IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 574 OF 2009

PETER NGURE NG'ANG'A …….....…….…... PLAINTIFF

Versus

PIONEER BUILDING SOCIETY (IN LIQUIDATION) .....DEFENDANT

JUDGMENT

Plaintiff's Claim

[1] The Plaintiff's claim against the Defendant is for: 1) a permanent injunction to restrain the Defendant from selling, alienating or in any other way dealing with the Plaintiff's property known as L.R No. Kabete/Muthumu/T68: and 2) a mandatory injunction to compel the Defendant to execute a discharge of Charge over the said property.

BRIEF FACTS

[2] At all material times relevant to this suit, the Defendant as a building society had approved a loan facility of Kshs. 270,000/- to be granted to the Plaintiff in September 1984. A Charge was registered in favour of the Defendant over L.R No. Kabete/Muthumu/T68 (hereinafter the suit property) on 28th September, 1984 to secure the sum of Kshs. 270,000/-. But despite the Charge being registered, no disbursement of Kshs. 270,000/= was made to the Plaintiff. The Defendant was subsequently placed in liquidation without disbursement of those.

[3] In spite of the fact that no disbursement was made, the Defendant issued the Plaintiff with a notification of sale without any lawful basis and without the requisite statutory notice required in law. The Defendant returned the original title to the Plaintiff but has unlawfully refused, ignored and/or declined to execute a discharge of Charge over L.R No. Kabete/Muthumu/T68. It is on that basis that the Plaintiff filed this suit asking for a permanent injunction to restrain the Defendant from selling, alienating or in any other way dealing with the Plaintiff's property known as L.R No. Kabete/Muthumu/T68: and also for a mandatory injunction to compel the Defendant to execute a discharge of Charge over the said property forthwith.

Plaintiff's case and submissions

[4] The Plaintiff was the sole witness of his case. He testified on 19th of December, 2013 and produced documents he had filed. In his evidence, he stated that the Defendant had been his

employer since the inception of the Defendant Company in 1980. He, however, resigned from employment in 1984 following his suspension for two months by the employer. But in September, 1984 before his suspension and resignation, the Plaintiff had applied for a loan of Kshs. 270,000 and a Charge was registered on his property at lower Kabete. Unfortunately, he told the Court, that he resigned before the said loan had been disbursed to him. The Defendant had filed suit number 5395 of 1992 over the said amount but the suit was dismissed with costs to the Plaintiff herein. The suit was never reinstated. The Plaintiff then asked his advocates to demand for the release of his title documents from the Defendant which he did. A Mr Masese who was working with the Defendant called him to pick his title which he did. To him, the titles were released to him by the Defendant. On his instructions, his advocates demanded for discharge of Charge on his property but the Defendant refused. Instead, the Defendant instructed the auctioneers to advertise the Charged property for sale on purported debt of Kshs. 4,580,000. Upon receipt of the Notification for Sale, the Plaintiff filed this suit. According to the Plaintiff, the Defendant did not even issue a statutory notice as required by law.

[5] On cross-examination, the Plaintiff insisted that the sum of Kshs. 270,000 for which the Charge was registered on the suit property was an independent loan from the other loans. The said sum of Kshs. 270,000 was, however, never disbursed to him. He was adamant that there was no consolidation of the loans as alleged by the Defendant. The Plaintiff further stated that he paid all the previous loans for purchase of car, fridge and furniture except a balance of Kshs. 15,000. He then averred that at one time after the notification of sale, he attended a meeting between Mr Muriuki and the official receiver Mr Thuithi where Thuithi proposed an amicable settlement of this case; he suggested that the Plaintiff pays Kshs. 200,000 to the Defendant and Kshs. 36,000 to the auctioneers. Mr Thuithi argued that the amount of Kshs. 200,000 was the accumulated interest on the balance of Kshs. 15,000 he owed. But the Plaintiff declined the offer because the Defendant owed him a sum of Kshs. 41,000 in costs of the suit that had been dismissed. Payment of the loans was made through check-off system from the salary. He, therefore, denied he owes the debt sought for in the notification of sale.

