



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 404 OF 2017

JULIA WAMBUI MWANGI.....PLAINTIFF

VERSUS

FAMILY BANK LIMITED.....1ST DEFENDANT

RUTH NJERI KARANJA.....2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed a plaint dated 15/06/2017 against the Defendants and prayed for orders *inter alia* that a declaration that the charge registered in favour of the 1st Defendant is fraudulent and a permanent injunction do issue against the Defendants from interfering with LR LOC 2/KANGARI/5046.
2. The Plaintiff claimed that she and her son, John Ngunjiri Mwangi are the joint registered owners of LR LOC 2/KANGARI/5046 hereinafter referred to as the suit land. That on 12/03/2017, she received a statutory notice of sale of the suit land from the 1st Defendant pursuant to a guarantee she allegedly undertook for a loan advanced to the 2nd Defendant. The Plaintiff strongly refutes this assertion and imputed the Defendants' fraud and irregular registration of the charge on the suit land.
3. The suit is vehemently opposed. The Defendants filed their respective statements of defences dated 01/12/2017 and 19/08/2019. The 1st Defendant maintained that it advanced the 2nd Defendant a loan facility of Kshs. 2.5M which the Plaintiff and her son agreed to be chargors by executing a Charge dated 11/12/2015 and registered on 14/12/2015. That upon the 2nd Defendant's default in servicing the loan, the 1st Defendant naturally resorted to exercise its statutory power of sale of the security and followed due process.
4. On the part of the 2nd Defendant, she denied any fraud on her part and stated that the Plaintiff and John Ngunjiri who is also her husband, voluntarily agreed to secure the loan. That the loan was directed to Ngunjiri's business who defaulted in forwarding repayments to the 2nd Defendant for onward transmission to the 1st Defendant.
5. The Plaintiff testified as PW1 and called two witnesses in support of her claim. She adopted her statement dated 15/06/2017 and testified that she is the registered owner of the suit land and denied signing any guarantee for a loan. That she had the suit land's title in her house but at the time of filing the suit, it was missing.
6. In Cross-examination, she denied signing the charge documents and ever appearing before Dennis Juma Advocate to sign any bank documents. Further she admitted not reporting the loss of the title deed to the police. She added that the 2nd Defendant is her daughter in-law and that upon inquiry, the 2nd Defendant admitted taking the title to the bank. On the issue of the spousal consent, she said her husband is deaf and dumb and proceeded to produce a chief's latter to that effect and copy of her husband's Identity Card.
7. PW2 – Douglas Mwangi Karanja testimony was limited to the Plaintiff's husband, Mwangi Kibue's deaf and dumb condition. He doubted that Mwangi was capable of transacting anything.
8. PW3 – Joseph Thiongo Kamuyu's evidence was similar to that of PW2 having grown and undergone rites of passage with the Plaintiff's husband.
9. The Plaintiff's case was closed at that point.
10. The 1st Defendant called Mary Kuria as DW1 a credit relationship manager at Family Bank, Thika branch. She adopted her statement dated 06/12/2017 and produced documents in the List of Documents annexed to their Replying Affidavit filed on 14/07/2017. She acknowledged knowing the Plaintiff as the 2nd Defendant's guarantor. That upon the 2nd Defendant's default on the loan repayment, the bank

initiated the process of statutory power of sale.

11. In Cross-examination, she was tasked to explain the discrepancies in signatures and attestations in the loan documents. She expounded that the documents were processed by their Advocates. On whether the Plaintiff was duly notified about the Guarantee, she said; -

“By the time Mwangi Kibui was of sober mind. I know him. He came to the bank with his wife. I talked to him in vernacular. I am not aware that Mwangi Kibui is not able to speak. I am not sure he was born dumb and deaf. I met him and talked to him.....

I spoke to Julia Wambui when she came to the bank with her husband. I summoned both of them to the bank...

In case of default, the bank demands the money in writing. In default, the bank issues a statutory notice. I know they got the monies because on receipt, they came to see me in the bank where I explained the consequences of default.

The guarantor, Julia and Mwangi came to the office and willingly offered to guarantee the loan on behalf of the 2nd Defendant and her family.”

12. The second witness was DW2 - Moses Kibathi Advocate. He relied on his statement dated 12/02/2018` as his evidence in chief.

13. On Cross-examination, he confirmed witnessing the spousal consent for the 2nd Defendant and Mwangi Kibui. That he witnessed the consent at his office in Kangari, Kigumo that was transacted in Agikuyu language. He also confirmed knowing the parties prior to the instant transaction.

