



REPUBLIC OF KENYA



KENYA LAW
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**Mutiso v Nzibu & another (Civil Suit 30 of 2018)
[2024] KEHC 3645 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 30 OF 2018**

MW MUIGAI, J

MARCH 7, 2024

BETWEEN

JOSHUA MUSAU MUTISO PLAINTIFF

AND

CYRUS ROBERT SALA NZIBU 1ST DEFENDANT

FAULU MICROFINANCE BANK LIMITED 2ND DEFENDANT

JUDGMENT

1. Vide Plaintiff dated 4th December, 2018 and filed in court on 14th December, 2018, the Plaintiff averred that at all material times to this suit the Plaintiff was the registered owner of Land Parcel No. MITABONI/MIUMBUNI/NGOLENI/2976 measuring 0.38 Ha; Land Parcel No. MITABONI/MIUMBUNI/NGOLENI/ 3325 measuring 0.83 Ha, Land Parcel No. MITABONI/MIUMBUNI/NGOLENI/2863 measuring 0.04 Ha, and land Parcel No. MITABONI/MIUMBUNI/NGOLENI/3308 measuring 0.18 Ha.
2. The Plaintiff averred further that the said parcels were registered in his name on 19.1.15 but there has been a delay in the issuance of the title deeds and he yet to be given the said title deeds to date.
3. The Plaintiff that on or about 20.9.2018 he was served with a 45 days redemption notice and a notification of sale by Messrs. Maduwande Auctioneers notifying him that the said auctioneers had instructions from the 2nd defendant to sell the abovementioned land parcels to realize the sum of Kshs. 2,769,080/= being the amount due and owing in respect of a loan Kshs. 1,982,500/= issued to the 1st Defendant by the 2nd Defendant and on which the 1st defendant had defaulted.
4. Contending that the said notice stated that the said parcels will be sold by public auction on 11.12.2018 at the Auctioneer's premises at Buruburu in Nairobi and that he was supplied with charge documents



in respect of the above-mentioned parcels allegedly executed by him on 22.2.2017 authorizing the bank to charge the parcels to secure the loans issued to the 1st Defendant in February, 2017.

5. He averred that from the said charge documents, land Parcel No. MITABONI/MIUMBUNI/NGOLENI/2976 was charged for the sum of 282,500/=, Land Parcel No. MITABONI/MIUMBUNI/NGOLENI/3325 for Kshs. 1,390,000/=, Land Parcel No. MITABONI/MIUMBUNI/NGOLENI/2863 for Kshs. 95,000/= and Land No. MITABONI/MIUMBUNI/NGOLENI/3308 for Kshs. 215,000/= making a total of Kshs. 1,982,500/= secured by the 4 charges.
6. He averred that the said charge documents were also accompanied by consents allegedly by his wife Esther Ndele Musau authorizing the creation of the charges, further that he never executed the charge documents and his wife also did not sign the consent forms.
7. It is contended that the 1st and 2nd Defendants illegally and fraudulently forged his signature and that of his wife to the charge documents and the consent forms and that the charges are therefore null and void ab initio. Opining that he never consented to his properties being used to secure the loans granted to the 1st Defendant and that he was not a party to any of the proceedings in relation thereto.
8. That the 2nd Defendant did not serve him with a notice of default as required under Section 90 of Lands Act and his wife was also not served with a notice of the intended sale as required under Section 96 (3) (c) of the *Land Act*, contending that the 2nd defendant also failed to carry out a forced sale valuation as required under Section 97 (2) *Land Act* and that the values of the parcels as stated in the notification of sale are grossly undervalued.
9. The Plaintiff further contended that the acquisition of the loan, the registration of the charge over the suit property and indeed all dealing in the title to property herein by the Defendants jointly and severally was illegal, fraudulent and therefore null and void ab initio. That he reported the said forgery and fraud at Machakos Police Station on 3.10.2018 vide OB No. 25/3/10/2018 and that investigations are ongoing.
10. The Plaintiff prayed for judgment against the defendants jointly and severally for:
 1. A declaration that the acquisition of the loan by the 1st defendant and the offering as security and registration of the charge over the suit properties without the Plaintiff's knowledge and consent was illegal, null and void.
 2. A declaration that the notice dated 20.9.2018 as well as the accompanying notification of sale are illegal and therefore null and void for failure to comply with Section 90 of the *land Act*.
 3. An order of permanent injunction restraining the 2nd defendant, its agents, servants or anyone acting through it from conducting the sale, advertising for sale or other dealing in the title to the suit property that is prejudicial and or adverse to the Plaintiff's proprietary interests thereon.
 4. Costs of this suit.
 5. Any other or further order that this Court may deem fit and just to grant.



