REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO 236 OF 2014

"FAST TRACK"

NJOKI KANJA……..……..PLAINITFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED……..…..1ST DEFENDANT

MICHAEL DOUGLAS KANJA…….2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated 3rd June 2014 was filed on 4th June 2014 was been brought under the provisions of Order 40 Rules 1 and 4, Order 51 Rule 1 of the Civil Procedure Rules, Section1A, 1B, 3A and 63 (e) of the Civil Procedure Act Cap 21, Article 40 of the Constitution of Kenya and all other enabling provisions of the law. Prayers Nos (1) and (2)were spent. It sought the following remaining orders:-

    1. **Spent.**

    2. **Spent.**

    3. **THAT this Honourable Court be pleased to grant an injunction restraining the 1st Defendant, whether by itself, its agents, employees and/or servants from disposing by way of auction, alienating, transferring interest or in any other way dealing with the Petitioner's (sic) properties known as L.R. Lari/Kireita/T.230 and L.R. Lari/Kireita/T.73 pending the hearing and determination of the suit.**

    4. **THAT the costs of the application be provided for.**

2. The 2nd Defendant did not file any response to the Plaintiff's present application or any written submissions herein. The ruling herein was therefore based on the written submissions that had been filed by both the Plaintiff and the 1st Defendant herein.

THE PLAINTIFF'S CASE

3. The Plaintiff's application was supported by her Affidavit that was sworn on 3rd June 2014. Her Supplementary Affidavit was sworn and filed on 9th July 2014. Her Written Submissions were dated 15th July 2014 and filed on 16th July 2014 while herSupplementary Submissions were dated 11th November 2014 and 18th November 2014.
4. The Plaintiff stated that she was the registered owner of those parcels of land known as L.R. Lari/Kireita/T.230 and L.R. Lari/Kireita/T.73 (hereinafter referred to as "the subject properties") in trust for her family members and that she had been duly instructed by her deceased husband never to pledge and/or charge the said parcels of land which were deemed to be family property.
5. She denied ever having attended the Land Control Board that was alleged to have sat on 6th July 2011 and contended that the consent from the Land Control Board that was supposedly issued on 6th July 2011 and the Charge dated 24thJuly 2011 over the suit premises, guarantee, authorisation and were procured and obtained irregularly as she never executed any documents. It was her contention that the only forms she executed for the 2nd Defendant were to be used for installation of electricity in the said subject properties. She therefore relied on the doctrine of *non-est factum*.She stated that a report was made to the police under OB No 022/13/2/2013 to that effect.
6. She was therefore surprised when on 24th March 2014 the 1st Defendant served her tenants with an invalid Notification of Sale dated 30th January 2014 for the sale of the subject properties. She was also categorical that the 1st Defendant did not also issue her with a Notice under Sections 90 and 96 of the Land Act. She also pointed out that properties that were used to secure a loan of Kshs 6,300,000/= in 2011 were valued at Kshs 4,300,000/= as at 26th March 2014.
7. She therefore urged the court to allow her application as prayed.

THE 1ST DEFENDANT'S CASE

8. Matthew Mugo Ndongu, the 1st Defendant's Supervisor Grade 1 and working in the Recoveries Department swore a Replying Affidavit on behalf of the 1st Defendant on 16th June 2014. The same was filed on 18th June 2014.
9. The 1st Defendant declined to comment on the relationship between the Plaintiff and the 2nd Defendant as it was not familiar with the same.It said that it was also not aware that the said subject properties were being held by the Plaintiff in trust of the family members.
10. It was emphatic that it afforded financial accommodation to the 2nd Defendant which application was duly thumb-printed by the Plaintiff herein. It also said that the Plaintiff thumb-printed the Guarantee and Indemnity illustrating that she was aware of the said financial facility to the 1st Defendant. Hence, it was not sufficient for the Plaintiff to have contended that she was illiterate and that she executed the documentation in the belief that the same was for the application for installation of electricityat the subject properties.
11. The 1st Defendant averred that M/S Muga Auctioneers and General Merchants issued the forty five (45) days' notice and the Forced (sic) Valuation Report and denied clogging the Plaintiff's right of redemption. It therefore urged the court to dismiss the present application with costs to it.

