



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL LAW COURTS AT NAIROBI

CIVIL SUIT NO: 213 OF 2010

PASTOR ANTHONY MAKENA CHEGE.....PLAINTIFF

VERSUS

NANCY WAMAITHA MAGAK.....1ST DEFENDANT

TUMAINI LETU AGENCIES LTD.....2ND DEFENDANT

RULING

Setting aside consent order by mortgagee

[1] Before me is the Interested Party's ("the Applicant") Chamber Summons dated 11th April 2013 which is expressed to be brought under the provisions of Order 1 Rule 10 (2) & 25 of the Civil Procedure Rules, 2010; Sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya. Prayers Nos. 1, 2 and 3 of the Application are spent by dint of the Orders of the Honourable Mr. Justice Mabeya made on 11th April 2013. What therefore remains for the court to determine is Prayer No. 4; i.e.:-

1. That consent Order entered herein on 18th June 2012 between the Respondents and all other subsequent proceedings and consequential orders to be set aside with costs.

[2] The application is based on the grounds which are set out on the face of the Application and in the Supporting Affidavit of ***Debra A. Ajwang***.

The Applicant's gravamen

[3] The Applicant submitted that the application is opposed except by the 2nd Defendant. And so, the Applicant prayed for the application to be allowed as against the 2nd Defendant. According to the Applicant, the 2nd Defendant's admission of the Application has two (2) major implications namely:

- i. The 2nd Defendant is the sole registered owner of the mortgaged property which is the subject matter of this suit and the loan agreement between the Applicant and the 2nd Defendant. The Applicant is a secured creditor and holder of the security over the mortgaged property as mortgagee. As such mortgagee, the 2nd Defendant could not legally obtain consent order with

other person on the mortgaged property which substantially affects the mortgagee's financial position as a secured creditor unless with the consent of the mortgagee. It is on that basis, that the Applicant applied for the setting aside of the said consent order. And, as the 2nd Defendant has not opposed the said Application at all, it should be allowed against the 2nd Defendant; and the court should just set aside the consent order.

- ii. The Plaintiff and the 1st Defendant, not being proprietors of the mortgaged property are not, therefore, privy to the mortgage. The Plaintiff and the 1st Defendant were mere guarantors of the Mortgage and have minimal legal interest in the suit property until such a time that the mortgage amount will have been paid in full and the property discharged. Therefore, since the 2nd Defendant, who was the only party to the consent with a substantial interest in the mortgaged property, has not opposed the Application herein, it is only fair that the same be allowed as prayed even without going into the merits of the said Application.

[4] After the application was filed, there have been several unsuccessful attempts, for over a year, between the Plaintiff and the Defendants to have this matter amicably settled out of court. They have been saying that they are pursuing a replacement loan facility from Housing Finance Company of Kenya Limited (HFCK) so as to pay off the Applicant and have the mortgage split into two (2). On failure to fasten a settlement, the court, on 23rd July 2014 directed that this Application be prosecuted and disposed-of by way of written submissions. The Applicant stated the law that a court cannot interfere with a consent judgment/order except in such circumstances as would afford good ground for varying or rescinding a contract between the parties. They cited the Court of Appeal case of **Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A.**, which stated as follows:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 E.A.C.A. 131, where the following passage from Seton of Judgments and Orders, 7th Edn., Vol. I, p. 124 was approved:

“Prima facie, any order made in the presence and with the 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 by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

[5] The Applicant emphasized on the fact that consent only binds parties who were present or whose counsel was present when the order was made but does not bind persons who were neither present nor parties in the suit. The Applicant was not a party in the suit and did not consent to the consent order. On that basis, the Applicant is not bound by the said consent order and it cannot also be imposed upon and/or enforced against the Applicant whatsoever. It should, therefore, be set aside as it substantially affects its rights and interests. The agreement/consent is contrary to the policy of the court; and there was a misapprehension/ignorance of material facts at the time of entering the consent. It is against the public policy of the court because, clause 2 of the Mortgage herein is express and clear that the 2nd Defendant would not deal and/or interfere with the mortgaged property in any manner whatsoever without the prior written consent of the Applicant. Under Clause 2 (f) of the Mortgage the 2nd Defendant expressly covenanted and agreed with the Applicant that during the continuance of the Mortgage, the 2nd Defendant would:

“Not pull down, waste, destroy or interfere or in any manner or by any means lessen the value of the mortgaged property or any part thereof and will not effect any alterations in and to the mortgaged property without the prior written consent of the Lender”.

