REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HC COMM. NO. 327 OF 2017

FATUMA MOHAMED HAJI.....1ST PLAINTIFF/APPLICANT

ASHA MOHAMED HESHI.....2ND PLAINTIFF/APPLICANT

-VERSUS-

AFRICAN BANKING

CORPORATION LIMITED.....1ST DEFENDANT/RESPONDENT

FAST ENERGY LIMITED.....2ND DEFENDANT/RESPONDENT

ALI JAMA ALI.....3RD DEFENDANT/RESPONDENT

HASSAN MOHAMED YUSUF.....4TH DEFENDANT/RESPONDENT

MOHAMED JAMA ALI.....5TH DEFENDANT/RESPONDENT

AND

HUSSEIN MOHAMED YUSUF.....INTERESTED PARTY

RULING

BACKGROUND

The 1st and 2nd Plaintiffs herein instituted this suit against the 1st, 2nd, 3rd, 4th, and 5th Defendants herein by a Plaint dated 3rd August 2017, alleged that, on or about 26th November 2012, the 1st and 2nd Defendants in collaboration with the Kenya Pipeline Company Limited (hereinafter referred to as **"KPC")** entered into a Transportation, storage and Delivery of Financed Products Agreement also known as a Collateral Financing Agreement (hereinafter **"CFA"),** whereby the 1st Defendant would finance the purchase of petroleum products by the 2nd Defendant and KPC would be the repository of the said products in trust for both the 1st and the 2nd Defendants. Further to the foregoing terms, KPC was to release the products in tranches to the 2nd Defendant upon authorization by the 1st Defendant.

The salient clauses, inter alia, of the CFA provided as follows;

a) Under **Clause A 1.1** ... "The petroleum products are to be disposed of in accordance with the written instructions of the Financier as provided in this Agreement;

b) Under **Clause A(2)** …. "KPC hereby acknowledges that it shall hold the Petroleum Products on account of the OMC but in trust for the Financier and shall at all times proceed as per the Financier's instructions."

c) Under **Clause 2 (2.2)** on obligations of KPC…. "To release the Petroleum products only as per the release order signed by duly authorized officers of the Financier from time to time as provided for in the Agreement."

d) Under **Clause D (1.4)** …. "The financier shall issue release (Bank Release) for financial products and the following shall be

expected:-

i) Bank release shall contain coded serial reference number indicative of the OMC/Financier/Grade/Vessel/Consignment Number/Release Number.

ii) Financiers release letters shall indicate remaining balances as per their records after each release.

e) Under **Clause 9 (9.1)** on Duration of the Agreement …. "This Agreement and all undertakings and obligations of the parties is limited to the consignment of petroleum products herein above referred to and shall remain in force from the date of signing until either:

i) Confirmation has been made by the Financier to KPC that the consignment has been fully released or Thirty (30) days after final statement of account as regards the consignment has been sent to the Financier by KPC and no objection has been raised to the statement;

ii) Termination by any party subject to giving written notice of not less than fifteen (15) days or

iii) Upon the expiry or termination of the Transportation and Storage Facility Agreement.

That the CFA in regard to the 1st and 2nd Defendants, contemplated a 'pay-and-release' engagement whereof the 1st Defendant would authorize KPC to release the petroleum products upon payment or settlement of their value by the 2nd Defendant.

That Pursuant to the CFA, the 1st and 2nd Defendants executed a Post Import Finance Agreement with a limit of USD $1,000,000/- through an offer letter dated 24th March 2011 whereof the 1st Defendant committed to finance the purchase of the petroleum products by the 2nd Defendant. The agreement had a term limit of 12 months and it expired on 31st March 2012.

The Said Agreement was executed by the 3rd, 4th & 5th Defendants as directors of the 2nd Defendant while the 1st and 2nd Plaintiffs executed the same as the Guarantors.

That in consideration of the advances of USD $ 1,300,000/- made to the 2nd Defendant by the 1st Defendant, the 1st and 2nd Plaintiffs as the Guarantors for due performance of the CFA offered as security their property situated in Eastleigh Estate and known as **L. R. 36/11/148** wherefore a Legal charge was registered against the said property.

The Plaintiffs averred that they were made aware by the 3rd, 4th and 5th Defendants that the 1st Defendant through a letter dated 7th December 2016 was demanding a colossal amount of **Ksh 235,549,409.75** plus arrears of **Ksh 44,145,315.10** and that they would advertise for sale the secured properties.

The Plaintiffs averred that upon being furnished with some documents by the 2nd, 3rd, and 4th Defendants in respect of the loan, they were surprised that, unbeknown to them and without their consent or consultation whatsoever, a further collateral Facility Agreement dated 18th March 2014 had been executed between 1st and 2nd Defendants and the Guarantors were the 2nd, 3rd and 4th Defendants and allegedly the Plaintiffs.

The Plaintiffs averred that they did not sign the guarantee for Agreement dated 18th March 2014 as the same was procured through forgery and fraudulently misrepresenting the same to be a legally executed documents. The Plaintiffs reported the forgery to the police at the Central Police Station through OB.NO. 55/14/12/2016.

