



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI**

Civil Case 374 of 2005

ANJANABEN ANIL SHAH PLAINTIFF

VERSUS

AKIBA BANK LIMITED DEFENDANT

RULING

The Plaintiff seeks an interlocutory injunction to restrain the Defendant from offering for sale advertising for sale, selling, disposing or transferring or in any other manner whatsoever alienating the property known as L.R. No.7741/226 pending the hearing and determination of this suit. The background is this. The suit piece of land is registered in the names of the Plaintiff and her husband Anil Laxmichand Shah. It is their matrimonial home. In August 2000 two companies namely Laxmichand Keshavji & Sons (K) Limited and Fisatex (K) Limited and the Plaintiff's said husband borrowed money from the Defendant and secured the repayment thereof by inter alia charging the suit property to the Defendant.

The borrowers defaulted and the Defendant sought to exercise its statutory power of sale under the charge thus provoking this suit and application. The suit property is registered under the Registration of Titles Act Cap.281 of the Laws of Kenya. From the affidavit evidence and the submissions addressed to me the Plaintiff's complaints are: She did not know that the document she signed was a charge on the suit property. Her husband had one evening in August 2000 brought the document which he said was from the bank and she was to sign it as a formality. Her husband did not give her an opportunity to read the said document and even if she had read the document she would not have understood it as she is not conversant with legal documents.

All her married life the Plaintiff was totally dependant upon her husband in making business and financial decisions. Due to her trust and faith in her husband, she accepted the husband's explanation believing that since her signature was required as a mere formality the document did not have serious implications. She did not know that the document conferred upon the Defendant power to sell the suit property if the money secured hereunder was not repaid by the borrowers. She did not appear before one Iyman Sherman-Faraj Advocate who is alleged to have attested her signature and explained the charge to her. The Plaintiff blames the Defendant for failing in its duty to ensure that she had received independent legal advice regarding the charge. For this argument reliance was placed upon the House of Lords decision in **BARCLAYS BANK PLC –VO'BRIEN AND ANOTHER (1943)4 AII ER 417.**

The Plaintiff also complains that she was not served with a valid mandatory statutory notice of sale as the one relied upon by the Defendant is defective in law. The consequence of failure to serve a valid Statutory Notice of sale according to the Plaintiff is that the Defendant's statutory power of sale had not crystallized. The Plaintiff further complains that the charge document is fatally defective as it offends the mandatory provisions of Sections 34 and 35 of the Advocates Act Cap.16 of the Laws of Kenya. For

this argument reliance was placed upon two decisions of this Court namely TRAVEL SHOPPE LIMITED –V- INDIGO GARMENTS EPZ LTD AND 2 OTHERS: HCCC No. 586 OF 2004(UN) and JAMBO BISCUITS (K) LTD –VBARCLAYS BANK OF KENYA LTD AND 2 OTHERS: HCCC NO. 1833 OF 2001(UR).

Finally, it is the Plaintiff's case that if the suit property is sold she will suffer irreparable loss as the same is her matrimonial home and such sale will render her and her family homeless.

On behalf of the Defendant chargee, it is contended that the Plaintiff has failed to establish a prima facie case with a probability of success at the trial. According to the Defendant the charge document does not offend the provisions of Section 34 and 35 of the Advocates Act and was validly executed by the Plaintiff who has not shown the undue influence or misrepresentation made by her husband and even if the same had been shown the same would not affect the Defendant's rights under the charge. It was further contended for the Defendant that the Plaintiff had been properly served with a valid statutory notice of sale and in the premises the Defendant is entitled to enforce its obligations under the charge. Reliance was placed upon the cases of SPARLING –VBRERETON (1866) L.R. 2EQ 64, LESTRANGE –V- GRAUCOB LTD (1934) AII E.R. 16, SIMBA AIRLINES LTD –V- HERITAGE BANK LTD (2000) LLR 1439 (CAK) AND ROYAL BANK OF SCOTLAND –V- ETRIDGE (NO.2) AND OTHER APPEALS (2001) 4 AII ER 449. I will refer to some of these cases later. I will now consider the above rival submissions in the light of the principles for the grant of an interlocutory injunction set in GIELLA –V- CASSMAN BROWN & CO. (1973) E.A. 358 which are:-First whether or not the Plaintiff has shown a prima facie with a probability of success at the trial. I bear in mind that this is an interlocutory application and I should not make definitive findings of fact or law in determining this first condition.