[6] The Plaintiff also filed submissions on 12th of March, 2014 and amplified his evidence. He listed the following as the issues for determination by the Court:-

a. Whether the Defendant disbursed to the Plaintiff the said loan amount of Kshs. 270,000/- secured by the Charge?
b. Whether there was consolidation of the loan facilities granted to the Plaintiff.
c. If the answer to (2) above is in the affirmative, whether proper notice was sent out to the Plaintiff prior to the consolidation and the legal effect of non-service of such a notice.
d. Whether there is any outstanding amount or whether the Plaintiff is indebted to the Defendant at all?
e. If answer to (4) is in affirmative, under what circumstance did Defendant return Plaintiff's original title deed.
f. Whether the Plaintiff was served with the requisite Statutory Notices as required under Section 74 of the Registered land Act Cap 300 Laws of Kenya?
g. Whether the Plaintiff is entitled to the reliefs sought?
h. Who is to bear the costs of this suit?

[7] The Plaintiff was obedient to the law and obtained leave of the Court before institution this suit since the Defendant was in liquidation. The order granting the leave was produced as Plaintiff Exhibit 1. According to the Plaintiff, the copy of the Charge document over the suit property states ….. **"Principal sum of shillings TWO HUNDRED AND SEVENTY THOUSAND (270,000)"……..**which means the Charge was to secure only Kshs. 270,000. And it is that Charge on which the Defendant purported to exercise their statutory power of sale. The Defendant's witness, DW1, despite talking about consolidation of loans, did not submit in evidence any further or any other Charge on the alleged consolidated loans. The Plaintiff contended that, during cross examination, DW1 could not produce evidence of how, if at all, the Kshs. 270,000/- was ever disbursed to the Plaintiff. DW1 only made reference to the "statement of account" which was an

excerpt of the "records' he claims they have. He did not produce in evidence any of the 'records' he used to compile the 'statement of account'. The Plaintiff, therefore, was of the view that the said 'statement of account' is nothing more than a document prepared by DW1 to reinforce their highly misleading statement of defence.

[8] The Plaintiff made further submissions that, for there to be a contract between two parties there must be the essential components of a contract, which are; offer; acceptance; consideration; and intention to create legal relation. The Plaintiff made an offer to the society by applying for a loan facility of Kshs. 270,000/= which he secured by charging his property known as L.R No. kabete/Muthumu/T68 in favour of the Defendant employer in September, 1984. However, the Defendant did not accept the offer because it failed to communicate and disburse the said loan to the Plaintiff after registration of the Charge, and therefore no contact was created between the Plaintiff and the Defendant. The failure shows there was no intention to create legal relation on the part of the Defendant which would bind the Plaintiff.

[9] On issue 2, the Plaintiff started from the Defendant's defence dated 16th march, 2010, which avers that during the Plaintiff's period of employment, the Defendant granted the Plaintiff a car loan of Kshs. 56,300/- which was secured by a chattels mortgage over the vehicles log book. On or about the 28th day of September, 1984, the Defendant further alleges that it advanced the Plaintiff a loan facility amounting to Kshs. 270,000/- (which is contested), and the same was secured by a property known as L.R No. Kabete/Muthumu/T68. However, the Defendant alleges that to enable it facilitate easy administration, the loans were consolidated with the Plaintiff's consent. During cross examination, DW1 was a sked whether he had any documents to even show that the Plaintiff was aware of the alleged consolidation. DW1 merely made a general reference to the documents marked 4(a) to 4(v). A cursory look of the correspondences reveals they are communication on car loan and furniture loan. None of them concerns the Kshs. 270,000/= which is the matter before this Honourable court. In as much as Clause 11, sub-clause 4(a) and (b) of Plaintiff's Exhibit 1 (the Charge) removes the application of Section 84 of Cap 300, it must be noted that the said clauses (as well as Section 84) provides for two Charges being consolidated. It has been admitted in paragraph 3(i) of the Defendant's statement of defence that the car loan of Kshs. 56,300/= disbursed in 1983 was secured by a chattels mortgage. It is the Plaintiff's submission that the law doesn't foresee a situation where a chattels mortgage and a Charge are consolidated but rather consolidation of two Charges. If the Defendant had the foresight to consolidate the chattels mortgage and Charge, nothing would have been easier than to draft an agreement to that effect upon disbursement (which is in dispute) of the Kshs. 270,000/- in 1984. Hence, there was no consolidation of the loans. Therefore, such purported consolidation has no legal effect and the Defendant cannot rely on the car loan of Kshs. 56,300/= granted to the Plaintiff and secured by a chattels mortgage over the vehicles log book to deny the Plaintiff a discharge of Charge over his property which Charge was created for a solely different loan and which loan was unfortunately never disbursed.