[6] The Applicant was of the view that decision by the 2nd Defendant in collusion with the Plaintiff and the 1st Defendant to split the Mortgage security and the mortgaged property into two (2) without the knowledge and/or consent of the Applicant was in breach of the agreement made between the mortgage between the 2nd Defendant and the Applicant. Such an agreement was only intended to stifle the rights and interests of the Applicant in the mortgage security and mortgaged property. As secured creditor, the Applicant has every right to be involved in any negotiations which could have any impact on its security. Public policy of this Honourable Court demand that valid and lawful agreements entered into by, rights and obligations arising thereto must be respected by the parties. Therefore, the decision by the 2nd Defendant to voluntarily breach the mortgage herein is in contravention of the public policy of this court. Needless to say that the collusion and/or fraud perpetuated by the 2nd Defendant, the Plaintiff and the 1st Defendant to split the mortgage security without the consent of the Applicant is in itself a sufficient ground for setting aside the consent order of 18th June 2012, and it should be so set aside to avoid an injustice to the Applicant. Under Order 1 Rule 3 of the Civil Procedure Rules, 2010:

“all persons may be joined as defendants against whom any right of relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

[7] 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; its effect is to terminate the initial loan contract between the 2nd Defendant and the Applicant and thereafter execute two (2) new contracts between the Applicant and the Plaintiff and 1st Defendant respectively. A contract can only be terminated by parties to the contract and the parties to the loan contract in this suit are the 2nd Defendant and the Applicant only. The Plaintiff and the 1st Defendant were not privy to the contract and cannot therefore purport to terminate the same. They are excluded by the doctrine of privity of contract. In any event, for the consent to have any legal force, the creation of two (2) new mortgages in the names of the Plaintiff and the 1st Defendant respectively would imply new contracts must be negotiated separately between the Applicant, and the Plaintiff and the 2nd Defendant respectively. Even if the Applicant wishes to go the way proposed in the consent, it would require a careful re-evaluation of the financial implication of the proposed new securities by the Applicant's team of financial experts before making any commitment on the new proposed arrangement. Note that the new arrangement is downgrading the initial mortgage from a mortgage issued by a corporate entity to mortgages issued by individuals. Therefore, the arrangement in the consent cannot be executed without the participation of Applicant. Thus, for that reason, the Consent entered herein is unlawful and/or illegal.

[8] 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. This fact has been admitted by the Plaintiff and the 1st Defendant in their respective responses to the Application herein. In the premises, unless the consent is set aside, the Applicant will suffer loss and damage. Accordingly, the Applicant prayed that its Application dated 11th April 2013 be allowed with costs.

The Plaintiff submitted as follows

[9] Following the comprehensive Ruling made by Justice Leonard Njagi herein on 6th March, 2011 the parties convened a meeting of the Company Board of Directors on 25th November, 2011. The said meeting was also attended by the parties' respective lawyers: Gatheru Gathemia for the Plaintiff, Moses Muchoki Kang'ata for Nancy Wamaitha Magak the 1st Defendant and James Makori for the 2nd Defendant Company. The meeting reached a resolution to transfer Apartment D2 to the 1st Defendant and Apartment D5 to the Plaintiff. The decision to sever the mortgage for the Apartments to the respective Directors on a 50/50% basis was also reached. This was then reduced into a written proposal was communicated *vide* a letter dated 29th November, 2011 to Savings & Loans (K) Ltd on how to implement. On 23rd January, 2012 under the Plaintiff's instructions, they wrote to the Branch Manager at Savings & Loans (K) Ltd at Sarit Center urging the bank to accede to the proposal to sever the Mortgage and permit each Director to hold their respective Apartments under their own names. On 1st March, 2012 the 2nd Defendant's lawyer James Makori Advocate wrote to the Manager of Kenya Commercial Bank at Sarit Center requesting that he communicates his decision on the proposal to sever the Mortgage. After consultation with the Loans Officer at Savings & Loans (K) Ltd. who was in charge of the mortgage, they were advised that since the matter on the two properties was subject of a court case it would be prudent to apply to court to have a court order directing the Bank to separate the Mortgage and effect the necessary transfer. Acting on advice of the said Loans Officer at Savings & Loans (K) Ltd at Sarit Center, the parties executed a consent letter dated 17th April, 2012 which captured all other terms of agreement between the Directors. The said consent letter was duly executed and filed in Court on 5th June, 2012 which was adopted as an order of the Court by Justice Mabeya on 18th June, 2012.

[10] The Plaintiff posited that the consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract aside, or if certain conditions remain to be fulfilled, which are not carried out. The formal consent order was send to Kenya Commercial Bank Ltd through the letter dated 18th July, 2012. Subsequently, the Plaintiff made and received several follow-up telephone calls from one Mr. Hillary Chirchir confirming that Kenya Commercial Bank Ltd was acting on the Court Order. The last such conversation was held towards the end of last year wherein the said Bank Officer confirmed that the Committee in charge of Securities and documentation at Kenya Commercial Bank Ltd had met and approved severing of the loan and transfer of the titles to the Directors. They then waited to receive formal communication from Kenya Commercial Bank Ltd on the proposal. It is yet to come forth.

