REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 682 of 2012

ROSEMARY KINANU GITUMA.....1ST PLAINTIFF

MARK KINOTI GITUMA.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

1. What is before court is the Plaintiffs' Notice of Motion dated 12 October 2012 but not filed herein until the 26 October 2012. The main prayer of the Application sought an interim order restraining the Defendant whether by itself, agents, servants, employees, auctioneers or any other person acting under them from advertising, offering for sale, selling whether by public auction or private treaty or otherwise howsoever interfering with the Plaintiffs' ownership of title to and/or interest in the two properties known as Nairobi/Block 106/97 Dam Estate ("the Dam Estate property") and Meru Municipality/Block 1/202 ("the Meru property"). The Plaintiffs were the joint registered owners of the Dam Estate property whilst the first Plaintiff is the sole registered owner of the Meru property. The grounds of the Application detailed that the 2 properties were separately charged to Savings and Loan Kenya Ltd, a wholly owned subsidiary of the Defendant bank, in order to secure monies for the purchase of House No. 6 situated on L. R. No. 1160/42, Karen, Nairobi ("the Karen property").

2. The Plaintiffs maintained that upon purchase of the Karen property and the registration of a Charge against it in favour of the Defendant, the Charges over the Dam Estate and Meru properties would be discharged. Unfortunately, the sale transaction involving House No. 6 had fallen through even after the borrowed sums were disbursed directly to the selling agent by the said Savings and Loans Kenya Ltd, the Defendant's predecessor in title. The Plaintiffs maintained that the Karen property had been secretly sold to another person for a price higher than that contracted by the first Plaintiff and the dispute arising as a result thereof was now the subject of an arbitration. The Plaintiffs maintained that the Defendant had been fully aware of the prevailing state of affairs so far as the sale falling through was concerned and have now rushed to auction the Dam Estate and Meru properties.

3. The Application was supported by the Affidavit of the first Plaintiff Rosemary Kinanu Gituma dated 12 October 2012. She deponed to the fact that she was the owner of the Meru property in her own right and that she and her son, the second Plaintiff were the joint registered owners of the Dam Estate property as administrators of the estate of Joshua Andrew Gituma deceased. The deponent then related the history as regards the acquisition of the Karen property. She noted that the purchase price had been agreed at Shs. 31.25 million. She had negotiated with Savings and Loan Kenya Ltd to finance part of the purchase price in the sum of Shs. 14.8 million which amount, it had been agreed, would be secured by a Charge over the Karen property. She maintained that since the Karen property was under construction, it had been agreed with Savings and Loan Kenya Ltd that the Meru and Nairobi Dam properties would be temporarily

charged to the Defendant to secure the initial disbursement of Shs. 4.4 million and Shs. 5.4 million respectively. That aggregate sum of Shs. 9.8 million was to be part of the total facility of Shs. 14.8 million. The deponent noted that the two Charges over the Meru and Nairobi Dam properties were to be discharged immediately the title to the Karen property became available for charging to the tune of Shs. 14.8 million. Mrs Gituma then went into detail on other monies she had borrowed on the strength of her pension entitlement and the fact that as the Nairobi Dam property was part of the estate of the deceased, consent of the court had to be obtained to charge the same for the monies borrowed. The deponent stated that she had never received copies of the Charge documents over the two properties despite promises but she did recall executing the Charges as before her advocates. The deponent then went into the circumstances surrounding the sale of the Karen property going off, attaching copies of correspondence as between advocates. She noted that the matter was to go for arbitration but that the agreed arbitrator had been appointed of late as a Judge in the Court of Appeal and the arbitration had not taken off while awaiting the appointment of a new arbitrator. There were two further matters of note contained in the Affidavit in support of the Application. Firstly, the Defendant had issued a statutory notice dated the 15 June 2012 relating both to the Meru and Dam Estate properties. The said Notice was only addressed to the first Plaintiff who deponed to the fact that she found this rather strange as regards the Dam Estate property which was jointly held with her son, the second Plaintiff. The statutory notice was given in respect of the two separate properties and Mrs. Gituma had been advised by her advocates on record that separate statutory notices of sale were required under the Land Act in respect of the two separate properties. Secondly, the deponent admitted her indebtedness to the Defendant as regards the principal sum of Kenya shillings 9.8 million while she maintained that she had repaid a total of Shs. 1.15 million. She noted that the bank had levied heavy penalties and interest on the loan accounts despite being fully aware that the Charges were provisional and predicated upon the successful completion of the purchase of the Karen property and the charging thereof to the Defendant.