The Plaintiffs averred that the 1st Defendant Bank and 2nd Defendant owed them a duty of care in their dealings in respect to the Agreement dated 30th March 2012 but the same was breached when the 1st Defendant and the Directors of the 2nd Defendant colluded to the breach of the salient terms of the contract thereby prejudicing the Plaintiffs.

CERTIFICATE OF URGENCY OF 3RD AUGUST 2017

By a certificate of Urgency Application dated 3rd August 2017 and filed together with Notice of Motion and Supporting affidavit, the Plaintiffs urged the Court to hear their matter on priority basis for reasons;

a) The 1st Defendant was on the verge of exercising its statutory power of sale by advertising for sale the Plaintiffs' property known as L. R. No. 36/11/48 situated in Eastleigh Estate Nairobi;

b) That if the sale proceeds while the integrity and legality of the Guarantee Agreement is profoundly in question on account of forgery and fraud, collusion and breach of contract by the 1st Defendant and the 2nd, 3rd, 4th and 5th Defendant's, then Plaintiffs' rights will be highly prejudiced thereby occasioning irreparable loss and damage.

c) The 1st Defendant had claimed an astronomical and illegal amount of Ksh 233.544,433/- on account of a guarantee agreement whose terms were varied through forgery and without notifying the Applicants.

d) The Plaintiffs are aged and depend on the property for their livelihood whereof the sale if allowed to proceed will consign them to

destitution.

In the Notice of Motion pursuant to **Order1A, 1B, 3A & 63 (c) and (e) of the Civil Procedure Act (cap 21 Laws of Kenya,) Section 78, 103, (3) & (4), Section 104, and 106 of the Land Act No. 6 of 2012, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the Law; the Plaintiffs/ Applicants' sought orders;

a) That pending hearing and determination of this application and/or suit, a temporary injunction be issued restraining the 1st Defendant/Respondent whether by itself, its servants, employees and/or agents from advertising for sale, selling, Auctioning, disposing off, entering into, accessing, alienating, transferring, interfering with and/or in any manner whatsoever dealing with the Applicants' property known as **L. R. No. 36/11/48** situated in Eastleigh Estate, Nairobi.

b) That pending the hearing and determination of this Application *inte partes*, temporary injunction be issued restraining the 1st Defendant/Respondent whether by itself, its servants, employers and/or agents taking any action whatsoever, and/or exercising and/or invoking of its rights whether accrued or otherwise under the charge dated 20th April 2012.

c) That a mandatory injunction be issued compelling the 1st Defendant to furnish and provide the Applicants with a complete and proper and accurate statement of accounts in respect of account number **0072010110090** in the name of the 2nd Respondent.

REPLYING AFFIDAVIT

The Application was opposed vide a Replying Affidavit dated 18th August 2017, sworn by Kajuju Marete a Senior – Legal Officer of the 1st Defendant (herein **"the Bank").** She stated that the Plaintiffs admitted paragraphs 2, 3, 4, and 5 of the Supporting Affidavit that they executed a Charge by which they offered the suit property as security in respect of facilities granted to the 2nd Defendant, Fast Energy Limited being the Principal Borrower and hereinafter referred to as **"Fast Energy".**

That the Plaintiffs are biological sisters; the 1st Plaintiff is the biological mother of 3rd, 4th, and 5th Defendants and the Interested Party as is revealed in the Report at page 7 to 10 of the 1st Defendant's Further List of Documents.

That nowhere does the report prepared by Global Forensic Security Services **(GFFS)** state that the sample signatures that were used to generate the report and more particularly those at pages 85 to 113 were signed in the presence of the said Document Examiner.

That it is thus not lost to the Bank that this suit was packaged by the Principal Borrower and the Guarantors to frustrate the realization of the suit property which was charged to it.

That of much relevance to these proceedings, the charge by clause 7.16 thereof granted the Bank a right to after making demand of sums due, to convert it into a currency that would enable the principal Borrower and charger meet their obligations to the Bank.

That Fast Energy as the Principal Borrower acknowledged receipt of the demand and by a letter dated 26th May 2016 sought time to make a "flexible repayment proposal". Marked **"KM4"** is a copy of letter dated 26th May 2016 from Orina & Company to Majanja Luseno & Company Advocates.

That the Bank has been able to realize three of its securities being All Those Properties known as L. R. Number 209/51/35, **CR. Numbers 39688** and **39700** which were registered in the name of Tuk (E.A) Investments Limited a company with common directorship with Fast Energy. The letter by the Purchaser of **CR. Numbers 39688** and **39700** Balasa Mamo Gosa and the Purchaser's Advocates for **L.R. Number 209/5135**, is found at page 178 of the list of documents.

That the sale of the above property was with the consent of Fast Energy and the Plaintiffs of the one part and the 3rd, 4th, 5th Defendants and the Interested Party. Marked "**KM 5"** are copies of letters from Fast Energy and Tuk (EA) Investment Limited sanctioning the sale of three of the charged properties by private treaty.

That the Plaintiffs have always been aware of their liability to the Bank as is evident from their own annexures to the Supporting Affidavit especially the 45 days **Redemption Notice dated 1st July 2016** at pages 114, Notification of sale at page 115 to 117 wherein it was disclosed the amount outstanding as **24th May 2016** was **Ksh 233,554,433.75/-.**

COURT RECORD ON 14TH SEPTEMBER 2017

On 14th September 2017, all parties were represented in court before Lady Justice O. Sewe, in the morning session when the matter was stood over to 11.30 am for further orders.