[11] The Plaintiff is a Pastor currently employed at Nairobi Pentecostal Church Valley Road and earning a monthly salary of Kshs. 150,000/=. The Apartment D5 which he owns at Riara Exeter Apartments is rented out to a Company known as Oriflame for a monthly rent of Kshs. 75,000/= which is being used to service the mortgage. The first Defendant is employed by Safaricom and has a well remunerated status which permits her to adequately service the Mortgage on her Apartment No. D2. The Plaintiff averred that the Interested Party is imposing economic duress and should not be allowed to do so. on them economic duress. The pressure is quite significant, unfair and illegitimate for it is aimed at inducing and compelling the parties into a particular contract that favours the Interested Party. It leaves the parties with no choice but to accept to redeem the properties at unconscionable conditions and terms set by the Applicant. This is a fetter on the parties' right to redeem the property. On this, they cited the case of *LTI Kisii Safari Inns Ltd & 2 others vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR* where the court stated *inter alia*:

"...and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterized as illegitimate and has constituted a significant cause inducing the Plaintiff to enter into the relevant contract."

And also the case of *Kenya Commercial Bank Ltd & Anor –Vs- Samuel Kamau Macharia & 2 Others – Civil Appeal No. 181 of 2004*; and the case of *CTN Cash and Carry –Vs- Gallaher [1994] 4 ALL ER.714* the English Court of Appeal in dealing with a lawful threat to stop credit facilities in future if a debt was not paid held in part:

“Although in certain circumstances a threat to perform a lawful act coupled with a demand for payment might amount to economic duress, it would be difficult, though necessarily impossible to maintain such a claim in the context of arm’s length commercial dealings between two trading companies especially where the party making the threat bona fide believed that its demand was valid”.

Steyn L.J. said in part at p.717 para. J:-

“In a sense the Defendants were in a monopoly position. The control of monopolies is, however, a matter for Parliament. Moreover, the common law does not recognize the doctrine of inequality of bargaining power in commercial dealings”.

[12] The relevant factors in determining whether economic duress has been established include whether the victim protested, whether there existed an effective alternative remedy, the availability of independent advice, the benefit received and the speed with which the victim sought to avoid the contract (*see Pao on VS. Lau Yiu [1979] 3 ALL ER 65 p. 78, 7*). Lastly, the effect of duress is to render the contract voidable at the instance of the person who has entered into a contract under duress.

“Consequently a person who has entered into a contract under duress may either affirm or avoid such contract after the duress has ceased and if he has voluntarily acted under it with a full knowledge of the circumstances he may be held bound on the ground of ratification, or if after escaping the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it”.

[13] The Plaintiff submitted that the application by the Bank is made in bad faith and without consultation. Also, the affidavit they have filed is false in several material particulars as it has not disclosed the constant involvement of the Bank Officers at different stages of this matter. It is also hypocritical for the bank to want to reverse the entire consent order when only one clause refers to the Bank and the Mortgage and the same is actually devised and couched in terms intended to recognize, safeguard and secure the Bank’s interest. They referred the court to the decision by Honourable Warsame J (as he then was) in the case of *Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation Limited [2008] e KLR* where he stated that

“The conduct of the Defendants is unfair and unconscionable. A court of equity will not intervene merely because the mortgagee has obtained a collateral advantage but it will intervene if the act complained of is unconscionable.”

[14] The Plaintiff made further submissions that, during the pendency of the application, there have been some material, relevant and factual developments, to wit, there was correspondence exchanged between the parties and the Interested Party through its Advocates where the Applicant set out the terms of engagement. In particular, it agreed that the parties could move the mortgage from them and seek refinancing from other financial institutions. Strict conditions were imposed to this agreement, all of which the parties have met. The Plaintiff has already sought and obtained refinancing from Housing Finance Company of Kenya Ltd for 50% of the balance of the amount due. On 15th May, 2013, they wrote to the advocates for the bank indicating what the Plaintiff and the other Defendants herein discussed, resolved and/or agreed upon on the matter. Directions given by Honourable Mabeya J on the 3rd May 2013 were that **the parties to meet, negotiate and agree on how to sever the mortgage under fair terms**. The bank wrote to the second Defendant on the 8th July, 2013 indicating that the amount outstanding stood at Kshs. 5,278,279.78/=. Vide their letter dated 23rd July 2013, the advocates for the bank proposed that the properties be sold by private treaty. The parties [Plaintiff, first and second Defendants] then met and resolved that the Directors of the second Defendant be given the first option to purchase. Pursuant to that agreement, the parties entered into some written sale agreements for the sale of the two properties to the Directors. On the 29th August 2013, the Respondents proposed consent to resolve the case

and proposed to clear arrears then standing at Kshs. 130,000. This was accepted by the advocates for the first Defendant vide their letter dated 13th September 2013. The advocates for the bank replied indicating that their client would consider our proposal upon the identification of a financier willing to take over the facilities and a letter of offer is issued. A copy of the letter dated 11th September, 2013 is part of the Plaintiff's evidence. This was also accepted by the first Defendant by way of a letter of even date.