4. In response, one **Kennedy Kasamba** swore an affidavit dated 16 November 2012. Therein the deponent described himself as the Senior Manager Credit Support at the Bank's head office at Kencom House, Nairobi. He noted that the main grounds upon which the Plaintiff seeks the injunctive orders sought would seem to be as follows:

"a) That the securities given to the Defendant were "provisional".

b) That the charges registered against the Applicants' properties were conditional upon the successful charging of House No. 6 on LR. No. 1160/42 Karen.

c) That the Applicants were never furnished with copies of the Charge documents despite "several enquiries".

d) That the Charge documents were improperly signed and attested.

e) That the sale of the said House No. 6 on LR. No. 1160/42 Karen failed.

f) That the alleged arbitration proceedings being conducted over the failed sale of the said House No. 6 on LR. No. 1160/42 Karen affect the Charges registered in favour of the Defendant.

g) That the Statutory Notice served is only addressed to the 1st Plaintiff.

h) The Defendant has charged hefty penalties and interest as well as made unsolicited loan advances".

The deponent maintained that the above reasons constituted a gross distortion of the dealings between the Plaintiffs and the Defendant merely intended to delay the realization of the Defendant's securities. He stated that the first Plaintiff duly executed the Charge document in respect of the Meru property dated 16 June 2009 to secure the principle advance of Shs. 4,400,000/-. He also recorded that both the Plaintiffs duly executed a Charge dated 24 November 2009 over the Dam Estate property this time to secure Shs. 5,400,000/-. Both of Charges were duly registered and the facility of Shs. 9,800,000/- was advanced to

the first Plaintiff as the principal borrower. As far as the deponent was concerned both the said Charges were independent of and separate from the transaction of the Karen property which, in any event, was not mentioned in either of the Charge documents. Further, the Defendant was not a party to the Plaintiffs' purchase of the Karen property as the same did not involve any borrowing from the Defendant. He attached copies of correspondence to his affidavit, in that connection. In terms of his response to paragraph 7 of the Affidavit in support of the Application, Mr. Kasamba detailed as follows:

"a) The 1st Plaintiff has not disputed executing the acceptance annexed to the Defendant's Letter of Offer dated 27th February 2009.

b) The Plaintiffs have not disputed that they executed the Charge Instruments presented to Court as "KK-1" and "KK-2".

c) The Plaintiffs have not challenged the attestation of their signatures and/or the Certificates of the Advocate and Notary endorsed on the Charge instruments.

d) The Plaintiffs have not disputed that the said instruments were registered against the title presented as "KK-3a" and "KK-3b".

e) The Plaintiffs have not disputed disbursement of the aggregate sum of Kshs.9,800,000/= at the request of the 1st Plaintiff secured by the two Charge instruments.

f) The annextures highlighted therein comprise an incomplete record of correspondence clearly intended to advance the Plaintiffs' interests in the present Application".

5. Significantly, at paragraph 17 of the Replying Affidavit, Mr. Kasamba stated that the Defendant Bank knew that the monies raised by securing the two properties and the acquiring of a Lien over the first Plaintiff's pension benefits, were to be applied towards a cash basis purchase of the Karen property. The deponent reiterated that the securities were taken by the Defendant and were registered. The same could only be discharged in the event that alternative security for the payment of the sums advanced was tendered. In point of fact, the deponent detailed that the Defended was only playing a limited role in the transaction to purchase the Karen property and was only notified that such had gone off by its own advocates by letter dated the 7 March 2012. In any case, the Defendant was in no way involved as regards the Arbitration proceedings. The Defendant's Replying Affidavit concluded by saying that the first Plaintiff had been advance the sum of Shs. 9,800,000/-, was aware of the repayment terms and had defaulted thereon. Her loan account with the Defendant was in arrears to the tune of Shs. 13,567,521 .20 as at 13 of October 2012. The deponent annexed a copy of the account statement to his said Affidavit. Further, the deponent maintained that the Plaintiffs had been validly served with a proper statutory notice as they shared the same address as set out in the Charge documents.

