



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL CASE NO 315 OF 2013

PARIKEN OLE TATIYIA..... PLAINTIFF

VERSUS

SAMUEL KAMAU WAITHAKA.....1ST DEFENDANT

K-REP BANK LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's application dated 17th July 2013 and filed on 23rd July 2013 was brought under the provisions of Section 3A & 63(c) & (e) of the Civil Procedure Act and Order 40 Rule 2 of Civil Procedure Rules. Prayer (1) and (2) were spent. It sought the following orders:-
 1. Spent.
 2. Spent.
 3. That pending the hearing of this suit the Defendants be restrained from selling, transferring or otherwise disposing of the suit property.
 4. Costs of this application be provided for.
2. The grounds under which the Plaintiff relied upon were generally that:-
 - i. The Plaintiff who was illiterate had entered into an agreement with the 1st Defendant in which he had agreed to sell and the 1st Defendant had agreed to purchase fifty (50) acres of the subject property namely Keromyokie/11 Kisumet/138 for the sum of Kshs 4,000,000/=.
 - ii. Instead the 1st Defendant charged the property to the 2nd Defendant, without the consent of the Plaintiff and the charge was thus tainted by fraud. The Plaintiff averred that there was no relationship between him and the 1st Defendant that would have warranted the said charge to secure the debts of the 1st Defendant to the 2nd Defendant.
 - iii. The 2nd Defendant did not caution the Plaintiff as was required in Section 74 of the Registered Land Act and that the prerequisites and requirements at the Land Control Board were absent.
 - iv. The lending to the 1st Defendant by the 2nd was reckless and fraudulent.

AFFIDAVIT EVIDENCE

3. In his Supporting Affidavit sworn on 17th July 2013, the Plaintiff deponed that he could not read and write and that he only spoke the Maasai language. He averred that after the burial of his wife around December 2011, he scouted for buyers to purchase a portion of his fifty (50) acres to offset debts that had been incurred during the hospitalisation of his wife.
4. He further stated that he was introduced to the 1st Defendant by a Moses Mosoi Konte who also did all the translations between him and the 1st Defendant. He said that he released his title deed to the 1st Defendant who was to sub-divide the suit property and excise fifty (50) acres therefrom for a consideration of Kshs 4,000,000/= , being Kshs 80,000/= per acre.
5. He, however, admitted signing some documents at Rewans Bar in Kiserian and at the offices of M/S Gitonga, Kamiti & Kairaria Advocates but that thereafter the 1st Defendant stopped picking his calls. Upon conducting a search on the property, he found that the same was not sub-divided as he had agreed with the 1st Defendant but that rather the same had been charged to the 2nd Defendant. The Plaintiff said that he later came to find out that the 1st Defendant took a loan of Kshs 9,000,000/= from the 2nd Defendant and that a person the 1st Defendant had sent to demarcate the land was actually a valuer and not a surveyor.
6. The Plaintiff contended that the documents submitted to the 2nd Defendant by the 1st Defendant were fraudulent and that he never signed the consent forms required by the Land Control Board which he noted were signed by the 1st and 2nd Defendants. He contended that the Defendants and their advocates concealed from him the exact nature of documents that he signed and that having failed to conduct due diligence on the 1st Defendant, the 2nd Defendant had been negligent. He said this was borne in the Statutory Notice dated 4th July 2012 where the 2nd Defendant had pointed out that the statements used by the 1st Defendant to obtain the loan were fake.
7. He further stated that he managed to trace the 1st Defendant who paid him a sum of Kshs 2,500,000/= leaving a balance of Kshs 1,500,000/=. It was his contention that the whole transaction between the 1st and 2nd Defendants was fraudulent and that he would suffer grave injury if the suit property where he stayed with his family was disposed of as had been threatened in the Statutory Notice of Sale.
8. The Plaintiff tendered in evidence copies of the Title Deed, Permit for Burial, Charge, Letter of Consent dated 13th March 2012, Application for consent of Land Control Board, Bank Statement from Equity Bank, Statutory Notice and a Demand letter from Plaintiff's Advocates dated 25th April 2013 which were all marked as "POT 1 – POT 8".
9. In response thereto, Gitonga Kamiti, and advocate in the firm of M/S Gitonga, Kamiti & Kairaria Advocates swore a Replying Affidavit on 5th September 2013. He said that his firm received instructions from the 2nd Defendant to charge the suit property to secure a sum of Kshs 9,000,000/= and that the Plaintiff and the 1st Defendant duly went to his office where they both executed the Charge. He was emphatic that he had explained to them the consequences of borrowing monies from the 2nd Defendant as was required under Section 74 of the Registered Land Act Cap 300 (Laws of Kenya) (now repealed.) He said that the Plaintiff informed him that he was a good friend to the 1st Defendant and that they used to assist each other in business. He stated that they spoke in Kiswahili throughout and that the issue of purchase of land was not brought to his attention.
10. George Muema, a Legal Assistant of the 2nd Defendant also swore a Replying Affidavit. It was sworn and filed on 9th September 2013. He stated that credit appraisal in respect of the 1st Defendant was done but that in any event there was no regulation requiring them to obtain the 1st Defendant's and Plaintiff's credit appraisal. He said that the Plaintiff's role was limited to consenting to the loan while it was the 1st Defendant's role to repay the money.
11. The 2nd Defendant tendered in evidence a copy of a letter dated 3rd September 2013 from Kajiado North Sub-County confirming that the consent to charge the suit property herein was sought and regularly issued by the said office. He said that the application form for consent was properly signed and any errors of dates therein were not material. In addition, he averred that the statutory