[15] The Plaintiff contends that he has negotiated and obtained from Housing Finance Company of Kenya Ltd the facility required by the Applicant. The facility negotiated as of 16th May 2014 is Kshs. 3,300,000 which will completely cover the Plaintiff's part of the mortgage. The Plaintiff has already paid Kshs. 600,000 to HFCK as at 19th June 2014. He has also meanwhile paid his share of the monthly repayments and arrears as required by the Applicant. On top of this, the parties have been regularly servicing the mortgage loan and there are no arrears and the amount outstanding on the entire loan is currently below Kshs. 4,520,280/= or thereabouts. The sought to rely on the case of *Suraya Holdings Limited & 2 others v CFC Stanbic Bank Limited [2014]* where Hon Gikonyo J stated that

“But in another sense, I find a lot of persuasion in the submissions by the Applicants based on clogging of the Equity of redemption of the chargors. The law - unlike before where equity of redemption was left to case law - has specifically provided for equity of redemption in section 89 of the Land Act, and no legal instrument or law that may entitle a chargee to foreclose the equity of redemption in charged land except in so far the law permits. The current laws on land have provided for elaborate procedures for enforcement of the chargee's power of sale of the charged property. That law has not changed and will still prevail even in cases where the Receivers and Managers of a company are seeking to sell the charged properties.”

The Plaintiff says that its commitment through Housing Finance Company of Kenya Ltd was on the strength of the Applicant's assurance that they seek an alternative financier. A valuation carried out recently at the instance of the Housing Finance Company of Kenya Ltd has shown that the Apartment Exeter Apartments D-5 which the Plaintiff intends to redeem by severance and/or refinancing of 50% of the mortgage account is currently valued at well over Kshs. 17m. Again they relied on the case of *Suraya Holdings Limited & 2 others v CFC Stanbic Bank Limited [2014]* (*ibid*) where the judge further stated:

“Looking at all these circumstances, I have no doubt that sale of the entire enterprise including the charged properties will occasion irreparable damage especially given the general prescription in Kenya, that receiverships would probably result in complete destruction of the business and goodwill of the company.”

[16] Therefore, the Plaintiff opines that the Applicant should be estopped from going back on its word after the parties have already obtained the commitment and written proof of ability to redeem the loan herein. Suh happening would cause the parties irreparable damage. The Applicant will not suffer any prejudice if the loan is severed since it will be paid all that is due to it without fail. See Warsame J (as he then was) in the case of *Sharok Kher Mohamed Ali & Another vs. Southern Credit Banking Corporation Limited [2008]* eKLR that:-

“The fact that a person seeks financial accommodation from a bank does not mean the bank can deal with the charged property in the way it deems fit. The existence of a mortgage document cannot give the bank unlimited power to seize, take possession and deprive the property owners. It is therefore my position that any arrangement between a mortgagee and a third party to deprive the chargor of his equitable right of redemption shall be void for all purposes. That right is inviolable and I think contemporary jurisprudence will frown at anything that leads to the clogging of the right to redeem. I think it will be startling result if banks were to be allowed to proceed in the manner this particular bank proceeded against the charged property. The conduct of the bank would

in my view constitute a clog on the equity of redemption directly or in the sense of impediment of the exercise of that equitable remedy.

By giving one month's notice and selling the mortgage property without proper notice and behind the back of the owners in a discrete and opaque manner to the 2nd Defendant, the bank introduced fundamental change of circumstances beyond the control of the borrowers or original contemplation of the parties, thus rendering it physically and commercial impossible for the borrowers to fulfill their obligation and/or rights to redeem the suit property. Such conduct and/or action on the part of the bank transformed performance into a radically different obligation from that contemplated and or envisaged under section 69A of I.T.P.A. It is therefore invariably clear that the power to sell the suit property without sufficient notice to the mortgagor and/or borrowers is unlawful, unfair and oppressive.