6. The first Plaintiff swore a Further Affidavit on 19 November 2012. With reference to her previous Affidavit, the deponent stated that the Court Order attached thereto as "A4a" and dated 17 September 2009 had allowed the Dam Estate property to be charged to Savings and Loan (K) Ltd and that the title of the Karen property was to be deposited upon the successful purchase of the same. I have perused that Order and it says nothing of the sort. The Order was granted on condition that the Applicant (the Plaintiffs herein) filed a copy of the title deed of the purchased property (the Karen property) with the declaration of trust endorsed on it as soon as the transaction goes through. To my mind, that Order allowing the charging of the Dam Estate property is on condition that once the Karen property has been purchased, a declaration of the trust in relation to the Dam Estate property being in the name of the deceased should be endorsed on the title of the Karen property, no more. What the deponent was presumably getting at was that, as stated in the following paragraph of the Further Affidavit, that the Bank knew all along that its contract with the Plaintiffs contemplated the successful purchase of the Karen property. As far as the purchasers were concerned, the principal security was to be the Karen property and not otherwise. Thereafter, the Further Affidavit goes on to acknowledge receipt of redemption notices from the auctioneer's appointed by the Defendant detailing that the sale of the Meru and the Dam Estate properties was programmed to take place 19 December 2012.

7. In that regard, when the parties appeared before me to submit in relation to this matter 13 December 2012, I granted the interim injunction restraining the Defendant pending the inter-parties hearing of the Application and pending the delivery of this Ruling. Prior to that date before court, the parties had agreed to put in written submissions as regards the Plaintiffs' Notice of Motion dated 12 October 2012. The Plaintiffs' written submissions were filed herein on the 20 November 2012. The Defendant's skeleton submissions were filed herein on the 15 November 2012 and were followed by further skeleton submissions filed on 29 November 2012, the latter with regard to the Plaintiff's submissions in respect of frustration and validity of the statutory notices. The plaintiffs' submissions opened by detailing what they term the factual background as follows:

· **There is a non-conforming loan advanced to the first plaintiff via the letter of offer dated 27th of February 2009 for the sum of Shs. 14.8 million, of which 9.8 million was advanced;**

· **The purpose of the loan as clearly stated in the letter of offer was clearly to finance the purchase of Residential property on LR No. 1160/42, House No. 6, Ndege Gardens, Karen, which would be charged for the full sum of Kshs 14.8 million and the Charges the subject of this suit discharged.**

· **The transaction to purchase House No. 6 aforesaid fell through for reasons that neither party is to blame;**

· **The defendant now seeks to sell the charged properties, and in doing so has served all notices herein on the 1st plaintiff only;**

· **The parties herein had contracted with full knowledge that House No. 6 would be the principal security to secure the loan and the same is evident in their correspondence.**

Thereafter, the Plaintiffs framed the issues for determination which they saw as follows:

a) Whether the contract contained in the letter of offer, and the subsequent charges over LR Nos. Nairobi/Block 106/97 and Meru Municipality/Block 1/202 have been frustrated by the failure to purchase House No. 6 situate on LR No. 1160/42, Ndege Road, Karen.

b) Has the defendant served valid statutory notices upon the plaintiffs for the power of sale to be said to accrue?

c) Has the applicant satisfied the conditions of the grant of an injunction pending suit?