[10] The Plaintiff continued. Issue three is related to issue number two and it was submitted that no notices were ever issued to the Plaintiff to notify him of the consolidation and no agreement allowing the same was submitted by the Defendant in evidence.

[11] The Plaintiff posits that the forth issue on outstanding indebtedness by the Plaintiff to the Defendant, was settled in cross-examination when DW1 admitted that the 'statement of account" tendered in evidence was a mere excerpt/extract of several records, which excerpt was personally complied by DW1. The alleged records was not produced in evidence, hence, it must be taken that the defendant has not proved any indebtedness owed to them by the Plaintiff.

[12] The 5th issue concerns the circumstances under which the Original land certificate was returned to the Plaintiff. DW1 testified that the same went missing from their records and it was assumed stolen. The Plaintiff did not mince words to dismiss that line of testimony as being a deliberate effort to mislead this Honourable Court and in the very least, DW1 perjured himself. The Plaintiff's document marked 8 is a latter which forwarded three documents to wit; 1) Land

certificate title No Kabete/Muthumu/T68; 2) Charge; and 3) Official search. How then, does DW1, while under oath allege claim the same "went missing' from their office? Further, he admitted during cross examination that he does not have a police abstract to justify his allegations as to the theft of the Land Certificate. The release of the documents alluded to in the said letter was an expressly implied admission on the part of the Defendant that there was no outstanding debt by the Plaintiff.

[13] The Plaintiff did not stop there. He addressed issue 6 on whether the Plaintiff was served with a statutory notice before the notification of sale; he submitted that the official receiver instructed Purple Royal Investments on 9th June 2009 to sell the Plaintiff's property on 11th August, 2009 without any notice to the Plaintiff, a fact admitted by DW1 during cross examination. This admission was startling and completely made a mess of the Defendants' own defence. It is the Plaintiff's legal right and entitlement to receive the statutory Notice before any sale of his property can be legitimate. Therefore, the Defendant's action to issue auctioneers Notification of Sale before serving the Plaintiff with statutory notice is a clog on the Plaintiff's equitable right of redemption and denied the Plaintiff the legal duration provided for under Section74(1) and (2) of the Registered land Act (Cap 300 laws of Kenya, now repealed). Therefore the Notification of Sale by Purple Royal Investment informing the Plaintiff that the Defendant had instructed them to sell the Plaintiff's property known as L.R No. Kabete/Muthumu/T68 by public auction on 12th April, 2013 was premature, illegal and irregular. Under Section 74 of the Registered land Act (Cap 300) Laws of Kenya,

> **"The Charge may sell the Charged property but only if the chargor is in default in making payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any Charge, and continues for one month, the Chargee may serve on the Charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may, and if the Charger does not comply, within three months of the date of service, with a notice served on him the Chargee may either appoint a receiver or exercise the power of sale.**

[14] The Plaintiff cited judicial authorities to support his said submission on section 74 of the RLA (now repealed), such as the case of **MUIRI COFFEE ESTATE LTD v KENYA COMMERCIAL BANK**, Khaminwa J referring to the case of **SIMIYU v HFCK (HCCC 937 OF 2001)** where Justice Ringera had an opportunity to consider the issue of the effect of want of service of notice under Registered land Act and he concluded that

> **"...Without compliance with the statutory demand, there can be no valid exercise of the power of sale and accordingly, it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof.'**