[17] According to the Plaintiff, the consent judgment entered into between the Plaintiff and the two Defendants is valid and cannot be set aside. No sufficient grounds have been set out by the Applicant to justify setting aside. **The interests of the bank are protected by the consent which requires the parties to sever the loan for the 2 properties equally to enable the parties to pay their respective 50% portions of the loan in full.** On this they relied on the case of *James Muchori Maina vs. Kenya Power & Lighting Company Ltd [2005] eKLR* where the court stated *inter alia*:

“Consent is in the form of a contract. It binds the parties. Since the time that consent was entered in court in 1999, it has not been challenged, nor has any of the parties applied to set it aside. The legal validity of a consent and principles on which it can be set aside were considered by the Court of Appeal in the case of Kenya Commercial Bank Ltd =vs= Benjoh Amalgamated Ltd. – Nairobi Civil Appeal No. 276 of 1997, wherein the Court of Appeal applied the reasoning in the case of Flora Wasike –vs– Destimo Wamboke (1988) 1 KAR 625 at page 626 where Hancox JA (as he then was) stated-

“ It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out”.

That consent was binding on the parties, and can only be set aside as enunciated above by the Court of Appeal. That consent still being intact on record cannot be challenged in this appeal.”

[18] The Plaintiff also believes that the Applicant was always kept aware of the consent and other proceedings between the parties. It should have come to court early enough. Now it has come into the matter too late after the parties have already concluded the matter. They cited the case of *Anthony Kiberenge Kamau V Kibuchi Wamunyi & 3 Others [2010] eKLR* where the court in dismissing an application filed by a party who was guilty of laches stated:

“When the Appellant filed the Motion dated 18th January 2010, he was duty bound to explain the delay in taking out the Motion late. Even assuming that the application for stay before the trial court was dismissed on 14th October 2009, there is no explanation as to why the Appellant failed to move with haste to file the Motion. He waited for another three months before lodging a new application without disclosing what he has been doing. I am convinced the Appellant is guilty of unreasonable delay in filing the Motion dated 18th January 2010. He is therefore in breach of the provisions of Order XLI rule 4 of the Civil Procedure Rules. I will therefore deny him the order of stay on account of laches on his part.”

The Plaintiff thinks joinder of interested party in an already concluded suit serves no purpose. The dispute as between the Plaintiff and the Defendants has been resolved by the parties. Bringing in the Interested

Party at this late hour has only served to delay the disposition of the matter. The Interested Party has no value to add to this case; it will not enable the court effectually and completely adjudicate upon the matter and settle all questions involved in the said suits. See Order 1 Rule 10 (2) which provides that:

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

[19] The Plaintiff averred that, it is quite misleading for the KCB's lawyer to assert that prayers No. 1 and 2 of his application has been dealt with by Judge Mabeya or any other Judge when the Bank has never obtained leave to be joined as an Interested Party in these proceedings. It is not feasible for them to even apply after judgment. In ***Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another*** [2014] eKLR Judge Nyamweya held as follows;

The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings" are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit. As this court has declined to set aside the judgment herein, there is no suit pending before this court, and the Applicants cannot therefore be joined as parties at this stage.

The cited other cases such as ***High court of Kenya at Eldoret Civil case No.136 of 2000 Kingori versus Chege and 3 others***[2000]2KLR Judge Nambuye held inter alia;

"...parties cannot be added so as to introduce quite new cause of action" "parties cannot be added so as to alter the nature of the suit" "necessary parties who ought to have been joined that is parties necessary to the constitution of the suit without whom no decree at all can be passed.

There is no complaint against the 2nd Defendant's unwillingness to execute ANY conveyance documents necessary to effect such changes and simultaneously secure the banks interest. The Bank is simply being stubborn and vexatious on this matter and ought to be directed to facilitate the redemption process already commenced by the parties herein. The 2nd Defendant has filed Grounds of Opposition with an appropriate Replying Affidavit. It is therefore misleading for the Applicant's lawyer to aver that the 2nd Defendant is not opposed to the Application seeking to set aside the consent Order executed by all the parties in settlement of this case. The plaintiff submitted that the Bank's Application is bad, misconceived, incompetent and prosecuted with bad faith and ought to be dismissed with costs.