8. The Plaintiffs referred the court to a number of letters annexed to the Affidavit in support of the Application from which it maintained that it was manifestly clear that the Defendant while pursuing additional securities for the Plaintiffs' borrowing, the true intention of all the parties was that this was being done in order to arrive at a successful completion of the purchase of the Karen property. The Plaintiffs put forward the proposition that as a result of the purchase of the Karen property going off, the contract as between the parties hereto to repay the amount of Shs. 9.8 million or any part thereof, was frustrated. In their opinion the only remedy available to the parties was restitution *ad integrum*. The court was referred to the Ruling of my learned brother **Emukule J.** in **Gimalu Estates Ltd & 4 Ors v International Finance Corporation & Anor. (2006) eKLR**. In that case the Judge had cited with approval a text drawn from **Halsbury's Laws of England (3rd edition) Volume 8 paragraph 320 on page 1856** as follows:

"…..The doctrine of frustration operates to excuse further performance where (1) it appears from the nature of the contract and the surrounding circumstances that the parties had contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the foundation of the contract will take place, and (2) before breach, performance becomes impossible, or only possible in a very different way to that contemplated without default of either party, and owing to a fundamental change of circumstances beyond the control and original contemplation of

the parties. The mere fact that the contract has been rendered more onerous does not of itself give rise to frustration…"

9. The Plaintiffs maintained that the fundamental nature and surrounding circumstances of the contract contained in the facility letter of offer, the Charges and the collateral documents all point to one common goal, namely that the purchase of the Karen property would be achieved without any foreseeable hindrance. According to the Plaintiffs it was the intention of the parties that the Plaintiffs' obligation to pay back the loan would arise once the Charge over the Karen property had been completed. Failing this transaction, there was a radical change in the obligation under (to repay) or on the part of the Plaintiffs. The **Gimalu Estates** case (supra) had adopted the finding in the English case of **Davis Contractors Ltd v Fareham U. D. C. (1956) A C 696** where the tests seen to have been detailed and expressed as follows:

"….Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it as a thing radically different from that which was undertaken by the contract. ***Non haec in foedera veni. 'It was not this that I promised to do…' There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."***

Further, **Emukule J** had also endorsed with approval the House of Lords' judgement in **National Carriers Ltd v Panalpina (Northern) Ltd (1981) A C 675** when it was stated:

"…Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the circumstances; in such case the law declares both parties to be discharged from further performance."

10. The Plaintiff then submitted that the statutory notices for the sale of the Meru and Dam Estate properties as issued by the Defendant were invalid. They submitted that the provisions of **section 90** of the *Land Act* contemplated the issuance of an individual statutory notice for each individual Charge and to each individual Chargor. They maintained that while the Meru property was registered in the sole name of the first Plaintiff, the Dam Estate property is registered in the joint names of both the Plaintiffs. The Plaintiffs submitted that the notices must be sent individually to each Chargor as contemplated by **section 19** of the *Land Act*. Even if the Plaintiffs shared an address, the provisions of the Act indicate that statutory notices must be sent to each. The Plaintiffs noted that the Defendant admitted having sent the statutory notices to the first Plaintiff only. The Plaintiff also maintained that the second statutory notice purporting to invoke the provisions of **section 96 (2)** of the Land Act was a nullity as it incorporated two separate Charges in one notice which, in any event, was a blatant contravention of **section 96 (2) (f)**. The Plaintiffs also submitted that the 45 day redemption notice issued by the auctioneer was also required to be served upon each individual Chargor. In the opinion of the Plaintiffs, the 45 day notice given in the redemption notice, can only start running after the expiry of the 40 day window granted by **section 96 (2)** of the *Land Act*. To this end, the Plaintiffs referred the court to 2 unreported High Court cases being **Samuel K. Mungai v Housing Finance Company of Kenya Ltd HCCC No. 1678 of 2001** and **Simiyu v Housing Finance Company of Kenya Ltd HCCC No. 937 of 2001**. In the former case, **Ringera J** (as he then was) with reference to the Registered Land Act had stated:

"I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages: it is a fundamental breach of the statutes which delegates from the chargor's equity redemption. Without service of a valid statutory notice, the power of sale does not crystallise and any subsequent service of the notification of sale and the actual auction are merely acts pursuant to a pretended power of sale. As such they are a nullity in law."