At 12.35 pm the same day when the parties come back to court before Hon. Lady Justice O. Sewe, Mr. Maingi was present for the Plaintiffs, Mr. Luseno was present for 1st Defendant; Mr. Abdulhakim was present for 2nd Defendant and the 3rd, 4th, and 5th Defendants were not represented and were not present in person.

Mr. Maingi for the Plaintiff informed the Court that the parties had negotiations and there was an agreement reached;

Mr. Luseno for the 1st Defendant said they had reached a Consent as follows;

> ***"By consent of the parties before the Court today, the auction in respect of all that property known as L.R. No. 36/11/48 situated in Eastleigh Estate within Nairobi City County and scheduled to be conducted on 15th September at 10.30 am be and is hereby suspended on condition that:***
>
> ***1. The Plaintiffs' 2nd Defendant the 3rd, 4th and 5th Defendants, being the principal Borrowers and Guarantors do pay the sum of Ksh 500,000/- per month towards the liquidation of the loan account commencing 5th October 2017.***
>
> ***2. The Plaintiffs, 2nd Defendant, 3rd Defendant, 4th Defendant and 5th Defendant and the interested party do procure a takeover guarantee from another financial institution to be proposed and secured amounts set out in the Guarantees issued by the Plaintiffs within 21 days from the date of recording of this consent.***
>
> ***3. The Bank being the 1st Defendant and the principal Borrowers and Guarantors shall cause the sale of those properties being Kajiado/Kaputei-North/2380 and Kajiado/Kaputei-North/2381 which are registered in the name of the 4th Defendant within 60 days from today's date.***
>
> ***4. The parties herein through their respective advocates shall within 14 days from today's date schedule a meeting to discuss the matters in issue before the Court.***
>
> ***5. That in default of any of the conditions of this consent of paying and procuring the takeover, then the Bank will be at liberty to realize the security.***
>
> ***6. Mention on 15th November 2017 for further directions. The date of 29th September 2017 that was given on 24th August 2017 by Hon. Onguto J is hereby vacated, it having been overtaken by events."***

Each of the advocates present signed on behalf of their clients on each page of the 4 pages of the Consent on record. The Trial Court adopted the consent as an order of the Court and signed against the order.

On record, the Plaintiffs filed Certificate of Urgency application on 30th August 2017 that remains pending.

CERTIFICATE OF URGENCY OF 4TH OCTOBER 2017

By a certificate of Urgency Application dated 4th October 2017, filed together with a Notice of Motion and supporting affidavit, the Applicants/Plaintiffs urged the court to be heard on a priority basis for reasons;

> a) The 1st Defendant was at an advanced stage of enforcing the consent order issued on 14th September 2017 whereof the Applicants were required on 5th September 2017 to pay a sum of Ksh 500,000/- and furnish a guarantee for Ksh 233,000,000/- which if allowed would prejudice the Applicant's rights in respect of the Application herein;
>
> b) That the consent order relied upon by the 1st Defendant was procured through coercion, undue influence and misrepresentation whereby the same if allowed would fetter the Applicant's right of redemption of their property and perpetrate an illegality.

In the Notice of Motion pursuant to **Order 1A, 1B, 3A, 63 (e) & 80 of the Civil Procedure Act (cap 21 Laws of Kenya), order 45 Rule 1 (a) & (b) of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules** and all other enabling provisions of the law; the Applicants sought orders;

> a) That pending the hearing and determination of this application inter partes, the Court issues a Temporary Stay of Consent Order dated 14th September 2017.
>
> b) That the Court reviews and/or sets aside consent order dated 14th September 2017;
>
> c) That the applicants' application dated 3rd August 2017 be set down for hearing
>
> d) That costs of this application be in the cause.

In the Supporting Affidavit of Asha Mohamed Heshi, the 2nd Defendant herein, she averred that on 14th September 2017, they were in court and their advocate indicated that he was ready to proceed with the application but the Judge, upon listening to Mr. Luseno for the 1st Defendant, ordered the 2nd Defendant's advocate to discuss with the Bank's Lawyer with a view of recording consent.

That the Lawyer clearly told the court that he wished to proceed and that if there was a consent then it should be between the Defendants since the 2nd Defendants case revolved around collusion between the Defendants in extorting money from the 2nd Defendant.

That when they returned in court at 11.am and the 2nd Defendants lawyer insisted that the consent should be between the Defendants in the

sense that it should not saddle 2nd Defendants with any obligations. The proceedings were conducted at follows;

a) Upon the 2nd Defendants lawyer protesting that the terms of the consent were not agreeable, the Hon. Judge refused to record the objections;

b) The Judge insisted that the consent be recorded and that Mr. Luseno to read out to the court the terms;

c) As Mr. Luseno kept on reading the terms, the 2nd Defendant's lawyer would object but the judge would brush him off;

d) That the Judge told the 2nd Defendant's lawyer not to disrupt as Mr. Luseno dictated the terms and that he should raise the issues after she was done;

e) When Mr. Luseno was done the 2nd Defendants lawyer rose to object to the terms of the consent and the judge refused to record his representations,

f) The 2nd Defendants lawyer raised the issue of the impact of the consent order as regards extinguishing the substratum their case but the same was not noted down nor considered;

g) The Hon. Judge rushed parties to sign the consent as she was rushing somewhere

h) Though their lawyers' application was unopposed, the Judge insisted and opted on the parties recording consent instead of according the Plaintiff the fairness of proceeding with the Application.

i) Due to the hurried recording of the said consent, the Judge did not deal with the aspect of the 3rd, 4th & 5th Defendants who were not in court yet the consent purported to bind them.

