plot.

5. That after I had signed the guarantor, my family members were against it and strongly objected…"

[40] In the premises, the answer to the first issue is plain, and it is, yes, the Plaintiff knowingly and willingly signed the Charge and the Deed of Guarantee and Indemnity.

[b] <u>On whether the sale of the suit property was regular:</u>

[41] The 4th Defendant presented documents herein to demonstrate that, following persistent default by the Borrower, it caused several demand and statutory notices to be issued to the Chargor. Of particular significance is the statutory notice dated **Monday 26 June 2000** (exhibited at page 6 of the 4th Defendant's Bundle of Documents). It shows that the said notice was addressed to the Plaintiff, giving him notice of default by the Borrower and giving him three months within which to redeem the charged property. Hence, the notice was fully compliant, from the standpoint of **Section 74** of the **Registered Land Act.** It is manifest though that the letter was addressed to P.O. Box 289 Eldoret; an address which the Plaintiff disowned. He produced a letter dated **13 July 2006** from the **Postal Corporation of Kenya** to back up his assertion. That letter reads as follows in part:

"…This is to confirm to you that the private letter box in question does not belong to your client, a Mr. Fidelis Okonga. The box belongs to a Catholic Mission and if you need more information you may call personally to the Headpostmaster, Eldoret for the same…"

[42] There is no gainsaying that service of a statutory notice is as important as the notice itself, for what would be the point of issuing a notice which does not reach the intended recipient. Hence, in **<u>Nyagilo Ochieng & Another vs. Fanuel Ochieng & 2 Others</u>** [1996] eKLR, the Court of Appeal underscored this point thus:

"…It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap. 300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale…"

[43] The Court of Appeal further stated thus with regard to proof of service:

"…Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as it is contemplated by Section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya…As pointed out earlier it was incumbent upon the bank to, at least, prove posting of the registered letter or letters containing the statutory notice or notices…In the absence of such proof of posting we are constrained to hold that the sale by auction was void…" (see also D.N.M. vs. M.K. & 4 Others, supra).

[44] And **Section 3(5)** of the **Interpretation and General Provisions Act**, provides that:

"Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would have been delivered in the ordinary course of the post."

[45] A look at the Charge as well as the Deed of Guarantee shows that the address that was given by the Plaintiff is Post Office Box No. 289, Eldoret. It is therefore of no consequence that the Plaintiff disowned that address and produced a document to support his posturing. If he misinformed the Bank as to his address for service the fault is entirely his. Nevertheless, it was imperative for the 4th Defendant to demonstrate that the notices were served at the particular address furnished by the Plaintiff. It is manifest that there was no such proof, by way of a Certificate of Postage, to demonstrate that the statutory notice dated **26 June 2000** was indeed posted to P.O. Box 289, Eldoret. In the premises, the inevitable conclusion, which is the conclusion I hereby come to, is that all the processes that took place thereafter, including the Redemption Notice, Valuation and sale of the charged property were all null and void.

[46] In ***<u>Macfoy –vs – United Africa</u>*** **<u>Ltd.</u> (1961) 3 ALL E.R. 1169, Lord Denning aptly stated that:**

"If an act is void, then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

[47] What, then, is the effect of the foregoing conclusion on the impugned sale? In **<u>the Nyagilo Ochieng Case</u>** (supra), the Court of Appeal held that:

> **"In our view, a sale which is void does not entitle the purchaser at such sale to obtain proprietorship or title to the land so sold. It is therefore clear that the second respondent did not acquire proper titles to the suit properties. Her remedy is against the bank primarily to obtain a refund of the consideration paid…In coming to the conclusion, we have reached, we cannot but entertain the view that the bank ought to have been more careful in proving service of the statutory notices. Failure of no such proof has resulted in an innocent purchaser for value being deprived of the title to the suit properties.**

[48] The Court then proceeded to issue orders thus:

> **"Consequently we allow this appeal with costs here and below and we order that the Status Quo at present, be maintained until the charge registered in favour of the bank as against the appellants is restored. It is also ordered that the charge registered in favour of the bank against the second respondent be de-registered. The effect of all this is that the charge registered in favour of the bank as against the appellants will be restored on the Register and it will be for the appellants to redeem the suit properties if they so wish. To leave no room for doubt we direct that the appellants will remain liable for payment of interest accrued on the loan to the date of redemption."**

[49] In the result, the orders that commend themselves to me, and which I accordingly grant, are as hereunder:

[a] That the sale of the property known as **Eldoret Municipality/Block 5/428** on the **12 September 2002** be and is hereby declared null and void;

[b] That the charge registered in favour of the 4th Defendant as against the Plaintiff be restored on the Register and that the Bank shall be at liberty to dispose of the said property upon full compliance with the applicable law, unless otherwise redeemed by the Plaintiff if he so wishes.

[c] That the status quo now obtaining in respect of the suit property as at the date of this Judgment be maintained pending compliance with Order [b] above.

[d] That costs of the suit be borne by the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2020

OLGA SEWE

JUDGE