[20] The 1st Defendant opposed the application and filed grounds of opposition dated 18th April 2013. The 1st Defendant substantially supported the submissions by the Plaintiff and I will highlight those areas which she has emphasized. She stated that the Applicant is not entitled to the orders sought in the application for the following reasons. One, The Interested party/Applicant was well aware of the developing issues on apartment Nos D2 and D5 at Riara Exeter apartments situated in LR No 330/86. So it is not true that the consent order was entered without their knowledge/ authority and consent. Letter dated 29th, November 2011 addressed to the Manager, Kenya Commercial Bank informed the Bank of the intentions to sever the facility herein. All agreements between the parties were duly communicated to the Applicant. The Applicant did not object to the terms set out in the correspondences herein including the fact that the 1st defendant will be personally responsible in financing the mortgage. Two, the Consent Order entered into by the parties herein is valid and cannot be set aside See the case of **Wasike vs Wamboko (1988) KLR** as well as the case of **Hirani vs Kassam (1952) 19 EACA pp 10 at pp432** quoted in the case of **Al Jalal Enterprises Ltd vs NIC Bank Limited & Another [2010] eKLR**. Similarly see the case of **Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269** and the case of **Purcell v F C Trigell Ltd [1970] 3 All ER 971**, quoted in the case of **Al Jalal Enterprises Ltd vs NIC Bank Limited & Another [2010] eKLR pp 16 at pp 3 of 5**. From the forgoing cases, the Applicant has not demonstrated that the consent order was entered into through fraud, collusion, contrary to the policy of the court or failure to disclose material facts. It follows then that the Applicant is bound by the terms of the consent adopted by the court and the same cannot be set aside. The decision by **Nyarangi Ag JA** in the case of **Wasike vs Wamboko (supra)** is apt; he stated as follows:

“it is abundantly clear to me that the appellant was a ready and willing party to the material judgment by consent and that the terms and consequences of the judgment were explained to her. The subject matter is, and the circumstances were, such that the appellant, who was accompanied by her husband, must have fully appreciated the implications of the judgments”.

[21] The 1st Defendant emphasized that the Applicant is guilty of laches and cited the maxim of equity that **equity aids the vigilant and not the indolent (“Vigilantibus non dormientibus aequitas subvenit”)**. The Applicant came too late and has not explained the delay in filing the application to set aside the consent order. The 1st Defendant also claims that he will be prejudiced if the consent is set aside as it is a result of amicable settlement of the respective rights of the parties. The Applicant will be able to realize the entire debt under the mortgage facility. The mortgage, therefore, is not altered in any way since alterations will mean that the mortgagees will stop servicing the mortgage. She is to bear 50% of the debt and the Plaintiff the other 50%. She relied on **Wasike vs Wamboko (1988) KLR; Hirani vs Kassdam (1952) 19 EACA 131** quoted in the case of **Al Jalal Enterprises Ltd vs NIC Bank Limited & Another [2010] eKLR; Brooke Bond Liebig Ltd v Mallya [1975] EA 266 at 269** quoted in the case of **wasike vs wamboko (1988) KLR; and Purcell v F C Trigell Ltd [1970] 3 All ER 971**, quoted in the case of **Al Jalal Enterprises Ltd vs NIC Bank Limited & Another [2010] eKLR;**

2nd Defendant’s submissions

[22] The second defendant submitted that it is fully owned by the Plaintiff and first Defendant who are its only Directors and Shareholders. The second Defendant was party to and supports the consent herein. So there is no basis for saying that the company does not oppose the application herein. A company is a juristic person and it acts through its Directors who are collectively referred to as the Board of Directors. Whatever decisions are taken regarding running the affairs of the company, they are taken by the Board of Directors. In this case the Board of Directors consists of the Plaintiff and the first Defendant. The Plaintiff and the first Defendant are the only trustees and shareholders of the company [second Defendant]. To the extent the power of the Directors are delineated in the Memorandum and they acted in respect to the company with utmost good faith, utmost care and skill and due diligence and in the interest of the company they represent. They have also made full and honest disclosure to the Applicant. As the directors acted

in the best interest of the Company, the court should not as a general rule interfere with internal management of a company. Therefore, the consent represents the decision of directors of the company, thus, the decision is the company's and should not be set aside. Instead, the application should be dismissed.

THE DETERMINATION

[23] From the entire proceedings, the pleadings and the submissions of the parties, two critical things are abundantly clear and are not disputed. The first one, that there is consent judgment which was entered upon consent signed by the plaintiff, the 1st Defendant and the 2nd Defendant and their counsel. The other, that there is a mortgage between the 2nd Defendant and the Applicant; and the Plaintiff and the 1st Defendants are guarantors of the Company's debt under the mortgage. The only quarrel the Applicant has with the said consent is that it was recorded in its absence, without its knowledge and consent. And, I gather that the basis of the application as presented before me is that; a) the consent herein was in relation to a mortgage in which the Applicant is the mortgagee and the 2nd Defendant is the mortgagor; b) the consent proposes severance of the mortgage property; an act the Applicant fears will substantially alter the mortgage and terminate the contract between the mortgagor and the mortgagee; c) as such, the consent recorded in court ought to have been with the written consent of the mortgagee; d) in the absence of such written consent by the mortgagee, the consent is illegal and should be set aside. These facts constitute the issues for determination by the court.