That the circumstances surrounding the recording of the consent was riddled with coercion and undue influence as the Hon. Judge and counsel for the 1st Defendant used the threatened auction, which was to happen the following day, to bear down on the 2nd Defendant.

GROUNDS OF OPPOSITION & REPLYING AFFIDAVIT OF 5TH OCTOBER 2017

The 1st Defendant objected the application on grounds;

The Plaintiffs cannot seek review and/or set aside consent that has been partly performed and from which performance they have derived benefit.

The Application offends the law as stated in ***Diamond Trust Bank Ltd vs Ply Pannels Ltd & others Nairobi C.A.243 of 2002;***

> ***"….where the consent judgment impugned has been executed like in the present case, the courts are less likely to set aside the consent judgment."***

There was no fraud, collusion or misrepresentation as the consent was negotiated amongst parties with the involvement of the Plaintiffs personally and their advocates on record who endorsed the handwritten copy.

The 1st Defendant deposed that the Principal Borrowers and Guarantors contrived a dispute in execution of the Security documents with the sole aim of frustrating and/or avoiding valid security and execution documents to avoid contractual obligations owed by the parties to the 1st Defendant.

The application is an abuse of the Court process.

In Reply Ms. Kajuju Marete deposed that the Plaintiffs derived benefit from the impugned Consent as they obtained a copy of the Consent and served Messrs Saddabri Auctioneers to stop the auction vide copy of Consent marked **"KM4".**

The Parties held a meeting on 2nd October 2014 in terms of **Clause 1(4)** of the impugned Consent as confirmed by copies of the1st Defendant's visitors book, copies annexed to the Replying Affidavit as **"KM2, 3, & 5.**

The Judge did not supervise the signing of the Consent but only directed parties to read it and being satisfied that it was what was agreed and recorded to then endorse thereon.

After 18 days of the Consent, which was in the presence of the parties present in Court, the instant application was filed.

The parties who are obligated to the Bank have formed a habit of not honoring any commitment they make to the bank and it would be improper to condone such practice.

CERTIFICATE OF URGENCY OF 23RD OCTOBER 2017

The 4th and 5th Defendants by a certificate of urgency dated 23rd October 2017, filed on 30th October 2017, urged the court hear their matter on priority basis for reasons;

a) That a consent order dated 14th September 2017 was purportedly recorded and adopted as an order of the Court in absentia of the 4th and 5th Applicant/Defendants or their Counsel on record.

b) That the 4th and 5th Applicant/Defendants were being compelled to comply with a consent order they were never privy to.

c) The Consent orders dated 14th September 2017 in paragraph 1 (1) (2) & (3) amounts to **economic duress, coercion and undue influence upon the applicants as the principal borrowers.**

d) The consent order seeks to alienate and deprive the applicants' property rights without due process of the law and without their consent and authority as stipulated under **Article 40 of the Constitution.**

e) The effect of granting the adverse orders goes to the root of the main suit which has now been substantially and primarily heard and determined at an interlocutory stage in absence of the 4th and 5th applicants herein.

f) The amount being sought by the 1st Defendant/Respondent is a colossal figure of Ksh 235,549,409.75 plus arrears as **such the court ought to have been cautious** when the consent was being endorsed by the Court.

g) By recording and endorsing the consent order the counsel for the 1st and 2nd Respondent/Plaintiffs and Counsel for 4th and 5th Defendants/Respondents and Counsel for interested Party have substantively denied the Applicants access to justice in as envisaged under **Article 48 of the Constitution** and the right to a fair hearing under **Article 50(1) of the Constitution.**

In the Notice of Motion, the Applicants sought the same orders as sought in the application dated 4th October 2017, that the court reviews, varies/ sets aside the orders issued on 14th September 2017.

DETERMINATION

This Court was moved to hear and determine 2 of the various applications filed and pending in this Matter.

The Applications Filed on 4th October 2017 and 30th October 2017 respectively. Both pertain to contest the impugned Consent of 14th September 2017.

The issues that emerge for determination are;

a) Should the application of 4th October 2017 be upheld or dismissed?

b) Should the Application of 30th October 2017 be upheld or dismissed?

APPLICATION OF 4TH OCTOBER 2017.

The Applicants gave oral submissions and relied on written submissions filed on 26th February 2018.

In a nutshell, Counsel submitted that the impugned Consent of 14th September 2017 was procured through coercion, undue influence and misrepresentation.

It was alleged that the Trial Judge executed undue influence and pressure against the Plaintiff/Applicant's Counsel by insisting that Consent be recorded.