The finding in the **Simiyu** case again by **Ringera J** was very similar:

"Although any person aggrieved by any irregular exercise of the power to sell mortgaged property shall have a remedy in damages against the person exercising the power (section 77 (3) of RLA) the irregularities in the exercise of the power of sale which are remediable in damages do not comprehend failure to serve an adequate statutory notice……. Without compliance with statutory commands, there can be no valid exercise of the power of sale and accordingly it cannot be said that the mortgagor's capacity of redemption is extinguished in any sale conducted in breach thereof. In view of the above considerations the Plaintiff had made out a *prima facie* case with a probability of success that the sale would be declared null and void."

11. Turning to the Defendant's submissions, it identified the issues for determination by the court as follows:-

(a)Whether the Defendant was a party to the Plaintiffs' transaction to purchase House No. 6 on L. R. No. 1160/42 Karen.

Whether the Charges registered against the Plaintiffs' properties were conditional upon the successful charging of House No. 6 on L. R. No. 1160/42 Karen.

(a) Whether the alleged arbitration proceedings were binding on the Defendant?

(b) Whether the Defendant's statutory power of sale has accrued?

(c) Whether the Plaintiffs have disclosed a *prima facie* case with a probability of success?

(d) Whether the award of damages is an adequate remedy?

(e) In whose favour does the balance of convenience lie?

(f) Are the plaintiffs entitled to any equitable remedy?

As regards (a), the Defendant submitted that as it was not a party to the said transaction being the purchase of the Karen property. It only financed the same through disbursing Kenya shillings 9.8 million secured by the other two properties being the Meru and Dam Estate properties. The Defendant never disbursed the further amount of Shs. 5 million to be secured over the first Plaintiff's pension benefits. The purchase of the Karen property was a "straight cash" transaction as was expressly confirmed by the first Plaintiff. Thus, the Defendant and/or its advocates were under no obligation to issue an undertaking to cover that transaction. As regards issue (b), the Defendant maintained that the Charge instruments were duly executed by the Plaintiff, attested and registered as against the titles of the Meru and the Dam Estate properties. Those charges were independent of and totally separate from the transaction to purchase the Karen property. The Charges were specific to the disbursements made to the Plaintiffs amounting to an aggregate sum of Shs. 9.8 million. In any event, the Karen property had already been sold and charged to another financial institution. As regards the arbitration proceedings in relation to the Karen property, the Defendant maintained that as it was not a party to that transaction, it cannot be involved in any such arbitration proceedings.

12. As to whether the Defendant's statutory power of sale has accrued, the Defendant noted that the Plaintiffs had conceded that they had executed the Charge documents. They had also conceded to having received the amount of Shs. 9.8 million disbursed by the Defendant. There had been default in repayment of that sum. Despite the statutory notices having been sent to the first Plaintiff for her to regularise her account with the Defendant, no response or offer of settlement had been received from the first Plaintiff, apart from this suit. More particularly, the Defendant stated that it had proceeded to issue notices informing the Plaintiffs of the intended sale through the mailing address specified in the Charge instruments. As to the question of whether the Plaintiffs had established a *prima facie* case with a probability of success, the Defendant commented that no single allegation had been made by the Plaintiffs which is triable. In its opinion, the Defendant had clearly and satisfactorily rebutted all the allegations raised by the Plaintiffs. In view of the fact that, in the Defendant's opinion, the Plaintiffs having not

demonstrated that they had a *prima facie* case, no damages could arise. The Defendant maintained that even if a *prima facie* case had been made out by the Plaintiffs, they had not demonstrated that damages would not be an adequate remedy. Finally, under this heading, the Defendant noted that the Plaintiffs currently benefited from both the Defendant's disbursement of Shs. 9.8 million to them, as well as the continued enjoyment of the charged properties. In its opinion, the balance of convenience does not call for the grant of the Orders sought in the Application and the Plaintiffs were not entitled to any equitable remedy.