- power of sale had crystallised and the Statutory Notices had been sent to the Plaintiff's and 1st Defendant's to their last known addresses as could be seen from the certificate of postage which he had attached to his Replying Affidavit at pp 22-24 therein.
12. It was the 2nd Defendant's case that the Plaintiff was paid a sum of Kshs 2,500,000/= by the 1st Defendant and that he should not be allowed to misuse the court to pursue a debt through the 2nd Defendant. The said advocate was categorical that the Plaintiff had demonstrated selective memory in the facts that he disclosed to the court on 16th September 2013.
 13. The Plaintiff swore a Supplementary Affidavit in response to the 2nd Defendant's Replying Affidavit on 5th September 2013. It was filed on the same date.
 14. He reiterated that his photos were taken at the said Advocates' offices, a fact that Gitonga Kamiti Advocate denied. He also said that he did not take his original title deed to the said advocates' offices as he had earlier on surrendered the same to the 1st Defendant for purposes of sub-division of the suit property. He also denied being able to speak Kiswahili as had been alleged by the said advocate or that the allegations about his relationship with the 1st Defendant were true.
 15. He denied ever attending the Land Control Board and annexed a copy of a letter dated 30th May 2013 to the Oloo Laiser Land Control Board marked "PO 1-1" asking for the minutes of the Land Control Board that sat on 13th March 2012 but that the same had not been availed to him or his advocates.
 16. In response to the Replying Affidavit of George Muema sworn on 9th September 2013, the Plaintiff admitted executing documents which he believed were for transfer of land to the 1st Defendant and that it was doubtful that the Land Control Board meeting was held on 13th March 2012.

LEGAL SUBMISSIONS BY THE PLAINTIFF

17. The Plaintiff's written submissions were dated and filed on 17th October 2013. He submitted that the whole transaction was tainted by fraud as the 2nd Defendant did not take a debenture over the assets of the supermarket for which the 1st Defendant and his wife had taken the loan to finance but had instead taken a person guarantee from him without ascertaining the relationship between him and the 1st Defendant.
18. It was his submission that the negligence by the 2nd Defendant was deliberate to draw the sum of Kshs 9,000,000. Further, the Plaintiff argued that in normal borrowing a bank would insist on a guarantee from the actual shareholders of the business being advanced money and that it was curious the 1st Defendant and the wife were not asked to execute the said guarantees. His argument is borne by the fact that Exhibit "MM1" annexed to the affidavit of George Muema shows that the 2nd Defendant conducted a background management and business history for a supermarket whose directors were the 1st Defendant holding 60% shareholding while his wife held 40% shareholding.
19. It was his case that he was not aware of the nature of the transaction when he signed the Charge and the Guarantee and that his consent was not valid and informed as it was obtained by fraudulent misrepresentation of facts by the 1st Defendant.
20. It was also his contention that he was not advised to take independent legal advice. He referred the court to Sarkar's Law of Evidence 16th Edition 2007 Vol 2 at page 1735 where it was stated that **"...the Courts of Chancery in England always extend to the weak, ignorant and infirm...."** He argued that the Defendants took advantage of his weakness and relied on the case of **Barclays Bank PLC vs Obrien & Another (1993) 4 All ER 417** which addressed the issue of conflict of interest by the advocate who acted for both the Guarantor and the Bank, as with the Plaintiff 2nd Defendant herein. He also relied on the case of **Graham vs Attorney General of Fiji [1936] 2 All ER 992** which made it clear that there was great necessity for advocates to maintain the highest standard of professional duty where clients were illiterate. He maintained that the explanation

- under Section 74 of Registered Land Act was in a language he could not understand.
21. The Plaintiff also pointed that the Charge was lodged on 28th March 2013 yet the Charge was Lodged on 26th March 2012. He questioned the hurry to register the charge even before the stamp duty was assessed and paid.
22. It was his argument that merely reading a document to an illiterate person in a language he understands is not sufficient but that it had to be proved that the document was explained to the illiterate person and that he clearly understood the nature and effect of the transaction. He relied on the case of **Omanhene Vs O, A 1937 PC 274** cited in Sarkar's Law of Evidence (Supra) on page 1736 – 1937.
23. The Plaintiff therefore argued that he had established a *prima facie* case that he was illiterate and did not understand the nature of the transaction when he executed the charge. It was his submission that he and his family would suffer irreparable loss if this ancestral home was sold and urged the court to grant the orders sought to preserve the suit property pending trial of the court.