It was the Plaintiff's submission that there being no loan that was advanced to the Plaintiff; the Plaintiff could not have fallen in default over such or any sum. In addition the Defendant did not follow the requisite procedure in exercising the power of sale which requires the issuance of a statutory notice if there is default in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any Charge, and continues for one month. It is only if the Charger does not comply, within three months of the date of service, with a notice served on him the Chargee may appoint a receiver of the income of the charged property, or sell the Charge d property. See Section 74(1) and (2) of the Registered Land Act (Cap 300, Laws of Kenya, now repealed). From the foregoing statutory provisions it is certain that the Plaintiff is entitled to a mandatory injunction to compel the defendant to discharge the Charge. The Plaintiff has established a clear case for the grant of mandatory inunction and the defendant does not have any justification to hold the Plaintiff's property at ransom by not discharging the Charge. The threshold for mandatory injunction as established in our submissions was captured in the case of **KENYA AIRWAYS LIMITED v KENYA A LIRLINERS PILOTS ASSOCAITION (2013) eKLR** where he

stated:-

> **"It is the court's considered view that at this stage of the suit, rather than establish a prima facie right to the relief sought the Claimant must establish a clear right to the relief sought. A clear right is one, whose existence is well established on a balance of probabilities in terms of our law of evidence."**

[15] The Plaintiff also submitted on Section 97(2) of the Land Act, 2012, which requires that a Chargee shall, before exercising the right of sale, ensure that a forced sale valuation is undertaken by a valuer. However, the valuation report on record is undated and one cannot tell when it was done. In the case of **DAVID GITOME KIHUGIKA v EQUITY BANK LTD,** J.B. HAVELOCK held that:

> **"The valuation, by the time that the sale came round in April, 2013, was over a year out of date. With properties in and around Nairobi in the current property market boom, it may well be that the suit property could have vastly increased in value even for forced sale purposes in the 14 months period. As a result, I find that the Defend ant has not complied with Section 97 (2) of the Land Act in this connection. The obligation on a Chargee to ensure that a forced sale valuation is undertaken by valuer comes under the heading to Section 97 of the Land Act, 2012 – "Duty of Charge exercising power of sale" to my mind, such a duty is obligatory."**

[16] The Plaintiff is convinced that he is entitled to a Discharge of Charge, because the loan of Kshs. 270,000/= for which the Charge was registered was never disbursed to the Plaintiff. It is the Plaintiff's right to have his property back by a discharge of Charge. He was given the Original Certificate of Title and the Defendant has no basis to withhold discharging the property. No person has a right to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description as envisaged under Article 40(2) (a) of the Constitution of Kenya. Therefore, the Defendant should be compelled to discharge the Charge so as to enable the Plaintiff to recover his property. Failure on the part of the Defendant to discharge the said Charge is a violation under the Bill of Rights. See the case of **OMAR MAKONDE MTURI v BENSON MWADSOMBO HANGA (2003) eKLR** where it was stated that:-

> **A mandatory injunction being permanent in nature applies in cases where the injury cannot possibly be compensated by damages.**

The Plaintiff has suffered loss over the period of time since the property was Charged to the Defendant and a sum of money which was never advanced to the Plaintiff. The value of such property has indeed appreciated and continues to appreciate and the same has been advertised for sale. In addition, the Valuation report produced by the Defendant's clearly shows that the said property is the Plaintiff's place of abode therefore such loss, pain and suffering cannot be compensated by damages and the Plaintiff is therefore entitled to a mandatory injunction to compel the Defendant to discharge the Charge and a permanent injunction to prevent the Defendant from selling the Plaintiff's property which is already advertised for sale. The Plaintiff says its case passes the tests outlined in law as well as the above authorities. The Plaintiff's case in the plaint is clear. The Plaintiff stands to lose his property should the intended sale be allowed to continue in violation of the Plaintiff's right of equity of redemption. The Plaintiff also stands to suffer irreparable loss and damage because, the purported sale is illegal, unlawful and un-procedural.

