



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 203 OF 2013

NJOKI KANJA.....PLAINITFF

VERSUS

FAULU KENYA DTM LIMITED.....1ST DEFENDANT

MICHAEL DOUGLAS KANJA.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Notice of Motion application dated and filed on 22nd May 2013 was brought under the provisions of Order 40 Rules 1 and 4, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 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 are spent. It sought injunctive orders against the 1st Defendant, whether by itself, its agents, employees and/or servants from disposing by public auction or otherwise or transferring interest and/or dealing with the Plaintiff's properties known as L.R. Lari/Kireita/T.64 and L.R. Lari/Kireita/T.22 (hereinafter referred to as the "suit premises").
2. From the grounds of the Plaintiff's application and her Supporting and Supplementary Affidavits, it is evident that her case was that the Charge over the suit premises, Guarantee, Authorisation and Consent from the Land Control Board were procured and obtained irregularly as she never executed the same.
3. She denied ever having authorised the use of her titles to be used as security for the loan of Kshs 3,500,000/= that was advanced to the 2nd Defendant by the 1st Defendant but rather the same were to be used for installation of electricity. It was her contention that she understood the documents the 2nd Defendant gave her to sign as being for installation of electricity. She therefore relied on the doctrine of *non est factum*. She was emphatic that she never appeared before Njenga Charles Ngugi Advocate who was said to have explained to her the effects of Section 74 of the Registered Land Act Cap 300 (laws of Kenya) (now repealed).
4. In response thereto, Ann Makori, the 1st Defendant's Head of Legal swore a Replying Affidavit on 2nd October 2013. The same was filed on the same date. The 1st Defendant's case was that the 2nd Defendant applied for a facility for the sum of Kshs 3,500,000/= and upon defaulting in repaying the said loan, its statutory power of sale crystallised.
5. The 1st Defendant referred the court to **CMCC No 2798 of 2013 Njoki Kanja & Michael Douglas Kanja vs Faulu Kenya Deposit Taking Micro Finance Limited & Another** in which

it said that is the said suit, the Plaintiff and the 2nd Defendant's only complaint when it attempted to exercise its statutory power of sale on 28th May 2013 was that they had not been served with the Statutory Notice. Noteworthy, the Plaintiff denied ever having executed the Verification Affidavit in respect of the said suit.

6. The Plaintiff's written submissions and Supplementary submissions dated 22nd October 2013 and 24th January 2014 were filed on 22nd October 2013 and 27th January 2014 respectively while those of the 1st Defendant dated 11th November 2013 were filed on 12th November 2013. The 2nd Defendant did not file any response to the Plaintiff's application or written submissions in the matter herein.