13. As regards the question raised by the Plaintiffs relating to frustration of the contract between the parties, the Defendant submitted that, in as much as the purpose of the loan facility was to assist the Plaintiffs to purchase the Karen property, all eventualities were covered by the Charge documentation by the Defendant seeking real and tangible securities for the advanced sums. It strenuously maintained that the obligation to repay the sum as above, was in no way conditional upon the charging of the Karen property. The Charge instruments themselves were quite clear as to when repayment informed you and there was no mention of the Karen property in either of the secured Charges over the Meru and Dam Estate properties. Further, the Defendant noted that the first Plaintiff, in her Affidavits, admitted to having made some repayment to the Defendant but now wished this court to believe that she was under no obligation to pay back anything further until the completion and charging of the Karen property. In the Defendant's view the parties had contemplated all possible outcomes in relation to the transaction, hence the Defendant's requirement for security to be registered covering the sums advanced. If the only scenario contemplated (by the Plaintiffs) was the successful purchase and charging of the Karen property, the Defendant would not have required any other security provisional or otherwise. At no point was the successful purchase of the Karen property an obligation or consideration in the agreement between the parties. In the Defendant's opinion, the doctrine of frustration did not apply to the present case. In its view, the **Davis Contractors** case contemplated the existence of a "radical change of obligations" and this was not the case here.

14. Rather as an afterthought, the Defendant did comment upon the validity of the statutory notices that it had issued. It noted that both Charges were executed and duly registered and clearly reserved the Defendant's rights under **section 83** of the *Registered Land Act*. Such reservations were clearly indicated on the Certificate of Official Search and Certificate of Lease both of which documents had been annexed to the Replying Affidavit. To the Defendant's way of thinking, registration conferred validity as to the reservation and the two Charges were properly consolidated so that they could be realised in the manner proposed by the Defendant. The Defendant continued by saying that the Plaintiffs were served with the statutory notices through registered post to the address as set out in the Charge instruments. It did not understand from the Plaintiffs' submissions that they had said that they had not received the same. The Defendant submitted that the *Land Act 2012* provides for the service of a 2-month Statutory Notice (under **section 90**), as well as a 40-day Notice to Sell (under **section 96**), different to the provisions relating to statutory notices under the repealed *Registered Land Act*. The Defendant stated that the 40-day Notice to Sell under section 96 does not in any way preclude the issuance of instructions to auctioneers for them to issue the 45-day Redemption Notice as contemplated under **rule 15** of the *Auctioneers' Rules, 1997*. In the Defendant's opinion, the 40-day and 45-day notices can run concurrently contrary to the Plaintiffs' assertions in that regard. In these circumstances, the Defendant submitted that the notices were therefore valid in law.

15. The transaction as between the Plaintiffs and the Defendant does not seem to be in any way out of the ordinary. The first Plaintiff, sometime in 2008, decided that she wished to purchase the Karen property. She entered into the Agreement for Sale dated 13 August 2008 under which she was to pay Shs. 11,250,000/- by way of Stand Premium, initially by paying Shs. 7,500,000/-upon executing the developer's Letter of Offer and Shs. 3,750,000/- on the signing of the Agreement for Sale exhibited as "A 2a" to the Affidavit in Support of the Application. Thereafter, the Karen property was to be built by the developer and the balance of the purchase price (Stand Premium) of Shs. 20 million was to be paid in 5 equal instalments of Shs. 4 million each over a period. There is no evidence before court as to how much of these monies the first Purchaser actually paid. Where there is evidence before court is that the first Purchaser approached the Defendant's subsidiary company Savings and Loan Kenya Ltd., to borrow an amount of Shs. 14,800,000 by way of mortgage facility application. The letter of offer from the said

Savings and Loan is dated 27 February 2009, six months after the first Purchaser had executed the Agreement for Sale. It is exhibited to the Supporting Affidavit to the Application as "A 2b". Under paragraph 6 of that letter Savings and Loan detailed the security to be taken which under i) reads:

"First Legal charge for K Shs. 5,400,000= over property L.R. No. NAIROBI/BLOCK 106/97 NAIROBI, DAM ESTATE, First Legal charge for K Shs. 4,400,000= over property MERU MUN. BLOCK 1/202 (to be discharged on completion of Karen House) & First Legal charge for K Shs. 14,800,000= over property L. R. No. 1160/42 HOUSE NO. 6, NDEGE GARDENS KAREN, NAIROBI."