Second, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer irreparable injury which could not adequately be compensated in damages. Third, that if the Court is in doubt as to the existence or otherwise of a prima facie case it should decide the application on a balance of convenience.

First, has the plaintiff made a prima facie case that she was not served with a valid statutory notice of sale? The notice is annexed to her affidavit as "AASI". The notice reads in part:

“The Lender Now hereby demands that you pay to the lender within ten (10) days from the date of service of this notice the over due amount specified above. Please take notice that should you fail to pay the overdue amount of Ksh 35,000,000/= within three (3) months after the expiry of the ten day notice period, the Lender will sell the property and/or exercise any statutory or other remedy which may be available to the Lender”

The Plaintiff admits having been served with this notice. Her complaint appears to be that it is confusing. I do not see the basis of the confusion. The notice required the Plaintiff to pay within 3 months after the expiry of the ten day notice and the 10 day notice was with effect from the date of service of the notice. In my view the Plaintiff has not shown a prima facie case that she was not served with a valid statutory notice of sale. The said notice gave the Plaintiff more than 3 months to redeem the charge.

Secondly, has the Plaintiff made a *prima facie* case that the charge offends the provisions of Sections 34 and 35 of the Advocates Act? The charge is annexed to her affidavit as 'AAS2'. The charge bears the name "Mohamed Madhani & Co. Advocates Nation Centre (7th Floor) Kimathi Street, P.O. Box 48539, Nairobi" The Plaintiff complains that the Charge does not have the words "Drawn by". It is submitted that such an omission offends Sections 34 and 35 of the Advocates Act. The case of JAMBO BISCUITS (K) LIMITED –V- BARCLAYS BANK OF KENYA LIMITED (SUPRA) where debentures without the endorsement of the person who had drawn them were found invalid for having been prepared otherwise than in compliance with the Advocates Act was cited, in support of the Plaintiff's case.

I agree with the Plaintiff that a charge is one of the documents (refer Section 34 (1)(e) of the

Advocates Act as read together with the third scale of the first schedule of the Advocates Remuneration Order) which should be drawn or prepared by a qualified person. There is no evidence in the case at hand that the charge in question was drawn by an unqualified person. There is an endorsement of the firm of Mohamed Madhani & Co. Advocate's whose address is furnished. What is missing is the phrase "Drawn by". The instant case is therefore in my view in a different category from the case of **JAMBO BISCUITS (K) LTD –V- BARLCAYS BANK OFKENYA LTD (SUPRA)** which completely lacked the endorsement of the person who had drawn or prepared the debentures. There is no doubt in my mind that the charge in the case at hand was drawn by the firm of Mohamed Madhani & Co. Advocates. In my view the omission of the words "Drawn by" does not invalidate the charge. The charge is validly endorsed with the name and address of the Advocates who drew or prepared the same. The charge in my view does not offend sections 34 and 35 of the Advocates Act.

The Plaintiff also placed reliance upon the case of **TRAVEL SHOPPE LIMITED –V- INDIGO GARMENTS LTD (SUPRA)** where my learned sister Mary Kasango J. was of the opinion that the debenture therein should have borne the phrase "Drawn by.". The primary reason why my Learned Sister declined to grant an injunction to the Plaintiff in that case was that the Plaintiff had no privity of contract and indeed was not a party to the debenture impugned and had not sufficiently proved that it was entitled to bring an action on a document to which it was not a party. In my view therefore the observations of the Learned Judge are not cast in stone. This is because the consequences of holding that the omission of the words "Drawn by" invalidated a charge or debenture to the whole world would be catastrophic.

Sir W. Page Wood V.C. in **SPARLING –V- BRERETON (SUPRA)** with respect to unqualified solicitors observed at page 67 as follows:-

“The cases at common law seem to show that although great difficulties are thrown in the way of any recovery of his costs by a solicitor who acts for a client without being duly qualified the proceedings themselves are not void. It would be most mischievous indeed, if persons without any power of informing themselves on the subject should be held liable for the consequences of any irregularity in the qualification of their solicitor. As against third parties the acts of such a person acting as solicitor are valid and binding upon the client on whose behalf they are done.”