LEGAL ANALYSIS

12. The Plaintiff submitted that she had demonstrated a *prima facie* case with probability of success and relied on the case of **Mrao Limited vs First American Bank Limited & 2 Others (2003) KLR 125**in this regard. It was her contention that the facts she had set out regarding the circumstances under which she executed certain documentation had not been rebutted by the 2nd Defendant as he did not oppose her application.
13. She also argued that the consents by the Land Control Board were issued two (2) weeks before the 1st Defendant made its offer to advance the financial accommodation to the 2nd Defendant.She denied ever having appeared before any advocate to execute the Charge documents and that she never understood the effect of her execution of the documents that were brought to her by the 2nd Defendant.
14. She placed reliance on the case of **Anjanaben Anil Shah vs Akiba Bank Limited [2005] eKLR**

in which it had been held that the Plaintiff therein had demonstrated a *prima facie* case as she had not executed the Charge Document before any advocate and the effects of Section 69 of the Indian Transfer of Property Act (now repealed) had not been explained to her.

15. She also relied on the case of **Avon Finance Company Limited vs Bridger & Another (1985) 2 ALL ER 281** in which it was held that the court could not enforce a transaction entered into without independent advise.

16. In this regard, the Plaintiff referred the court to the doctrine of "*non-est factum*"and the case of **Saunders vs Anglia Building Society (1970) 3 ALL ER 961**to the effect that a person relying on the aforesaid doctrine had to demonstrate that there was a radical distinction between what he signed and what he thought he was signing.

17. It was therefore her submission that she would suffer irreparable loss and/or injury that could not be compensated by way an award of damages if the interlocutory injunction was not granted for the reason that she would be deprived of her property contrary to the provisions of Article 40 of the Constitution of Kenya, 2010 as her consent had not been obtained and the subject properties had been charged irregularly and illegally. She therefore submitted that the balance of convenience titled in her favour for the granting of an interlocutory injunction.

18. On its part, the 1st Defendant argued that the Plaintiff had not demonstrated that she had met the threshold that was set out in the case of **Giella vs Cassman Brown Co Limited[1973] EA 358** for the granting of an interlocutory injunction.

19. A perusal ofpg 12 of the Charge dated 24th July 2011 clearly indicated that the advocate, one Joseph M Rioba, had certified that the Plaintiff had appeared before him and that she had freely and voluntarily executed the instrument and understood its contents.

20. On the same page, the Plaintiff was also said to have acknowledged as follows:

"I NJOKI KANJA acknowledge that I understand the effect of Section 74 of the Registered Land Act (the "Act") as varied provisions of this Charge and I hereby agree that the Chargee may exercise its statutory powers of sale and of appointment of receiver with such express variations and addition contained in this Charge and that the Chargee's rights under section 83 and 84 of the Act of the Act and the restrictions under section 70 of the Act be noted against the above-mentioned title."

21. In Paragraph 13 of its Written Submissions, the 1st Defendant stated as follows:-

"The question at this point would be in the 86 years of the Plaintiff's life how has she transacted or dealt with issues that required her to read and write? She only states that she trusted the 2nd Defendant (her grandson) who brought her documents to sign which she claims she thought were an application for electricity connection... On this we ask even if the Plaintiff knew that the documents she affixed her thumbprint on were electricity connection application form (which was not the case here) why is it that she did not question, when no electricity was connected to her home? It took the Plaintiff receipt of notification of sale of LARI/KIREITA/T.73 and LARI/KIREITA/T.203 to pursue/look into her "alleged application for electricity?" It is the 1st Defendant's humble submission that this application for injunctive relief is an afterthought, abuse of this honourable Court's time and ought to be dismissed…"

22. Additionally, the 1st Defendant's argument in Paragraph 10 of its Replying Affidavit that after the proper execution of the letter of offer was executed, the charge document was prepared with the knowledge of the Plaintiff and the 2nd Defendant and they both signed the documents illustrating an understanding of their obligations as stipulated in the Charge document and their acceptance to be bound by the said document were neither here nor there.

23. Knowledge of preparation of the said Charge Document was not sufficient to demonstrate that the Plaintiff had been informed of the implication of her offering the subject properties as security for the loan that the 2nd Defendant was purported to have taken. Under the Registered Land Act Cap 300 (Laws of Kenya) (now repealed), it was crystal clear that a chargee **had to**

appear before an advocate and the ramifications of her execution explained to him or her in a language that he or she understood (emphasis court).