14. The 2nd Defendant testified as DW3 and adopted her statement dated 19/08/2019 and produced DExh. 6-9.

15. On Cross-examination, she confirmed the Plaintiff and Mwangi Kibue are her parents' in-law. DW3 denied stealing the title and charging it fraudulently. She added that the Plaintiff and her husband Ngunjiri voluntarily charged the suit land as the loan amount was advanced to Ngunjiri's business account, Ebenezer Turbo Ltd. She explained that Ngunjiri had defaulted on repaying a previous loan hence his blacklisting on credit reference bureau and was thus requested to apply for the current loan on his behalf.

16. That marked the closure of the 2nd Defendant's case.

17. Parties agreed to file their respective written submissions. The Plaintiff filed her submissions dated 02/02/2021 whereas the Defendants filed theirs dated 02/03/2021 and 26/02/2021 respectively.

18. On behalf of the Plaintiff, it was submitted that she owns the suit land jointly with her son Ngunjiri Mwangi in trust for her husband Mwangi Kibue. That Mwangi is deaf and dumb and illiterate hence could not understand the nature of the proceedings or charge on the land. The Plaintiff disputed the charge documents for want of attestation and denied signing or imprinting her thumb to that effect. According to her, the 2nd Defendant stole the title and fraudulently charged the suit land before leaving her matrimonial home.

19. The 1st Defendant on its part rehashed the genesis of the loan facility advanced to the 2nd Defendant and Plaintiff's role as a guarantor. The 2nd Defendant contended that the suit land was legally charged as required under Section 79 of the Land Act and obtained spousal consent as required under section 79 (3) of the Land Registration Act. They faulted the Plaintiff for failing to prove fraudulent allegations on its part to the required standard as set in the Evidence Act.

20. The 1st Defendant added that in case of default, the Plaintiff and Ngunjiri willfully undertook to indemnify the loan up to a maximum of Kshs. 2.5M. without any prejudice, the 1st Defendant urged this Court not to entertain the Plaintiff's plea of her husband's insanity to void a charge that was duly executed and due process followed in exercising the power of sale.

21. Last but not least the 2nd Defendant submitted that the Plaintiff failed to prove the elements of fraud if at all in charging the suit land. She cited the case of **Jandu vs. Kirpal & Another (1975) EA** and outlined the Plaintiff's knowledge and participation in acquisition of the loan. She prayed for dismissal of the suit with costs.

Issues for Determination

22. From the pleadings and submissions on record, the main issues for determination are; -

- a. Whether the Plaintiff has proved her claim for a fraudulent charge on the suit property.
- b. Whether this Court may order permanent injunction against the 1st Defendant.

Analysis and Determination

23. The Plaintiff's case as I understand it is that the Defendants fraudulently charged her land without her knowledge and consent. She has in great detail, insisted that she and her son hold the suit land in trust for her husband, Mwangi Kibue. In her brief submissions, she shifted her argument and drew the Court's attention to her husband's condition whom she claims to hold the land in trust. To my mind, she is not

disputing the loan facility but the alleged fraudulent charge on her land and accruing Guarantee and indemnity.

24. The Plaintiff enumerated particulars of fraud against both Defendants as follows; -

Particulars of fraud on part of the 1st Defendant;

- a) Registering a charge in its favour without the Plaintiff's spouse, spousal consent.
- b) Registering a charge document which they ought to have known that the signatures are fake and/or not genuine.
- c) Failing to conduct due diligence, to establish the true owner of LR LOC 2/KANGARI/5046.
- d) Registering a charge in its favour without demanding consent to charge from the relevant Land Control board as stipulated in the Land Control Act.

Particulars of fraud on part of the 2nd Defendant

- a) Obtaining the Plaintiff's title deed irregularly and/or fraudulently and thereby charging the Plaintiff's LOC 2/KANGARI/5046 without the Plaintiff's signing and/or execution of the charge document and /or presenting herself as the owner of LOC 2/KANGARI/5046.
- b) Causing a charge to be registered in favour of the 1st Defendant, without a consent to charge from the relevant Land Control Board, as stipulated in Land Control Act.

25. In analyzing the Plaintiff's case, the starting point is the legal burden placed on her to prove her case on a balance of probabilities as provided in Section 107 of the Evidence Act. Additionally, Sections 108 and 109 of the Act expound on this burden and its incidence that; -

'108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.'

26. The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. Moreover, in the Court of Appeal case of **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** it was held that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.