The existence of vitiating factors in respect of the Consent orders materially affect the validity of the order.

The Plaintiff relied on the affidavits sworn and filed as follows by;

a) Asha Mohamed Heshi of 14th October 2017

b) Abdul Hakim Abdullahi of 15th October 2017

as to the alleged events that culminated to the Consent of 14th September 2017.

The Plaintiff further alleged that it was/is the Trial Court's duty to the litigants not to record a consent where some of the key players were

not in Court. This in itself demonstrated some level of partiality and involvement of the Trial Judge in execution of the impugned consent.

The Plaintiff relied on the following cases;

a) Samson Munikah P/AMunikah & Co Advocates vs Wedube Estates Ltd (2007) eKLR

"in view of the foregoing, we think it can be safely be stated that a consent judgment may be set aside only in certain circumstances e.g on the ground of fraud or collusion, misrepresentation of the facts, public policy or for such as would enable a court to set aside or rescind a contract."

b) Benedict Ngula Nguli vs Gedion Nduva Mwendo & Anor (2009) eKLR

On definition of coercion thus;

"Coercion is defined as browbeating, bullying, compulsion, constraint, duress, force, intimidation, pressure, strong-arm tactics, threats" Collins Concise Thesaurus, 1997 Ed…. Further in Chesire, Fifoot and Furmsytons Law of Contract at page 280, the authors state thus; 'since agreement depends on consent, it should follow that agreement obtained by threats or undue persuasion is insufficient. Both common law with a limited doctrine of duress and equity with a much wider doctrine of undue influence have acted in this area."(our emphasis)

In Reply to 1st Defendant's submissions. The Plaintiffs submitted that the Trial Court was inclined not to hear the application despite the fact that the auction was slated the following day and insisted that parties must enter into a consent. The Court paid no heed to the various objections of the Plaintiffs. Indeed, after Mr. Luseno crafted some sort of purported consent over the objections of the Plaintiffs, [read the content in Court], the Judge left Court even before the Consent was signed by the advocates of the parties who were present. In Court, Counsel for the Plaintiff during oral submissions, submitted that the Trial Judge was approached by a lady who came to Court, presented the Trial Judge a note and then the Trial Judge rose and left the Courtroom.

The 1st Defendant, submitted as follows facts that were not controverted;

a) The plaintiffs are biological sisters

b) The 1st Plaintiff is the biological mother of 3rd,4th & 5th Defendants and Interested party respectively

c) The 3rd,4th & 5th Defendants and Interested Party are Directors of 2nd Defendant Company; Fast Energy Limited.

d) The 2nd Defendant is the Principal Borrower of the 1st Defendant Bank African Banking Corporation.

e) The 3rd 4th& 5th Defendants and the Interested Party, Plaintiffs are all Guarantors

These family ties were confirmed from Investigation Report by Enla General Agencies commissioned by the 1st Defendant in February 2016.

With regard to the impugned Consent, the 2nd Defendant did not file an application to review the Consent. Nyachoti & Company Advocates who vide Notice of Appointment filed on 7th September 2017 did not file any affidavit to rebut representations made before the Trial Judge on 14th September 2017.

The 1st Respondent submitted that the Consent sought to be reviewed is partly enforced, the Plaintiffs extracted the impugned consent and served 3rd Parties, halted the impending auction and attended a meeting with 1st Defendant Bank.

The 1st Defendant relied on the following cases;

a) Diamond Trust Bank Ltd vs Ply Pannels Ltd & others, Nairobi C.A.243 of 2002(supra)

b) Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd C.A. Nairobi No 1 of 2015 (variation of the Contract)

"The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the court, absence of sufficient material facts and ignorance of material facts."

In ***Consulting Engineering Ltd vs Development Authority & Anor Nairobi C.A. 263 of 2009*** held as follows;

"The issue before the trial court was the validity of the consent recorded on 2nd April 2003. The record of proceedings before court on 2nd April 2003 is explicit and in writing; a judge cannot receive additional evidence to add to, explain, vary or subtract the contents of the record of proceedings of the court."

ANALYSIS

The substance of the instant application is that the Trial Court coerced, unduly influenced Parties/Counsel in this matter and misrepresented facts/terms for the Parties/Counsel to enter into a Consent. That the Trial Court was inclined not to hear the application of 3rd August 2017 as Counsel for the Plaintiffs was ready to proceed. It is also alleged the Trial Court despite objections raised by the Plaintiff's and 2nd Defendant's advocates pursued the recording of the consent as read by Counsel for 1st Defendant. Thereafter, it is also alleged that the Trial Court/Judge left the Court.