24. Evidently, the 1st Defendant's assertions that the fact that the Plaintiff affixed her thumbprint on both the Charge documents and Guarantee form,*prima facie,* meant that she understood her obligations under the said documents was indeed telling that she did not execute the said documents before the advocate, a clear departure from the obligations required of a chargee to a chargor.

25. If indeed, she had had done so, nothing would have been easier than for the said advocate to have sworn an affidavit to rebut the Plaintiff's contention that she never appeared before him or for the 1st Defendant to have adduced any other material documentary evidence to support its assertion that the Plaintiff appeared before the said advocate.

26. The court was thus not persuaded by the 1st Defendant's assertions that there was no obligation on its part to explain to the Plaintiff the effect of pledging the title documents in respect of the said subject properties when executing the security documents. There was a high burden on the 1st Defendant to ensure that it complied with all provisions of the law and that it had conducted due diligence to firmly to safeguard its interests in respect of the subject properties.

27. In this regard, the court concurred with the Plaintiff's submissions that the issue of whether or not the doctrine of *non-est factum* was applicable in the circumstances of the case herein was of utmost importance for determination by the court in a full trial.

28. The 1st Defendants' contentions that the consents from the Land Control Board were regularly obtained following applications its application together and that of the 2nd Defendant with the knowledge of the Plaintiff were also, in the view of the court, another pertinent issue for determination by the court in a full trial.

29. The Applications for Consent of Land Control Board in respect of the subject properties, copies which were annexed in the 1st Defendant's Replying Affidavit Exhibit marked "MMN 4" evidenced by a signature on execution part for the **"signature of owner, lessor, mortgagor, chargor or authorised agent or agents etc"**that had been affixed thereon.

30. The court's curiosity was piqued as the said Applications to the Land Control Board were duly signed yet the Plaintiff was said to have been illiterate and thumb-printed documents. In Paragraph 8 of its Replying Affidavit, the 1st Defendant acknowledged that the Plaintiff had thumb-printed the documents. If it was to be accepted that the Charge was duly thumb-printed by the Plaintiff, the question that arose was whether she really duly executed the said Applications as they both contained signatures and not thumb-prints.

31. The court needed to have been satisfied that the agent, if at all, who had executed the said Applications for Consent to the Land Control Board had implied or express authority of the Plaintiff to execute the said applications on her behalf and that the said consents were obtained regularly and legally, which the 1st Defendant failed to demonstrate.

32. Similarly, it was not sufficient for the 1st Defendant to have contended that the Plaintiff had **knowledge** (emphasis court) that applications in respect of the said subject properties had been made at the Land Control Board. However, the court did not wish to engage in the discourse of the legality or otherwise of the said Consents on the ground that the same had been obtained before the financial accommodation was advanced to the 2nd Defendant as had been contended by the Plaintiff as that was an issue that was best left for ventilation in a full trial.

33. Whereas the 1st Defendant argued that it had duly served the Notification of Sale upon the Plaintiff, which the Plaintiff did acknowledge having received the same and the fact that it had carried out a Valuation Report before it advertised the sale of the said subject properties by way of public auction, the court noted that the 1st Defendant did not annex copies of the mandatory statutory notices that ought to have been issued to the Plaintiff under Section 90 and Section 96(2) of the Land Act Cap 280 (Laws of Kenya).

34. Section 90 of the Land Act Cap 280 (laws of Kenya) provides as follows:-

> **1. If a chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**
>
> **2. The notice required by subsection (1) shall adequately inform the recipient of the following matters—**
>
> **a. the nature and extent of the default by the chargor;**
>
> **b. if the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three months, by the end of which the payment in default must have been completed;**

(a)

35. Turning to Section 96 of the Land Act, the same stipulates as follows:-

> **"1. Where a chargor is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the chargor under section 90(1), a chargee may exercise the power to sell the charged land.**
>
> **2.Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell."**

36. A reading of Section 96 (1) of the Land Act shows that these forty (40) days would be in addition to the three (3) months' notice under Section 90 (2) of the Land Act and different from the Notification of Sale to be issued by an auctioneer. No evidence was adduced by the 1stDefendant to demonstrate that it had complied with the mandatory provisions of Sections 90 and 96 (2) of the Land Act.