DEFENDANT'S WRITTEN SUBMISSIONS

[17] The Defendant called one witness, Mr FRED KANG'ELA. He told the Court that he was an accountant with Pioneer Building Society, the Defendant herein. He also knew the Plaintiff as a former employee of the Defendant. He averred that the Plaintiff had various loans with the Defendant amounting to Kshs. 4,589,582 as at 31st of May 2009. He testified that he prepared

accounts for the Plaintiff's loan account. He also said that the Plaintiff defaulted in paying the loans advanced to him. He insisted that the existing loans were consolidated with the consent of the Plaintiff and were then secured by a charge on the suit property. He relied on documents marked 4(a)-(u). He, however, confirmed that the title document is not one of the documents filed as security for the loan herein. He contended that there was no official communication on the release of the title herein which according to him ''went missing''. He went on: that immediately the loan was approved the Plaintiff started to withdraw the funds. The sum owing at the time of his dismissal was Kshs. 148,600 less Kshs. 44,077 which the Plaintiff paid. lso filed written submissions. It started by stating that at the material times the Plaintiff was an employee of the Defendant; he Charged his property land Reference Number Kabete/Muthumu/T68 to the Defendant as security for a loan of Kshs. 270,000/- which was disbursed to the Plaintiff. The Plaintiff has refused, neglected and or ignored to service the said loan of Kshs. 270,000/- which continues to attract interest as per the Charge. According to DW1 the Plaintiff had various loans as follows:-

i. House extension – electricity kshs.11,000/- and additional facility for Kshs.6,000/-
ii. Car loan – Kshs.56,300/-
iii. Furniture loan – kshs.13,500/-

[18] The Plaintiff also Charged his property in favour of the Defendant for Kshs. 270,000/-. During the hearing, it was the defendant's evidence that the loans were consolidated into one. During cross-examination the Plaintiff was put to task to demonstrate that the amount of Kshs. 270,000/- was not disbursed which he did not. Further your Lordship the consolidation of loan facilities was with the consent of the Plaintiff for the purpose of easy demonstration of the facilities. In the circumstances, the Plaintiff was entitled to exercise its statutory power of sale. The property had been Charged to secure the loan advanced to the Plaintiff by the Defendant over Land Reference Number Kabete/Muthumu/T68. The Charge created a contract between the Plaintiff and the Defendant. The Defendant accepted the offer by disbursing Kshs. 270,000/-, and that is borne out by the statement of amounts prepared by DW1 and tendered in evidence.

[19] The Defendant stated that the various financial accommodations were consolidated as demonstrated by the evidence of DW1 which was unchallenged. The consolidation was for easy administration and the Plaintiff gave his consent. He is only turning away from that fact and against the employer after he was dismissed from employment. But, it is too late in the day to allege otherwise. The Plaintiff's assertion that there was a chattels mortgage is misleading the court as that facility was only extended as at the time the Plaintiff was the Defendant's employee. The Plaintiff has not proved that the various financial accommodations extended by the Defendant to him were not consolidated. He has failed to meet the threshold provided for by Sections 107(2) 108 & 109 of the Evidence Act. The Plaintiff was indebted to the Defendant as shown in the accounts prepared by DW1. According to the Defendant, it was new evidence that the title for land Reference Number Kabete/Muthumu/T68 was erroneously returned or was missing from the Defendant's custody. The Defendant pressed on and declared that the Defendant exercised its statutory power of sale as required under Section 74 of the Registered Land Act (repealed). In any event the issue of a statutory Notice would only arise if the charged property has been sold by a Chargee and the chargor is seeking to reverse the sale. On that basis, the Defendant submitted that the case of **MUIRI COFFEE ESTAE v KENYA COMMERCIAL BANK** is distinguishable as in the matter before the court the Statutory power of sale was not exercised.

[20] In sum, the Defendant is of the view that the Plaintiff has not satisfied the threshold of granting a mandatory injunction. See the case of **MIRAFLORES APARTMENTS LIMITED v CLEB AKWERA & ANOTHER – HIGH COURT ELC NO. 633 OF 2011 –**where Justice Kimondo declined to grant a mandatory injunction on the ground that the evidence was not clear cut to warrant the grant of such orders. Before the Defendant commenced to exercise its statutory power of sale, a valuation report dated 7th May, 2009 document No. 7 in the Defendant's list of documents was prepared. The value of Land Reference Number Kabete/Muthumu/T68 was given at Kshs. 1,500,000/-. Therefore the case of **DAVID GITOME KIHUGUKA v EQUITY BANK**

LIMITED is distinguishable as a valuation in the present case was done. The Plaintiff is intent to depriving the defendant that what is rightfully the Defendant's. The appreciation of the land is not one of the factors to be considered in a case for mandatory injunction; it is not loss, pain and suffering. This suit should be should be dismissed with costs to the Defendant.