Although somewhat badly expressed, to me it is quite clear the intention thereof and that is that the Defendant in advancing the sum of Shs. 14,800,000/-to the first Plaintiff was to take a Charge in that amount over the Karen property upon completion of its purchase. In the meantime however, bearing in mind that the Defendant was to advance Shs. 9.8 million to the first Plaintiff, it required that to be secured by the 2 Charges over the Meru and Dam Estate properties. This was the aggregate amount detailed on the 2 Charges being Shs. 4.4 million secured against the Meru property and Shs. 5.4 million being secured against the Dam Estate property, respectively. In this regard, I tend to agree with the Defendant that as it was advancing Shs. 9.8 million to the first Plaintiff, it needed to put security in place therefore and not to have to rely upon some future security over the Karen property which may never have materialised for whatever reason. As it turned out, it didn't so materialise as the Karen property was sold elsewhere. I also agree with the Defendant that as regards the Karen property transaction, it is not involved in any way in the dispute between the developer of the same and the Plaintiffs and certainly it is not a fit party to be included in the arbitral proceedings.

16. This then leads me to the issue of whether the agreement between the Plaintiffs and the Defendant was frustrated by the Karen property being sold elsewhere. The nature of the transaction as between the Plaintiffs and the Defendant was simply one involving the lending of money. The original intention was that the money should be lent to go towards the purchase of the Karen property, of that there is no doubt. To this end, the Defendant disbursed Shs. 9.8 million to the first Plaintiff. Reading the correspondence exhibited to the first Plaintiff's Affidavit in support of the Application it is quite obvious to me that the first Purchaser was juggling as hard as she could to raise funds from any source towards paying the initial deposit by way of stand premium for the purchase of the Karen property. She had obviously set her heart on the purchase of the same. However in the borrowing of money from the Defendant, the Plaintiffs had incurred an obligation, namely to pay the money back. The first Purchaser admitted that she had paid some monies of her own prior to the purchase of the Karen property going off. In my opinion, the purchase of the Karen property going off was not an event of frustration in relation to the contract between the parties. That contract involved the lending of money and the repayment of the same, no more. What the money was used for is, to my mind, irrelevant to the contract of lending. I do not believe that the parties therefore contracted on the basis that some fundamental thing or state of things would continue to exist. I would adopt the text as above drawn from **Halsbury's Laws of England** as approved by my learned brother **Emukule J** in the **Gimalu Estates** case and further as follows:

"The doctrine of frustration has been variously stated to depend on an implied condition, (the purchase of the Karen property) **the disappearance of the foundation of the contract, the intervention of the law to impose a just and reasonable solution, all the facts of a radical change in the character of the obligation; but the last view is now the predominant one. That view requires interpretation of the terms of the contract in the light of the nature of the contract and the relevant surrounding circumstances, and an enquiry whether those terms are wide enough to meet the new situation."** (Bracketing mine).

In my opinion, the contract between the parties had been set sufficiently wide enough to meet the new situation of the Karen property having been disposed of elsewhere.

17. Having found that the doctrine of frustration does not apply to the contract between the parties and in order, to find that the Plaintiffs have made out a *prima facie* case as envisaged by the first requirement of the **Giella versus Cassman Brown (1973) EA 358**, I must now examine the position with regard to the

adequacy of the statutory notices. This is the second limb relied upon by the Plaintiffs in their submissions herein. The Defendant on this point relied upon the authority of **Muturi & 2 Ors versus Kenya Commercial Bank Ltd (2005) eKLR**. Having perused the case report, it seems that the Defendant is seeking to rely on the provisions of section 84 of the Registered Land Act which provides:

"a chargee has no right to consolidate his charge with any other charge unless the right is expressly reserved in the charges or in one of them and is noted in the register against all the charges so consolidated."

With respect I do not consider that this section of the now repealed Act assists the Defendant in any way in its argument as to why, where there were two chargors is in relation to the Charge over the Dam Estate property, a separate statutory notice should not have been served on each of them. The fact that the 2 Chargors share a postal address does not seem of any significance to me, they both should have been served with the statutory notice.