In the case of ***Benson Omwenga Anjere vs Kivati Nduto & Anor [2013] eKLR*** the Court considered what constitutes coercion, duress and undue influence as follows;

Coercion is defined by Black Law Dictionary as;

> ***"Compulsion, constraint, compelling by force or arms or threat."***

Duress is defined by Black Law Dictionary as;

> ***"Any unlawful threat or coercion used by a person to a manner she or he otherwise would not (or would) [it is] subjecting a person to improper pressure which overcomes his will and coerces him to comply with a demand which he would not yield if acting as free agent."***

Undue Influence is described in Black's Law Dictionary;

> ***"persuasion, pressure or influence, short of actual force, but stronger than mere advice, that so overpowers the dominated party's free will or judgment that he or she cannot act intelligently and voluntarily, but acts instead subject to the will or purposes of the dominating party."***

The same Court referred to ***PAO ON vs LIAU YIU LONG [1980] AC 614*** where it was held;

> ***"In determining whether there was coercion of will such that there was no true consent; it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are … ...relevant in determining whether he acted voluntarily or not."***

In ***Agrafin Management Services Ltd vs Agricultural Finance Corporation & 5 Others 2012 eKLR*** the Court stated;

> ***"The Consent order is a binding agreement between parties since it is trite law that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation commenced, bring it to an end. That when it complies with the requisites and principles of contract, it becomes a valid agreement which has the force of law between parties. The Consent once given judicial approval, becomes more than a contract. Having been sanctioned by the court, it becomes a determination of the controversy and has the force and effect of judgment."***

In ***Metropolitan Properties C Ltd vs Lannon (1969) I QB*** it was held;

> ***"Also, in a case where bias is being alleged against a Court or Judge it is not the likelihood that the Court or Judge could or did favor one side at the expense of the other that is important, it is that any person looking at what the Court or Judge has done, will have the impression in the circumstances of the case, that there was real likelihood of bias."***

Applying these principles to the instant application, this Court makes the following observations;

1) The instant application was filed under certificate of urgency on 12th September 2017. The Duty Court certified it urgent to be served to parties and was placed before the Trial Court for hearing on 14th September 2017.

2) On 14th September 2017 as per the Court record, parties through Counsel moved the Court as follows;

Mr Maingi: We were served with Notice of Appointment by the Firms of Nyachoti & Kithinji for 2nd -5th Defendants……

The Application is dated 12th September 2017 which was filed under certificate of urgency. I am ready to proceed. I have not received any response with regard to that application.

Mr Luseno: On behalf of the 1st Defendant we were served yesterday. It was drawn to my attention by Mr. Nyachoti who appears for the other directors who are sons of the Plaintiff. My instructions are that they want this matter resolved. The Facts remain the same, save that there is an auction scheduled for tomorrow.

Mr Nyauchi: We are in support of the application by the Applicant.
Mr Abdul Hakim: My instructions are to support the application by the Bank. We are disputing the loan amount.

Court: In view of the proposal by Mr. Luseno, the parties are hereby granted time to hold discussions with a view of settlement. The matter is hereby stood over to 11.30 am today for further orders.

Later at 12.35

Mr Maingi: The Parties have been having negotiations and there is an agreement reached.

Mr Luseno: We Have reached a Consent on the following terms …… (The consent as outlined above was read out to the parties and court)

In ***Petition No. 42 of 2018, Bellevue Development Company Ltd vs Hon. Justice Francis Gikonyo & 3 Others***, Supreme Court observed that;

> ***"….the Superior Court Judge had [has] no jurisdiction to enquire into or review the propriety if decisions of Judges who were of concurrent jurisdiction as himself [herself] and did not possess supervisory jurisdiction over [other judges] under Article 165 (6) of The Constitution.***

This court shall not delve on allegations against the Trial Judge but what the court record contains as it has no jurisdiction to do so; supervise, review or question the conduct of Judicial officer during hearing of the matter.

In ***Petition 42 of 2018*** supra

> "***I think that even though Judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that at the end of the day justice is served.***

Central to the administration of justice a judicial officer ought to exercise judicial discretion and direction on how to process a matter filed/presented in court.

In ***Rex vs Wilkes (1770)4 Burr 2527, 2539*** Lord Mansfield stated;

> ***"Discretion when applied to a Court of Justice, means sound discretion guided by law. It must be governed by Rule, not humour; it must not be arbitrary, vague and fanciful, but legal and regular***."

Guided by these principles, the court will consider the instant application as follows;

I have outlined the chronology of events of 14th September 2017 that culminated with the impugned Consent as also outlined above.

In my view, the Trial Court is moved by parties on what/which application, matter they intend to proceed with. The Court has discretion to consult with parties/Counsel in giving directions on how to proceed.

The instant application was filed on 12th September 2017, was certified urgent and parties were served within 2 days and parties were in Court on 14th September 2017. Surely, even if the Plaintiff was ready to proceed with hearing of the application, the Trial Court considered and rightly and legally so that the Respondents though served informed the Court that they had not filed Responses/Replying Affidavits and/or Grounds of Opposition. Pleadings had not been closed with all parties responses to the application on record. Secondly, only then after pleadings closed would directions on how to proceed with the application would be considered. If it was by filing and exchanging written submissions and then Parties/Counsel would highlight or leave the Court to determine the same based on the submissions, this process had not taken place. Therefore, if the Trial Court was not inclined to hear the instant application without following these mentioned legal processes, it was discretion properly, legally and regularly exercised. It is mandatory that the access to justice and right to fair hearing is available to all parties.

Even before, the Trial Court granted orders on whether to hear the application or not on that day, The Court record confirms, the Counsel for 1st Defendant intimated that he was informed by Counsel for the 3rd 4th & 5th Defendants that they wanted to resolve the matter. The other parties through Counsel supported the Applicant's application. The Trial Court granted opportunity and time for parties and Counsel to explore negotiations and adjourned to 12.30 pm.