Imagine a party who has executed a charge or debenture later turning round and seeking to invalidate the charge or debenture after taking full benefit thereof on the basis that the advocate who drew the charge and debenture omitted to endorse the words "Drawn by"! Such a result would offend our sense of justice

I turn now to what I consider the Plaintiff's primary complaint that her husband obtained her signature on the charge document by undue influence and misrepresentation and the Defendant was fixed with constructive notice of the husband's undue influence and misrepresentation. The Plaintiff deposes that in August, 2000 her husband brought to her a document which he said was from the bank and asked her to sign the same as a formality. The husband did not give her an opportunity to read the said document which she signed without reading. She further deposes that all her married life she has totally depended on her husband in making business and financial decisions and has never herself exercised any independent judgment on those matters. She further deposes that she did not understand that the document she signed was a charge and that it conferred upon the Defendant the power to sell the suit property if the money secured thereunder was not repaid by the borrowers. She further deposes that she only came to appreciate the implications of the document she signed after she was served with the statutory notice of sale. She also deposes that the Defendant knew that Anil Laxmichand Shah was her husband and she had been advised that her relationship was that of trust and confidence and that the Defendant was obliged to ensure that she received independent legal advise regarding the contents meaning and legal effect of the said charge before signing the same which advise she had not received. She further deposes that she did not appear before Iyman Sherman Faraj Advocate who is alleged to have attested her signature and explained the charge to her. Indeed the said Advocate is not known to her. She further deposes that she does not know whether the money demanded was advanced to the borrowers and if so what they did with the money. She also deposes that she has been advised that due to the matters deposed to in the affidavit the said charge is

invalid and incapable of giving rise to a statutory power of sale capable of being exercised by the sale of the suit property.

The Defendant has, chosen to resist the Plaintiff's averments in her affidavit by Grounds of Opposition. The Grounds of Opposition I am afraid do not answer the Plaintiff's detailed averments. The crucial averments that remain unanswered are that:-

- 1. The Plaintiff did not appear before Iyman Sharman Faraj who is alleged to have attested her signature on the charge.**
- 2. The effect of a sub section 1 of Section 69 of the Transfer of Property Act was not explained to the Plaintiff.**
- 3. The Plaintiff did not know that she was executing a charge over the suit property.**
- 4. The Plaintiff's husband misrepresented to her the effect of the charge only telling her that her signature was required merely as a formality which was nothing for her to concern herself with.**
- 5. The Plaintiff reposed total trust and confidence in her husband in the running of family business and financial matters.**
- 6. The Plaintiff does not know whether the money under the charge was advanced to the borrowers and if so what they did with the money.**

It is obvious that the Plaintiff has tried to bring herself within the operation of the principles in the case of **BARCLAYS BANK PLC –V- O'BRIEN (SUPRA)**.

That was a House of Lords decision where it was held inter alia that:

“where a cohabitee entered into an obligation to stand as a surety for the debts of the other cohabitee including the debts of a company in which the other cohabitee (but not the surety) had a direct financial interest and the creditor was aware that they were cohabitees the surety obligation was valid and enforceable by the creditor unless the surety was procured by the undue influence misrepresentation or other legal wrong of the principal debtor.

If there had been undue influence misrepresentation or other legal wrong by the principal debtor then unless the creditor had taken reasonable steps to satisfy himself that the surety entered into the obligation freely and in knowledge of the true facts, the creditor would be unable to enforce the surety obligation because he would be fixed with constructive notice of the surety's right to set aside the transaction. However, unless there were special exceptional circumstance, a creditor would be held to have taken reasonable steps to avoid being fixed with constructive notice if he had warned the surety at a meeting not attended by the principal debtor of the amount of the potential liability and of the risks involved and advised the surety to take independent legal advice.

On the facts the bank knew that the parties were husband and wife and should therefore have been put on inquiry as to the circumstances in which the wife had agreed to stand as a surety for the debt of her husband. The failure by the bank to warn the wife when she signed the security documents of the risk that she and the matrimonial home were potentially liable for the debts of the company or to recommend that she take legal advice fixed the bank with constructive notice of the wrongful misrepresentation made by the husband to her and she was therefore entitled as against the bank to set aside the legal charge on the matrimonial home securing the husband's liability to the bank.”