27. Additionally, the Court of Appeal in **Pamba Ong'weno Amila v John Juma Kutolo [2015] eKLR** dismissed an Appeal challenging the finding on want of proof of fraud and held that fraud is a conclusion of law and facts alleged to be fraudulent which must be set out and evidence led thereon to prove fraudulent intent. The Court also stated that allegations of fraud must be proved to a standard above balance of probabilities but below beyond reasonable doubt.

28. It is trite that financial institutions require security for advancing monies lent to borrowers. In the event of default in repaying the loan, the lender can lawfully recover the outstanding loan from the guarantors in line with the Deed of Indemnity and Guarantee prior entered into by the respective parties. This is the concept of statutory power of sale as provided under the Land Act.

29. The Plaintiff alleged loss of the title deed of the suit land. She never reported the loss to the relevant authorities. In her examination in chief, she denied giving out her title to the Defendants. She also denied receiving any letters from the bank. However, in cross-examination, she contradicted herself and said; -

"The 2nd Defendant is the wife of my son....I did ask her about the title and she admitted taking it to the bank. I am not aware that if the borrower defaults the guarantor is obliged to pay. I did not receive letters from the bank dated 15/3/17, 15/6/17; I only got the auctioneers notification of sale dated 27/7/17. My husband is both deaf and dumb. He does not understand much. It is possible he could have signed (thumb printed the) spousal consent document dated 9/12/15...."

30. The above excerpt is highlighted to demonstrate that the Plaintiff is less than candid because she did receive the statutory notices from the bank as stated in paragraph 5 of her Complaint and paragraph 4 of her witness statement. The notice was equally annexed in her list of documents dated 15/06/2017.

31. On the allegation of her husband's condition, she produced a chief's letter dated 23/10/2017. Whereas the said letter and Doctor Kimani's statement were filed in Court, there was no substantive evidence adduced in Court to prove this allegation. None of the Plaintiff's witnesses challenged the validity of the impugned bank charge and deed of indemnity signed by the Plaintiff.

32. The 1st Defendant avers that the due diligence was carried out in processing the loan facility application and ultimate advance of the monies. The 1st Defendant maintained that the Plaintiff voluntarily charged the suit land and called witnesses to that effect. Precisely, on cross-examination, DW1 confirmed knowing the Plaintiff and her husband and that they discussed the loan facility and guarantee in vernacular Kikuyu language which the parties subscribe to. DW1 was firm that she knew that the title was given to the bank by the Plaintiff and her son. The Plaintiff did not rebut her evidence.

33. In giving rise to a valid exercise of power sale, the 1st Defendant testified that the Plaintiff willingly accepted to guarantee the loan facility and signed relevant documents thereto. Further in line with Section 79(3) of the Land Act pertinent spousal consents were obtained as the suit land was held jointly in favour of the Plaintiff and 2nd Defendant. The section provides; -

79. Informal charges

(1) An owner of private land or a lessee, by an instrument in the prescribed form, may charge the interest in the land or a part thereof for any purpose including but not limited to securing the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfillment of a condition.

(3) A charge of a matrimonial home, shall be valid only if any document or form used in applying for such a charge, or used to grant the charge, is executed by the chargor and any spouse of the chargor living in that matrimonial home, or there is evidence from the document that it has been assented to by all such persons.

34. The 1st Defendant also demonstrated that relevant notices were issued as required under Section 90 of the Land Act.

35. The 2nd Defendant was emphatic that the decision to apply and guarantee the loan was a family decision and that she applied for the loan on behalf of her husband who at that time had lost his creditworthiness in the sense that his name had been listed with the credit bureau as a defaulter thus dimming his chances of being granted loan facilities. DW2 confirmed preparing and witnessing the spousal consents for both the Plaintiff and 2nd Defendant. He went further to confirm that he knew the parties even before the said transaction.

36. The totality of the above analysis leads to answering the first issue in the negative.

37. Having determined the first issue as above, the Plaintiff's prayer for permanent injunction against the 1st Defendant is now moot. In the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR** the Court defined a permanent injunction as; -

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

38. The Plaintiff has not proven her case against the Defendants on a balance of probabilities to warrant such an order. A prayer for injunction cannot exist in a vacuum. The preservatory orders granted by this Court on 03/10/2017 are now discharged forthwith.

39. In the end, it is not difficult to arrive at a holding that the Plaintiff has failed to prove her case.

40. It is dismissed with costs in favour of the Defendants.

41. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF MAY 2021.

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Ndegwa HB for Mugo Moses for the Plaintiff

Ndungu HB for Ms Saina

2nd Defendant: Present in person. Advocate is absent.

Kuiyaki/Alex: Court Assistants