LEGAL ANALYSIS

7. The court has carefully considered the pleadings, affidavits, written submissions and case law for both the Plaintiff and the 1st Defendant and notes that although it was not in dispute that the 1st Defendant advanced the 2nd Defendant a sum of Kshs 3,500,000/= that was secured by the suit premises, questions did abound in the mind of this court as to whether the Plaintiff was in fact aware of the implication of the documents that she was said to have executed and the legality and validity of the documents that were obtained herein leading to the charging of the said suit premises.
8. The 1st Defendant was categorical that the Plaintiff executed the Charge but she denied the same. It was the Plaintiff's word against that of the 1st Defendant. The failure by Njenga Charles Ngugi, the advocate who was indicated to have explained to the Plaintiff the implication of Section 74 of the Registered Land Act (now repealed) to swear an affidavit herein was fatal to the 1st Defendant's case. His evidence would have been critical in proffering an explanation as to the circumstances under which the Plaintiff executed the said disputed Charge if at all.
9. While there appeared to have been existence of other proceedings before a subordinate court, it was incumbent upon the 1st Defendant to have persuaded this court to conclusively find that the Plaintiff was indeed aware of the same. A perusal of the verification affidavit in support of the said suit shows that there was a signature appended thereto. However, the Charge document and the Plaintiff's affidavits herein clearly show that the same was thumb-printed. This court is of the view that there is need for this issue to be interrogated further with a view to establishing whether indeed the Plaintiff herein executed the said Verification Affidavit as was alleged by the 1st Defendant or at all. This is particularly important as the Plaintiff annexed to its Supplementary Affidavit, a letter dated 7th October 2013 from M/S Kamotho Njomo & Co Advocates to M/S Opundo & Co Advocates, the latter who were said to have filed the suit in the subordinate court without the Plaintiff's authority.
10. The court's curiosity was also piqued as the Letter of Consent in respect of L.R. Lari/Kireita/T. 227 was addressed to the Plaintiff herein whereas the meetings at the Land Control Board in respect of the said suit premises were said to have been held on 6th July 2011.
11. The Letter of consent to charge the suit premises annexed to the 1st Defendant's Replying Affidavit was addressed to Douglas Kanja Gakunga whereas the Plaintiff was the registered owner of the suit premises. The Identity Card Number indicated thereon matches Number 5248388 shown in a copy of the Plaintiff's identity card annexed to her Supporting Affidavit. It is therefore not clear to this court why the said Letter of Consent No 474284 in respect of L.R. Lari/Kireita/T.64 was not addressed to the Plaintiff if she was actively engaged in the said process.
12. Similarly, it would be critical to establish the authenticity and validity or otherwise of the Applications for Consent of Land Control Board dated 20th July 2011 and 25th July 2011 in respect of L.R. Lari/Kireita/T. 227 and L.R. Lari/Kireita/T. 64 respectively attached to the 1st Defendant's Replying Affidavit.
13. If it is to be accepted that the Charge was duly thumb-printed by the Plaintiff, a question would arise as to whether she duly executed the said applications to the Land Control Board as they both contained signatures and not thumb-prints. There are also alterations in the latter Application for Consent of Land Control Board that would require some explanation as to who was the actual applicant for the consents.

14. Additionally, it would be necessary for the court to establish whether the said Douglas Kanja Gakunga, whose name appears in the Letter of Consent and Applications for Consent of Land Control Board, was one and the same person as Michael Douglas Kanja, the 2nd Defendant herein. It would also be important to establish the role of Peter Gakunga Kanja, whose Identity Card Number 1066779 was attached to the 1st Defendant's Replying Affidavit and marked with the words "Guarantor."
15. As can be seen hereinabove, there are too many unanswered questions that would need to be resolved before the 1st Defendant can be said to have acquired full authority to realise the securities herein. The Plaintiff has indeed established a *prima facie* case for the reason that in the event the court were to find that she never executed the Charge documents herein, then the 1st Defendant's statutory power of sale could not be said to have crystallised. She demonstrated that she had a case with a high probability of success.
16. In the event the Plaintiff was not granted an interlocutory injunction pending the hearing and determination of the suit, an award of damages would not be adequate compensation if it was eventually proven that she had succeeded in her case. Damages ought not to be granted just for the sake of it but must be anchored on very concrete facts.
17. The court must at all times caution itself against interfering with the foreclosing rights of the 1st Defendant which had accrued following default by the 2nd Defendant. Indeed, courts should be very slow to interfere with contracts. Doing so would render the need to enter into contract voluntarily a waste of time as it would amount to courts re-writing contracts for parties.
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.
19. The court has considered the cases relied on in support of the parties' respective cases and finds that those that were referred by the 1st Defendant were not of any assistance due to the gaps identified hereinabove. On the other hand, the court finds that the Plaintiff was able to meet the threshold in the case **Giella vs Cassman[1973] EA 358 at page 360** where Spry J held that:-

“ 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

20. On account of the foregoing, this court finds that the Plaintiff's Notice of Motion application dated and filed on 22nd May 2013 was merited and the same is hereby granted in terms of Prayer No (3) therein. The 1st and 2nd Defendants shall bear the Plaintiff's costs for this application.
21. 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.
22. It is so ordered.

DATED and DELIVERED at NAIROBI this 14th day of August 2014

J. KAMAU

JUDGE