The parties deponed and acknowledged that they were involved in discussions in the absence of the Court. The Court adjourned and went to Chambers. When the Court came back the parties had a self-recorded Consent. The Plaintiffs' Counsel informed the Court that parties held negotiations and there was an agreement. The Plaintiff's Counsel did not raise any objection with regard to the offer to explore negotiations, in fact they all complied. Therefore, where and in what form was the pressure or influence, wielded by the Court that overpowered the dominated parties free will or judgment to determine whether to enter into negotiations or not and if so what terms were agreeable to the Consent?

If the deliberations took place when the Court left, there was no opportunity or possibility for the Court to participate in discussions, coerce

and unduly influence the parties on the negotiations and emerging terms of the Consent.

The Court hears and determines matters on evidence and law. If it was hell-bent on issuance of certain orders; without considering the subject matter on merit, it would have heard the matter *interpartes* and granted relevant orders.

If the parties were unable to agree or felt pressured on any issue with regard to negotiations or terms of the Consent, when the Court came back that day or the next day, the parties through Counsel should have informed Court that no Consent was reached and give the Court the opportunity to hear and determine the matter/issue and be determined on merit. The Applicants were at liberty to seek maintenance of status quo pending the hearing of the application.

The Applicant stated that the Court imposed negotiations with a view to obtaining a Consent instead of hearing the application. The Court record shows the Court was moved by 1st Defendant's Counsel that the Defendants wanted to resolve the matter. By virtue of **Article 159 COK2010**, which provides for alternative dispute resolution mechanisms maybe employed by the Court and the **Overriding Objective Section 1A, 1B & 3A CPA the** Trial Court granted parties an opportunity to amicably resolve the dispute by negotiating with a view to reaching Consent. The overriding objective upholds;

> ***"just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."***

The Plaintiff's advocate stated that as the terms of the Consent were read out by 1st Defendant's advocate, he tried to object to the terms read out and 2nd Defendant's advocate also objected but the Trial Court asked them to wait until the Consent was recorded. Thereafter, the Court left abruptly to attend to pressing issues after promising to hear their objections.

The parties/Counsel deponed that they were not given a hearing on objections raised to the Consent. The parties/Counsel had ample opportunity to withhold their consent to the terms of the Written Consent by withholding appendage of their signatures until the next time or day the Trial Court would sit and address the Court on their refusal or withdrawal from the Consent. Instead, the Court record confirms that on each of 4 pages of the Consent, each of the advocates appended their signatures to the Consent. It is the Consent, the Plaintiffs extracted and served the Auctioneers to stop the impending auction. It is the same Consent whose terms/condition was to have parties to meet with the 1st Defendant that the parties willingly attended the meeting with the 1st Defendant as agreed. On all these occasions, the Court was not present or involved and had no means to coerce or unduly influence the parties on the terms of the Consent and enforce it thereafter. More so after, the Court endorsed the parties Consent as an order of the Court, the Plaintiffs used the Consent and stopped the impending sale.

With regard to the Trial Court leaving the Court abruptly, the Plaintiff's advocate was candid during oral submissions and informed this Court that the Trial Court was prompted by a note brought by a lady to Court and thereafter the Court informed them that there were pressing matters and the Court had to attend to immediately. These facts do not connote deliberate conduct to avoid hearing parties but discloses some emergency that necessitated adjournment. The totality of the evidence on record and presented does not disclose the Trial Court's coercion or undue influence to the parties and/or deliberate effort to deny parties a fair hearing. The Applicant did not establish a case of coercion, undue influence or misrepresentation. The Trial Court made no proposals nor was it part of negotiations by parties and could not have misrepresented any facts/terms. The Court record confirms that parties moved the Court appropriately and orders were granted orders accordingly. This application fails and is dismissed with costs.

b)Should the Application of 30th October 2017 be upheld or dismissed?

The application by 4th & 5th Defendants is that they did not admit the 1st Defendant's debt at any time, they were not present in Court nor was their advocate on record Mr. Nyachoti present in Court on 14th September 2017. The Consent of 14th September 2017 bound them yet they were not present nor represented by Counsel. Therefore, they did not negotiate nor sign the Consent. By the plaintiffs and other Defendants negotiating and signing the Consent without their input and including them, they were denied their Constitutional right under **Art 40 ,48 & 50 of CoK 2010.** The Applicants are of the view that the Trial Court ought to have interrogated the issue of fraud and/or forgery as the issue in the main suit and also the fact that they were not present and/or part of court proceedings that culminated to the impugned Consent.