LEGAL SUBMISSIONS BY THE DEFENDANT

24. In its submissions dated 5th November 2013 and filed on 6th November 2013, the 2nd Defendant argued that it appraised the 1st Defendant and that in any event, the Plaintiff's contention that it did not conduct credit appraisal on the 1st Defendant was irrelevant since the Plaintiff was attempting to usurp its role in credit appraisal and approval.
25. The 2nd Defendant referred the court to the case of **John Mwenja Ngumba and 2 others vs National Industrial Credit Bank Ltd and Another (2013) eKLR** in this regard.
26. The 2nd Defendant was emphatic that the advocate explained the implications of Section 74 of the Registered Land Act (now repealed) and that the certificate was duly executed. It was its argument that the Plaintiff did not deny ever having visited the advocates' offices and that there was no proof of any fraudulent actions. It relied on the case of **Wangari Ndegwa vs Housing Finance Co Ltd [2007] eKLR** where the court refused to find that there was any fraudulent misrepresentation on the part of the Plaintiff therein when she executed the charge.
27. It was the 2nd Defendant's averment that the letter issued by the Deputy County Commissioner Kajiado North Sub-County was in line with the new government structure and the same confirmed that the consent had emanated from its offices.
28. It was also its contention that the stamp duty was assessed and paid on 26th March 2013 and that the submission advanced by the Plaintiff in this regard was incorrect. The property was properly valued by M/S Metrocosmo Ltd and that the statutory Notices of Sale and Notification by the auctioneer were proper and in accordance with the law following the default by the 1st Defendant. It referred the court to the cases of **CA 148/95 Nyangilo Ochieng & Another vs Fanuel B Ochieng & Another** (unreported), **Eliazer Kiprugut Kosgei vs Barclays Bank of Kenya & Another [2013] eKLR**.
29. The 2nd Defendant therefore submitted that the Plaintiff had not met the test in **Geilla vs Cassman Brown case** and asked this court to find that the charge had properly crystallised, that the statutory power of sale had been regular and properly exercised and that the creation, perfection and registration of the charge was done in strict compliance with the law.

LEGAL ANALYSIS

30. Although as the 2nd Defendant has correctly stated that credit appraisal of the 1st Defendant was an internal mechanism and the Plaintiff could therefore not purport to scrutinise the same, it has not escaped the attention of the court that the 2nd Defendant's letter dated 4th July 2012 to the Plaintiff and the 1st Defendant stated as follows:-

“...it has come to our attention that your statements which we relied on in approving your loan facility were not authentic. We also note that you have failed to honour your monthly

instalments....”

31. Perusal of the minutes marked as “MM 1” page 1 (b) in the 2nd Defendant’s Replying Affidavit shows that the approval was made without conditions compared to other borrowers shown in the said minutes. Whereas the 2nd Defendant had concerns about the collateral that the 1st Defendant had been given as security and recommended that a Professional valuation be done within the bank’s panel, the loan application was approved upfront.
32. This was unlike the cases of Anne Wamuyu Kamau and Boaz Ndunge Atenya shown in the said minutes, the requests for money were approved by the committee subject to the following conditions:-
- i.
 - ii. **Legal charge over property pledged as collateral.**
 - iii. **Professional valuation over the property to be undertaken by a valuer within the bank’s panel.**
 - iv. **Insurance cover over the property against fire and burglary with bank’s interest noted on the policy.**
33. The procedure in approving loans by the 2nd Defendant is a relevant and pertinent issue that needs to be interrogated further in view of the fact that the 1st Defendant appeared to have duped the 2nd Defendant by using fake bank statements when obtaining the loan of Kshs 9,000,000/=. The Plaintiff was categorical that he was under the impression that he had been executing documents for the sub-division and transfer of fifty (50) acres to the 1st Defendant.
34. 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.
35. This is a case of the Plaintiff’s word against the 2nd Defendant’s advocate who said he met and explained to the Plaintiff the implications and consequences of Section 74 of the Registered Land Act (now repealed). The issue of the language and literacy of the Plaintiff is also one that has been hotly contested by the 2nd Defendant and needs to be resolved as well as whether the Plaintiff and his family members attended the Land Control Board.
36. Having carefully considered the affidavit evidence, the oral and written submissions by counsel for the Plaintiff and the 2nd Defendant, this court is satisfied that it would be in the interests of justice to preserve the suit property pending the hearing and determination of the suit herein. This is because the Plaintiff has established a *prima facie* case with a probability of success. He has demonstrated that he will suffer irreparable loss which cannot be adequately compensated by damages and the conditions for granting an injunction on a balance of convenience are present. This court is satisfied that the Plaintiff has met the criteria set out in **Geilla vs Cassman Brown & Co Ltd [1973] EA 358** and an injunction ought to be granted in his favour pending the hearing and determination of the suit herein.

DISPOSITION

37. The upshot of this court’s ruling is that prayer No 3 of the Plaintiff’s Notice of Motion dated 17th July 2013 and filed on 23rd July 2013 is hereby allowed. Costs in the cause.
38. Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th day of January 2014

J. KAMAU

JUDGE