37. Although the court should and ought not to re-write the contracts that have been entered into by parties, it must always have at the back of its mind that the sale of a person's property is not a matter that should be taken casually because it deprives a party of right to own property, a right that is enshrined in Article40 of the Constitution of Kenya, 2010 as was rightly submitted by the Plaintiff.

38. The importance of not depriving a person his or her property was considered in the case of **Kwanza Estates Limited vs Dubai Bank Kenya Limited (2013) eKLR**in which it was held as follows:-

> **"I am satisfied that a party deprived of his property through an illegal process would suffer irreparable loss and or damage…"**

39.Having considered the pleadings, the affidavit evidence, written submissions and the case law that was relied upon by the parties herein, the court found that there were too many unanswered

questions that would need to be resolved before the 1st Defendant's rights to exercise its statutory power of sale could be said to have crystallised.

40. Indeed, there was need for the court to establish whether or not the doctrine of *non-est factum* was applicable herein. Notably, if it was found at the end of the trial that the process of execution of the documents by the Plaintiff was illegal and irregular, the Plaintiff would suffer loss that could not be compensated by way of damages if the interlocutory injunction was not granted pending the hearing and determination of the suit herein.

41. As was rightly pointed out by the Plaintiff, this very court addressed the question of the doctrine of *non-est factum* in the case of **Njoki Kanja vs Faulu Kenya DTM Limited & Michael Douglas Kanja [2014] eKLR** which involved similar circumstances between the Plaintiff and the 2nd Defendant herein and in the case of **Pariken Ole Tatiyia vs Samuel Kamau Waithaka & Another [2014] eKLR.**

42. In the case of **Njoki Kanja vs Faulu Kenya DTM Limited & Another** (Supra), this court observed as follows:-

> **"18. However, in view of the hazy facts of the case herein, it would be worthwhile for the court crucial to establish whether or not the doctrine of *non est factum* is applicable herein. The court is not able to conclusively state who is giving the correct version of what actually transpired herein or whether the 1st Defendant exercised the due diligence that was required on its part. Accordingly, the court finds that the balance of convenience would tilt in favour of the Plaintiff herein."**

43. Similarly, in Paragraph 34 of the ruling delivered in the case of **Pariken Ole Tatiyia vs Samuel Kamau Waithaka & Another** (Supra), this court held as follows:-

"While the court appreciates the 2nd Defendant's position that the charge was created, perfected and registered strictly in accordance with the law and that the statutory power of sale crystallised, the court cannot ignore the principle of *non est factum* in arriving at a just resolution of this matter. The Plaintiff may have executed the Charge but the question that arises is whether or not his intention was to execute a Charge or a transfer to the 1st Defendant. The Plaintiff's receipt of Kshs 2,500,000/= from the 1st Defendant would require to be looked into to establish the circumstances under which the same was paid. The 1st Defendant's non-attendance all the times this matter has come up in court can only lead the court to inquire as to what his real intentions with the Plaintiff were. The court cannot purport to know what these facts were until it hears all the parties to the dispute herein."

> 44. The fact that the 2nd Defendant had utilised the funds it was advanced by the 1st Defendant would not be a fact the court would take into account when considering whether or not the Plaintiff was entitled to injunctive orders. What would be of concern to the court was whether or not the Plaintiff had met the criterion that was set out in the case of **Giella vs Cassman Brown Co Limited(1973) EA 358**.

45. In the circumstances of this case, the court was thus satisfied that the Plaintiff,had without a doubt, met all the criteria that were set out in the case of **Giella v Cassman Brown Co Limited**(Supra)in which it was held as follows:-

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

DISPOSITION

46. For the foregoing reasons, the upshot of this court's ruling was that the Plaintiff's Notice of Motion application dated 3rd June 2014 and filed on 4th June 2014 was merited and the same was granted in terms of Prayer No (3) therein.The 1st and 2nd Defendants shall bear the Plaintiff's costs of this application.
47. The Plaintiff is hereby directed to file and serve upon the 1st Defendant an undertaking as to payment of damages within fourteen (14) days from the date of this ruling.
48. It is so ordered.

DATED and **DELIVERED** at **NAIROBI**this **26th** day of **March** 2015

J. KAMAU

JUDGE