The Defendant's contention is that the decision in the above case was overruled in the case of ROYAL BANK OF SCOTLAND –V- ETRIDGE (NO.2) (SUPRA). I have read the entire case and with all due respect to the Counsel for the Defendant the basic principles enunciated in the BARCLAYS BANK PLC. –V- O'BRIEN (SUPRA) were not overruled by the decision in the case of **Royal Bank of Scotland –V- Etridge (supra)**. The latter case lightened the burden of the bank or creditor in establishing want of notice of undue influence misrepresentation or wrong doing of the husband. For instance in the surety wife case there would be no presumption of undue influence as had been suggested in the O'Brien case. Independent legal advice in the Etridge case did not mean advice by a different solicitor as had been suggested in the O'Brien case. Also found unnecessary is the recommendation that the bank itself explains the transaction to the wife as had been so recommended in the O'Brien case. The basic O'Brien principles however remained intact. Lord Scott of Foscote summarized the same as follows:-

(1) The issue as between the surety wife and the bank is whether the bank may rely on the apparent consent of the wife to the surety transaction.

(2) If the bank knows that the surety wife's consent to the transaction has been procured by undue influence or misrepresentation or if it has shut its eyes to the likelihood that that was so, it may not rely on her apparent consent.

(3) If the wife's consent has in fact been procured by undue influence or misrepresentation the bank may not rely on her apparent consent unless it has good reason to believe that she understands the nature and effect of the transaction.

(4) Unless the case has some special feature the bank's knowledge that a solicitor is acting for the wife and has advised her about the nature and effect of the transaction will provide a good reason for the purposes of (3) above. That will also be so if the bank has a reasonable belief that a solicitor is acting for her and has so advised her. Written confirmation by a solicitor acting for the wife that he has so advised her will entitle the bank to hold that reasonable belief.

(5) So too a sufficient explanation of the nature and effect of the transaction given by a senior bank official would constitute good reason for the purposes of (3) above.

(6) If there are any facts known to the bank which increase the inherent risk that the wife's consent to the transaction may have been procured by the husband's undue influence or misrepresentation, it may be necessary for the bank to be satisfied that the wife has received advice about the transaction from a solicitor independent of the husband before the bank can reasonably rely on the wife's apparent consent.

(7) If the bank has not taken reasonable steps to satisfy itself that the wife understands the nature and effect of the transaction the wife will subject to such matters as delay acquiescence change of position, etc be able to set aside the transaction if her consent was in fact procured by undue influence or misrepresentation.

(8) Subject to special instructions, or special circumstances the duty of a solicitor instructed to act for a wife proposing to stand as a surety or to give security, for her husband's debts is to try and make sure that she understands the nature and effect of the transaction.

(9) In all surety wife cases the bank should disclose to the surety wife, or to the solicitor acting for her the amount of the existing indebtedness of the principal debtor to the bank and the amount of the proposed new loan or drawing facility."

I entirely agree with the above recommendations and I will apply them without apology to the case at hand. As I have stated above the Plaintiff's factual position in support of this application has not been

controverted by the Defendant. She has therefore shown on a prima facie basis that the Defendant cannot rely on her consent to the charge. She has deponed that her signature on the charge was procured by undue influence and misrepresentation. She has also deposed that she did not appear before any advocate to execute the charge and that the charge was not read or explained to her as required under the Transfer of Property Act. In the premises the Defendant did not take reasonable steps to satisfy itself that the Plaintiff understood the nature and effect of the charge. The Plaintiff has therefore shown on a prima facie basis that she may set aside the charge. In the premises, I am satisfied that the Plaintiff has made out a prima facie case with a probability of success at the trial.

As regards whether the Plaintiff would suffer irreparable loss and injury unless the injunction sought is granted, I have no doubt she would. To lose a matrimonial home on account of debts the Plaintiff alleges she does not know about will in my view occasion irreparable injury to the plaintiff that damages would not be able to adequately compensate.

Having found that the Plaintiff has satisfied the two conditions for the grant of an interlocutory injunction, I do not have to consider the balance of convenience. I accordingly grant the Applicant the order sought in terms of prayer 2 of the Chamber Summons dated 6th July, 2005. I do so on terms that the Applicant shall file a written undertaking as to damages on oath within 7 days of today

. Costs shall be in the cause

. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER,
2005.**

F. AZANGALALA

JUDGE

Read in the presence of:-

Malik for the Defendant/Respondent and Wanjohi for the Plaintiff/Applicant

F. AZANGALALA

JUDGE