[24] Before I consider the merits of the application, I wish to settle the question of joinder of parties. On 11th April, 2013, Mabeya J allowed prayers 1, 2 and 3 of the application herein. Prayer 3 was for joinder of the Applicant as a party in the suit. Therefore, all arguments on this limb are not useful and I will not determine them unless I should sit on appeal over an order by a judge of concurrent jurisdiction. That is a judicial taboo and I am not prepared to hustle it. That notwithstanding and in order to pay homage to clarity, the Applicant is a party in this suit as the order for joinder has not been reviewed or set aside., I will now proceed to determine the real issues in controversy.

[25] The law on setting aside of consent judgment is as set out in of the ***Brooke Bond Liebig (T) Limited vs. Mallya [1975] E.A.*** that:

“The circumstances in which a consent judgment may be interfered with were considered by this court in Hirani v. Kassam (1952), 19 E.A.C.A. 131, where the following passage from Seton of Judgments and Orders, 7th Edn., Vol. I, p. 124 was approved:

“Prima facie, any order made in the presence and with the 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 by an agreement contrary to the policy of the court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

[26] First matter of concern; a proper consent in the sense of the law is one which is made in the presence and with the consent of parties and or their counsels. Such consent ***is binding on all parties to the proceedings or action, and on those claiming under them.*** This statement of law presents a sort of a squirm in this case, because the Applicant was not a party at the time the consent was entered into but has now been joined for purposes of the application for setting aside of the consent in question. There are arguments that the Bank had full knowledge of and was involved in the negotiations which culminated into the consent. There is other argument that the consent is for the benefit of the Applicant Bank. There is evidence the bank was aware of the negotiations herein. The Respondents averred that it is the Bank's credit officer who advised them to procure a court order since the matter was already in court. The advice may have been well-

intended. But how was it executed? It is extremely important to note that the negotiations and the consent which the Respondent say was as a result of a negotiated process, related to a split of the mortgage between the Bank and the 2nd Defendant. It became, therefore, invariably necessary that any formal recording of a consent in court should have involved the bank as a party in the suit. Joinder of parties carries with it unfettered discretion on the part of the court and the Respondents should have realized that the Bank is a necessary party and applied for its joinder. Otherwise, how else were they going to enforce a consent judgment on a non-party? The Bank could not even have been deemed to be claiming under any or one or more of the parties in this suit. There are ample legal reasons which support this view. The Bank is a mortgagee which has its distinct status and standing in law. It cannot be claiming under the parties herein including the mortgagor. It has its separate legal personality as a legal person. I need not belabour this point; it is the most important legal innovation formulated in the case of *Salomon vs. Salomon*, and is now settled law.

[27] Let me consider the other argument that the consent was for the benefit of the Bank. That may be true but any benefit accruing to the bank should be done with the written consent of the Bank. The Mortgage dated 18th November 2008 is not denied. There is also a debt owing which is not denied either. The said mortgage was express that the mortgagor will not interfere with the mortgaged property unless with the prior written consent of the mortgagee. Such consent may, however, be implied where circumstances irresistibly point to the fact that the consent should be deemed to have been given. As I stated earlier, there is evidence that the Bank was aware of the negotiations herein only that it did not give its written consent. It has provided sound legal grounds why it thinks the consent prejudices them. The most plausible reason is that the consent will substantially affect the mortgage as well as the contract for loan it had with the 2nd Defendant. I admit that a split which is suggested by the consent has considerable effects of the mortgage herein into a totally different arrangement altogether. Further, whereas the proposal by the Plaintiff for a take-over of the 50% of the loan by HFCK is acceptable, that by an individual, i.e. the 1st Defendant is not acceptable to the bank. This objection is not hollow. It makes perfect sense in commercial world. But I reckon that the Respondents stated that their intention and the purpose of the consent is to ensure the entire debt is paid. This admission and intention is essential in my decision-it will be borne out later as I find ways of serving substantive justice to all the parties.

[28] The Respondents have extensively addressed the court on economic duress. They say that despite their good intentions to repay the debt herein, the Bank is just acting unreasonably in order to induce or force them into unconscionable bargain. They cited plethora of relevant cases on the point. Is the Bank's insistence that its consent should have been sought before the consent was recorded unconscionable demand? In light of the law, the Bank was not a party at the time the consent judgment was recorded yet it was to affect its rights under the mortgage. Again, enforcement of a consent judgment such as the one recorded herein against a person who is not a party in the suit would be a legal farce for as long as it is affecting rights of such person. In addition, as a mortgagee the Bank's written consent was not obtained although, however, for completeness of law, any consent which is required in law or under legal instrument such as a mortgage should not be withheld unreasonably. Evidence that the Bank was aware of the proposals for split of the mortgage is important. The law on mortgages permits split of charges and also transfer of charges as long as the consent of the mortgagee is given. These provisions, on the one hand, guarantee the right to discharge the charge which the chargor has under the mortgage; it is part of equity of redemption; and on the other, ensures the debt is adequately secured and repaid. This brings me to the point where I should state that, it seems to me that the Bank is not averse to the split of the charge or transfer of the charge in amicable settlement of the matter as long as it is on terms which do not prejudice the Bank. From the submissions of the Bank, it prefers a take-over or what is now commonly known as purchase of existing loans by a reputable bank. Their fear is that only one half seems to meet the criterion, i.e. the take-over of part of the loan by HFCK. The other does not as it is the individual who is involved and that would be a downgrade of their security. And as I stated earlier, in commercial transactions parties are expected to do business at arm's length and to achieve this, the law on mortgages has provided rights and protections for the chargor as well as the chargee. The law sets out the chargee's remedies and the obligations of the chargor in respect of the charged property, including that he will not interfere or part with possession or part thereof of the charged property unless with the consent of the