COURT'S RENDITION

One fundamental issue: whether loan was advanced or not

[21] The issues for determination were agreed upon and filed by the parties. But I find one issue to be of fundamental importance as it not only runs through the heart of this case, but encapsulates the core of the controversy. The question of whether there was a consolidation of loans will also be determined thereto. If the answer the Court comes to is that no loan was advanced, the other issues will meet their fate as such. If it is that the loan was advanced, the other issues will as well be determined in that light.

Was the loan advanced?

[22] The Plaintiff adduced evidence that the Charge over his property was for the sum of Kshs. 270,000. Despite registration of the Charge, the Plaintiff told the Court that the loan was never disbursed to him by the Defendant. In law, a Charge creates a contractual relationship between the Chargor and the Chargee, in our case, the Plaintiff and the Defendant, respectively. A Charge also creates and specifies the individual obligations of each party to the Charge. The basic obligations of the Chargor include;, covenants to repay the sum of the Charge together with such interest thereto; ensure Charged property is not wasted; does not do anything which affects the security etc. etc. The basic obligations of the Chargee include; disbursing the loan or sum secured by the Charge; to issue such notices as are required under the law in the exercise of statutory rights of the Chargee; not to foreclose the right to redemption; etc. etc. Disbursement of the loan secured by the Charge forms the cardinal responsibility of the Chargee and where the Chargee does not disburse the loan in accordance with the Charge, is a breach of the Charge; total failure of consideration. The Charge herein was duly registered and it does not say whether the amount of Kshs. 270,000 secured by the Charge were as a result of a consolidation of other existing loans. The Charge secured a sum of Kshs. 270,000 which was to be disbursed to the Plaintiff as per the Charge. No further Charge was registered on the Charge herein to secure any other sum apart from the Kshs. 270,000 secured in the Charge. The Defendant defended itself and asserted that the sum of Kshs. 270,000 was an amalgamated total of existing loans. The issue of consolidation of existing loans was therefore, the assertion of the Defendant, and in line with the now well-known legal adage, he who asserts proves, the Defendant bore the onus of proof. If proved, that will be a form of disbursement. What is the evidence of the Defendant towards disbursement of the loan? The Defendant called one witness, DW1 who produced an extract of accounts prepared by him as well as other documents on all the loans the Defendant advanced to the Plaintiff. First, the statement of account at best is an excerpt of other records or a severely restricted block summary of other documents. The statement did not give any specific information on the loan covered by the charge and was not backed by any primary source material or information which show disbursement of any kind of the sum of Kshs. 270,000 to the Plaintiff. DW1 in reference to his ''statement of accounts'' document stated that **''...These statements are normally typed after the original is created in our file record. What we send is an extract''.** The original was is in the custody of the Defendant. It was not produced because that would have cle3arly shown the actual entries including disbursement as well as repayment. The ''statement of account'' produced does not at all prove disbursement of the money secured by the Charge. It contains running and block items of account which has no direct bearing to the Charge. The other argument by the Defendant through DW1 that there was a consolidation of several financial facilities extended to the Plaintiff is self-defeatist. Look at the submission by the Defendant **that a chattels mortgage was only extended as at the time the Plaintiff was the Defendant's employee.** And that **the Plaintiff had various loans as follows:-**

i. **House extension – electricity kshs.11,000/- and additional facility for Kshs.6,000/-**
ii. **Car loan – Kshs.56,300/-**
iii. **Furniture loan – kshs.13,500/-**

But, the Plaintiff also Charged his property in favour of the Defendant for Kshs. 270,000/-.