18. The Plaintiffs referred the court as above to the 2 decisions of **Ringera J** in the **Muigai** and **Simiyu** cases (supra). In my view what the learned judge found in connection with the validity of notices as issued under the Registered Land Act (now repealed) in every way applied to statutory notices being issued under the provisions of the *Land Act 2012*. As regards the Dam Estate property, the Defendant knew full well that it was not solely owned by the first Purchaser and in fact it knew that the property belonged to the estate of the deceased and that the first and second Purchasers were administrators of that Estate. It was perfectly aware that there were other beneficiaries involved as per the Declaration of Trust exhibited to the Affidavit in support of the Application as exhibit "A 4b". Obviously, I have to take regard of this matter in light of the usual principles for the grant of an interlocutory injunction as enunciated in the **Giella v Cassman Brown** case (supra). Have the Plaintiffs made out a *prima facie* case with a probability of success at the trial? In determining such, I need to bear in mind that I should not be given findings of fact or law at this stage more particularly so where the affidavit evidence is so contradictory. The case that the Plaintiffs have to prove at the trial or at least the second Plaintiff, is that he was not served with a valid statutory notice under the provisions of either **section 90** or **section 96** of the *Land Act 2012*. It is obvious to me from a perusal of the statutory notices exhibited to the Replying Affidavit as "KK 4a" and "KK 4b" that the second Plaintiff was never served with the same. Consequently so far as the Dam Estate property is concerned, the Plaintiffs would be entitled, in my opinion, to an interlocutory injunction preventing the selling by public auction or private treaty or otherwise howsoever interfering with the Plaintiffs' title and ownership thereto. However, what about the Meru property? From the Certificate of Lease dated 15 August 2006 exhibited as "KK 3a" to the Replying Affidavit the sole owner thereof is the first Plaintiff. In that respect, I am satisfied that the aforesaid statutory notice was served on the first Plaintiff. However, and as the Plaintiffs have noted in their submissions, the statutory notices under **sections 90** and **96** of the *Land Act* referred to both the Meru property as well as the Dam Estate property. In the opinion of the Plaintiffs, each of those properties require their own statutory notice.

19. I have perused the relevant sections in relation to chargee's powers of sale under the *Land Act, 2012*. **Section 90** provides for the various remedies of the chargee under a charge including the right to sue for monies owed, the right to lease the charged land as well as the right to sell the same. The latter right is the subject of **section 96** of the Act which requires the further 40 day-notice to be dispatched to the chargor as well as the necessity under **section 97** to have the land valued for forced sale purposes. All these sections talk about a charge in the singular not in the plural. They also referred to a notice being given in the prescribed form. However those forms under **section 96** have yet to be prescribed. In my opinion, the Plaintiffs are correct in that a composite form of notice under either **section 90** or **section 96** of the Act, will not suffice particularly where land is held by different chargees as is the case here. In consequence of the above, I find the notice issued by the Defendant in respect of both the Meru and Dam Estate properties under **sections 90** and **96** of the Act to be defective and consequently invalid.

20. Turning now to the Application itself, the usual prayer as regards an interim injunction would be to ask for it to be in place until the hearing of the suit. Prayer 2 of the Notice of Motion dated 12 October 2012 only asks for the interim injunction to be in place pending the inter-parties hearing of the

Application. However and somewhat luckily for the Plaintiffs, prayer 5 details:

“..such other orders as the court may find necessary to preserve the subject matter do issue.”

In these circumstances, I find it necessary to preserve the subject matter of this suit being the Meru and Dam Estate properties and will allow an interim order as per prayer 2 but only on the condition that such will remain in place until the Defendant puts its house in order so far as the issuance of proper statutory notices under the *Land Act 2012* is concerned. Further, I am disturbed that the first Plaintiff seems to be making no effort to repay the monies that she had borrowed from the Defendant. To that end, I note the repayment amount as per the letter of offer dated 27th of February 2009 was to be at the rate of Shs. 274,722/-per month. For the first Plaintiff to have the benefit of the interim injunction that I have granted as above, I direct that she must resume repayments in the monthly amount that she has already agreed to as above, commencing 1 February 2013 and thereafter on the first day of each month until payment in full. In the circumstances, I make no order as to costs.

DATED and delivered at Nairobi this 30th day of January 2013.

J.B.HAVELOCK
JUDGE