chargee. For instance, see PART VII of the Land Act. and Section 87 of the Land Act is an apt example; it provides as follows:-

87. If a charge contains a condition, express or implied that chargor prohibits the chargee from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.

The law also provides for rights and protections for the chargor. First and foremost, the chargor is to be informed fully of the nature and effects of the mortgage and a certificate is signed thereto. But, the apex right of the chargor is right to discharge property and equity of redemption. In these circumstances where there is sufficient constitutional as well as statutory provisions of the rights, reliefs and protections of both parties, duress may be difficult, although not impossible to sustain especially where a party is insisting on strict recognition of its right or protection or relief under the law. There has to be conduct which is so unconscionable and which is a flagrant breach of the law in order to successfully argue a case of economic duress in a mortgage arrangement. Unconscionable conduct has been defined in the Black's Law Dictionary to mean *showing no regard to conscience; affronting the sense of justice, decency or reasonableness*. And unconscionable bargain is *one that no man in his senses and not under delusion would make to another on the one hand, and one no honest and fair man would accept on the other*. See the case of *LTJ Kisii Safari Inns Ltd & 2 others vs. Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR* where the court stated *inter alia*:

"...and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterized as illegitimate and has constituted a significant cause inducing the Plaintiff to enter into the relevant contract."

And also the case of *Kenya Commercial Bank Ltd & Anor -Vs- Samuel Kamau Macharia & 2 Others – Civil Appeal No. 181 of 2004*; and the case of *CTN Cash and Carry -Vs- Gallaher [1994] 4 ALL ER.714* the English Court of Appeal in dealing with a lawful threat to stop credit facilities in future if a debt was not paid held in part:

"Although in certain circumstances a threat to perform a lawful act coupled with a demand for payment might amount to economic duress, it would be difficult, though necessarily impossible to maintain such a claim in the context of arm's length commercial dealings between two trading companies especially where the party making the threat bona fide believed that its demand was valid".

[29] Insistence by the Bank that the mortgagor should recognize the protection of the mortgagee that no split of the mortgage can be undertaken without the written consent of the mortgagee is not economic duress. The Bank may have been difficult in a sense in not responding expressly on their position on the split of the mortgage in the manner proposed by the Respondents and more so, given the fact that they were continually informed of the going-on among the parties on the intended split of the mortgage herein. But, trouble is found in the way the Respondent executed the agreement among them. I stated this earlier, and I will repeat for it is worthy; invariably, the Bank ought to have been joined as a necessary party in the suit if the consent was to be effectively enforced against it, but the Respondent chose to record a consent judgment among them to the exclusion of the Bank. And that is what tinctures the consent and its execution thereof. But one thing is clear; on the one hand, the willingness of the Respondents' to repay the entire loan, and that they acted in honest belief that the consent is for the benefit of the Bank; and on the other hand, the Bank's willingness to also have an amicable settlement of this matter. On that basis, I will allow the Respondents to make a proposal to the Bank about how the other half of the loan shall be secured, preferably by being taken over by another reputable bank. I will take that the take-over of the one half of the loan by HFCK is acceptable to Kenya Commercial Bank, but the proposal will await the acceptance by the Bank of the proposal on how the other one half of the loan on the apartment allocated to the 1st Defendant shall be secured. The entire negotiation should be completed within 45 days from today. Meanwhile, I reserve my

decision on the setting aside of the consent in so far as it relates to the mortgaged property. Instead, I hereby stay the execution of that part of the consent judgment which relates to the mortgaged property. In other words, there shall be no split of the security consisting in the mortgage property until further orders of this court. As this case presents very difficult circumstances, the Applicant should also act reasonably and actively in the proposed split. And depending on the result of the negotiations herein, I will give further directions on the matter. It is so ordered.

Dated, signed and delivered in court at Nairobi this 16th day of February 2015

F. GIKONYO

JUDGE