[23] The Defendant relied on the correspondences and other document on loans which the Defendant advanced to the Plaintiff to proof the Charge was security for an amalgamated existing loans. Such documents must meet the legal test. The Charge did not talk of amalgamated existing loans; it talked of a sum of Kshs. 270,000 advanced by the Defendant to the Plaintiff. The general law is that parties to a contract such as Charge must be held up to their bargain. See Ringera J (as he then was) in **MORRIS & COMPANY v KCB LTD [2003] 2 EA 605.** The Charge is self-reinforcing and complete unless it refers to or incorporates some other documents to it. And documents preceding the Charge are only used to ascertain the intention of the parties or in the construction of a document**,** which is not clear. On this point I am content to quote a work by Kimondo J in the case of **JOHN MURIITI GACUGO NG'ANG'A v HFCK LTD & ANOTHER NBI HCCC NO 15 OF 2005 (UR)** that:

> ***''…..The 1st Defendant had pleaded in paragraph 4 of its amended statement of defence that upon execution of the charge instrument, the letters of offer were not relevant to the contract. I disagree. The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intention of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supersede any other agreement between the parties''.***

Mabeya J expressed similar opinion on the matter in the case of **CHRISTOPHER NDOLO MUTUKU & ANOTHER v CFC STANBIC BANK LIMITED [2013] eKLR.** And this Court rendered itself thus in the case of **SURYA HOLDINGS LIMITED v CFC BANK LIMITED & ANOTHER [2014] eKLR** that:

> ***[66] Accordingly, the Letter of Offer and any other pertinent document in the bargain of the loan which eventually leads to a charge, bind the parties in so far as they are not inconsistent with the charge, and such documents preceding the charge are useful in ascertaining the intention of the parties. Quite apart from the legal position I have stated, all the debentures herein and the charges created thereto acknowledge the letters of offer and agreements in the bargain leading to the debt herein and there is nothing in those letters of offer and agreements which is inconsistent with the debenture thereto.***

[24] The Charge is clear and has no ambiguity in any of its terms. The documents of existing loans do not show any relationship with the charge. The existing loans herein were secured by a chattels mortgage e.g. log books and the salary. And from the documents presented, the loans were being paid through check-off system from the salary. When you examine closely the evidence by DW1, there is nothing that even shows that those other loans amounted to Kshs. 270,000 which perhaps would have provided some connection between the existing loans and the loan of Kshs. 270,000 which was secured by the Charge. I do not think, there is any formula which can be applied to inflate the figure of the existing loans to Kshs. 270,000 as at September, 1984. There is also nothing which was exhibited in Court showing the Plaintiff consented to consolidation of the existing loans as alleged. DW1 who was relying on the records of the Defendant was not able to even say when the alleged consolidation of the loans was done. The documents produced are not in harmony with the Charge and cannot be used to contradict the Charge. The submissions and the evidence by DW1 clearly lead to one inescapable conclusion; that the Charge was for the sum of Kshs. 270,000 and was separate from the other existing loans. Even if the Plaintiff may have owed some money out of the existing loans, those sums were not secured by the Charge. The Charge herein was not even a continuing Charge to cover all sums owing from the Plaintiff to the Defendant; otherwise, a contrary view would defeat the entire

purport of registering a Charge in law. The claims by DW1 that the Charge covered all existing loans, therefore, have no basis.

[25] The evidence adduced by the Plaintiff shows the sum secured by the Charge was not disbursed; and given the statutory as well as the contractual obligation of the Defendant to disburse the loan secured by the Charge herein, evidential burden is raised on the Chargee to show it disbursed the said sums. Evidential burden should not be confused with legal burden of proof or a shift of the legal burden. It is raised on the party who would fail if no further evidence is adduced. In this case, the Chargor has shown he did not receive the sum secured by the Charge or in other words, there was no disbursement of the loan by the Defendant. I expected some paper trail from the Bank which shows they performed their part of the bargain. A certified statement of account on the loan account of the Plaintiff maintained by the Defendant showing the specific entries on all monies advanced to and repayments made by the Plaintiff would have been most ideal evidence; that would have greatly assisted the Court. Nothing of that kind was presented even by DW1 who claimed to be the accountant of the Defendant.