The Applicants relied on the case of;

Pastor Anthony Makena Chege vs Nancy Wamaitha Magak & Anor [2015] eKLR,

> ***"As the law demands, all relevant and necessary parties were not enjoined in this suit at the time of the consent. The omission or deliberate refusal and/or failure to enjoin the Applicant as a necessary party to a suit contravenes the public policy of the court established under order 1 of the Civil Procedure Rules, 2010. In entering into the consent herein on 18th June 2012, it was foreseeable to the Plaintiff, 1st Defendant, 2nd Defendant and their respective counsel that this would substantially affect the interests of the Applicant in one way or another since the Applicant is the holder of the security created over the mortgaged property. The consent goes to the root of the contract (letter of offer) and the mortgage; ….***
>
> ***The Applicant submitted that the said consent order was entered into without the knowledge, authority and/or consent of the Applicant as required by law and the same was done in flagrant breach of the terms and covenants contained in the mortgage dated 18th November 2008."***

The Court reiterates the case of ***Benson Omwenga*** supra on the basis and the process to set aside consent judgment, and referred to the following cases;

*1) **Hirani vs Kassam [1952] 19 EACA 131***

"Prima facie, any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action and on those claiming under them…. And cannot be varied or discharged unless obtained by fraud or collusion or consent was given without sufficient facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside the Court to set aside an agreement.''

2) ***Flora Wasike vs Destimo Wamboko (1982-1988)*** where the court held;

a) It is settled law that a consent judgment can only be set aside on the same grounds as could justify the setting aside of a contract, for example fraud, mistake or misrepresentation.

b) An advocate would have ostensible authority to compromise a suit or consent to a judgment so far as the opponent is concerned.

c) The court would not readily assume that a judgment recorded by a judge as being by consent was not so unless it was demonstrably shown otherwise.

3) See also ***Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd & Another. C.A. 276 of 1997.***

4) Kasmir Wesonga Ongoma & Another vs Wanga [1987] eKLR,

"… A consent judgment is a judgment, the terms of which are settled and agreed to by the parties to the action. Where is the evidence that the terms were settled" How am I to tell if the parties agreed' it would have made all the difference if each party had signed or thumb printed. This Court has already suggested the adoption of such practice.

The Court record confirms that on 14th September 2017, the 4th Defendant Hassan Mohammed Yusuf and 5th Defendant Mohammed Jala Ali though included in the terms of the Consent of 14th September 2017as outlined above were not present in Court and they were not represented by Counsel in Court. The Consent was signed by advocates;

a) Mr. Maingi Musyimi for Plaintiffs

b) Mr. Steve Luseno for 1st Defendant

c) Mr. Gregory Nyauchi for interested Party

d) Mr Abdul Hakim holding brief for Mr. Midenga for 2nd Defendant.

If the 4th & 5th Defendants were not in Court or represented, they could not possibly have participated in negotiations and consented to the terms of the Consent.

The 1st Defendant objected to the variation and/or setting aside of the Consent as parties already executed, complied and derived benefit from the Consent. The Court is alive that parties have enjoyed stay of the auction and status quo for almost 2 years now without realizing its security in default or the Borrowers servicing the loan(s). However, constitutional rights override other legislative enactments and these rights must be adhered to. It is not contested that the applicants were not in Court on 14th September 2017. Mr. Nyachoti did not appoint any other Advocate to hold his brief on negotiations and/or signing terms of the Consent. So, the Applicants were not privy to the consent/contract and cannot be bound unless they signified consent through signing the same.

The Applicants alleged the Trial Court ought to have considered that some parties were not present. With respect, parties through Counsel approached the Court to allow them to resolve the dispute. The Court allowed them to negotiate. They came and informed the Court that they reached an agreement. None of the parties and/or Counsel informed the Court that some parties were not in Court or represented. How would the Court know who was present or not, who was represented or not and what arrangements parties/Counsel have agreed and/or terms of the Consent? The parties through Counsel informed the Court who was present and what was agreed and recorded. The buck stops with the Parties and Counsel. The Court hears from Parties/Counsel then determines the issue(s) raised by pleadings and evidence from parties.

In the circumstances, since the 4th and 5th Defendants were not present on 14th September 2020 they cannot be bound by terms they did not negotiate, contract or consent to. The Consent of 14th September 2017 is set aside and all consequential orders and parties revert to status quo ante. The consent cannot be severed because, the 4th & 5th Defendants are directors of the 2nd Defendant Company that did not object to the consent.

DISPOSITION

1. The application of 4th October 2017 is dismissed.

2. The Application of 23rd/30th October 2017 is granted/upheld.

3. The Consent of 14th September 2017 is set aside and all consequential orders.

4. The parties revert to *status quo ante.*

5. Costs in the Cause

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH SEPTEMBER 2020(VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MS MWANGI H/B MR. LUSENO FOR 1ST DEFENDANT

MR. MAANGI H/B FOR MAINGI FOR 1ST & 2ND PLAINTIFF/APPLICANT

COURT ASSISTANT - TUPET

16TH SEPTEMBER 2020

Mr. Maingi: The ruling be deferred to tomorrow at 11.00am.

Court: The Court will read it tomorrow at 11 am.

M.W. MUIGAI

JUDGE

16TH SEPTEMBER 2020

17TH SEPTEMBER 2020

Mr. Kayoko h/b for Mr. Amutala for 3rd & 4th defendant

Ms. Mwangi h/b Mr. Luseno: We are seeking leave to appeal the decision.

Court: The parties are granted leave to appeal. The parties shall be provided with copies of proceedings & Ruling upon payment of requisite fees.

Mr. Maingi for 1st & 2nd Plaintiffs: We want to appeal the decision of the court of application of 4th October 2017.

M.W. MUIGAI

JUDGE

17TH SEPTEMBER 2020