Alleged lost Certificate of Title

[26] Before I close on that issue, I need to state that I find it quite curious for DW1 to state under oath that the original Certificate of Lease to the suit property went missing without blinking the eye, or providing evidence of the alleged loss of the Certificate of Lease. I wonder how the Defendant would have sold the suit property without the original title. What is more startling is that the Defendant did not even apply for issuance of another title deed from the Registrar of Lands as required in law, and in that process proof of loss would have been provided. Even if that was not done, the least DW1 could have provided is a police abstract or an affidavit or declaration of the officer in whose custody the Certificate was at the time. None of these things was presented to Court hence, my deprecation of such kind of evidence by witnesses who are expected to assist the Court attain a just resolution of disputes. There was enough evidence that the Certificate was forwarded accordingly by the advocates and no disciplinary proceedings on the said advocates have been initiated if there was any wrong doing. When I put these matters together, the evidence by DW1 was not truthful and was merely contrived to assist the case of the Defendant. Such evidence attracts adverse judicial ritual of rejection. I will treat the evidence to be without any evidentiary value in supporting the Defence case.

Statutory power of sale

[27] In view of my finding on the disbursement of loan money, there cannot be any lawful exercise of statutory power of sale. That notwithstanding, as the exercise of statutory power of sale forecloses the chargor's right to redemption of the property, it must be exercised strictly in accordance with the prescriptions of the relevant law. The centrality of equity of redemption cannot be overemphasized, which now has statutory expression in section 86 of the Land Act. Extinguishing it requires strict adherence with the law, in this case the RLA (repealed). Therefore, exercise of the statutory power of sale without following the law is illegal, null and void and does not extinguish the proprietary rights of the chargor nor pass any good title to a purchaser in an action which is founded on the illegality committed by the Chargee. Ringera J (as he then was) in the case of **SIMIYU v HFCK (HCCC 937 OF 2001)** had the following to say on the effect of want of service of notice under Registered land Act and he concluded that:

> **"...Without compliance with the statutory demand, there can be no valid exercise of the power of sale and accordingly, it cannot be said that the chargor's equity of redemption is extinguished in any sale conducted in breach thereof.'**

The relevant provision was section 74 of the Registered Land Act (now repealed) which required the chargee to serve on the chargor a statutory notice before selling the charged property. The section provides that:

"The Charge may sell the Charged property but only if the chargor is in default in making payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any Charge, and continues for one month, the Chargee may serve on the Charger notice in writing to pay the money owing or to perform and observe the agreement, as the case may, and if the Charger does not comply, within three months of the date of service, with a notice served on him the Chargee may either appoint a receiver or exercise the power of sale.

[28] There is no proof that the requisite statutory notice was issued before the Chargee instructed the auctioneer to issue a notification of sale. The requirement of the said notice is not a mere technicality or form which can be diminished by other considerations that a valuation was done. Lack of such notice vitiates the entire exercise including the notification of sale issued by the auctioneers. On that basis, I set aside the notification of sale of the suit property issued herein. In sum, the Plaintiff has established a very strong and clear case for the issuance of permanent as well as mandatory injunctions. There was no disbursement of the loan of Kshs. 270,000 and so no sale by whatever pretext can ensue at the behest of the Defendant as a Chargee of the suit property. In the circumstances, I hereby issue a permanent injunction restraining the Defendant, by itself or its agents or servant from selling the suit property- Land Reference Number Kabete/Muthumu/T68. Equally, I find refusal by the Chargee to discharge the Charge encumbering the suit property to be most unfortunate; an affront and a violation of the Plaintiff's right to property guaranteed in Article 40 of the Constitution. Accordingly, I hereby issue a mandatory injunction compelling and directing the Defendant to execute a discharge of Charge on the suit property- Land Reference Number Kabete/Muthumu/T68 - in the prescribed form and deliver it to the Plaintiff within the next 14 days, which failing the Deputy Registrar shall sign one on behalf of the Defendant and under the authority of this Court. The Plaintiff's suit succeeds wholly with costs to the Plaintiff.

Dated, signed and delivered in open court this 25th day of September, 2014

F. GIKONYO

JUDGE

In the presence of:-

Alex court clerk

Angaya for Muriuki for Plaintiff

Mahugu for defendant