2ND DEFENDANT'S STATEMENT OF DEFENCE

11. The 2nd defendant in its statement of Defence dated 16th September,2019 and filed in court on 20th September,2019, denied the contents of the Plaintiff and averred that the Plaintiff has admitted that the titles to the suit properties were provided as security for the grant of the loan advanced by the 2nd Defendant to the principal borrower.
12. Further that the Plaintiff alleges that he became aware of the charges when he was served with a 45 days redemption notice and immediately reported the matter to the police for investigations. The 2nd defendant in reply to this opined that this is not true and very misleading for reason that the said redemption notice was issued on the 20th September,2018 whereas the alleged police report and OB number was only procured on the 3rd October,2018 and no reason is given for the delay in reporting and which demonstrates prima facie that the said report was intentionally made for purposes of this court and to procure an injunction against the intended sale.
13. It was averred that the Plaintiff duly executed the said charge documents in the presence of an advocate who has sworn any affidavit refusing or denying such execution. Further it was averred that the Plaintiff could not have supplied the original titles necessary for the registration of the charges without his knowledge and consent to the 1st Defendant to use the same as security for the loan taken.
14. It was averred by 2nd Defendant that allegations by Plaintiff don't hold water as the same was unfounded and baseless. The same intended to avoid the sale of the suit properties in realization of the 2nd Defendant's Power of sale by alleging fraud and forgery in the execution of the charge documents over the suit properties.

HEARING

THE PLAINTIFF'S CASE

15. PW1 was Joshua Musau Mutiso. He testified that he sued the 1st Defendant who is a son to his brother in law. Testifying that the 2nd Defendant is a banking institution. PW1 wished to adopt the contents of his witness statement dated 4/12/2018 in his evidence. He relied on lists of documents P exhibit 1,2 and 3, Exhibits listed at 1,2 and 3 dated 4/12/2018. Testifying that the purported signature on the charge documents P exhibit 2 does not belong to him as it is not the similar to the one on his witness statement. PW1 told court that he never appeared before an Advocate by name of Samuel Rugendo Mulewa as alleged. PW1 has never given documents to his son and he has never collected his title deeds from the lands office. According to PW1 the alleged signature of his wife on the charge documents does not belong to her. PW1 did not use his property for money as alleged.
16. In cross- examination, it was PW1's testimony that the lands vide the searches belong to him and that the titles were registered in his names on 19/01/2015 and issued on 15/04/2015. PW1 confirmed the charge in favour of the 2nd Defendant was entered on 22/02/2017 and he has not sued Kibatia & Co. Advocates who prepared the charge documents. PW1 has not sued Samuel Rugendo Mulewa who attested the documents as well as Mrs. Esther Asati Advocate. PW1 has not been served with a notice by an Auctioneer and I do not agree with the Auctioneer's Claims. His postal address is in Kathiani and not Emali where the 1st Defendant resides. According to PW1 he lodged report with the police on 3/10/2018 and further that he lodged a claim of forgery. The report by the police is not yet out and none of the suspects involved in the forgery have been arrested.
17. In re-examination, it was PW1's testimony that he does not know the progress of the police investigations. He gave out his specimens signature for forensic examination. He claimed that the case



is being investigated. He told court that strangers entered onto his farm claiming that they were agents of the 2nd Defendant out to sell his land. PW1 has never received the statutory notice which is addressed to Emali, yet he resides in Kathiani. A charge on parcel 3308 Ngoleni is dated 22/02/2016 and he reported the incident to police on 3/10/2019. He did not delay reporting to the police.

18. PW2 was Esther Ndele Musau. She testified that the Plaintiff is her husband and the 2nd Defendant is a son to her elder brother. Testifying that Meshack Kyalo is her son and that all the property in dispute belong to the Plaintiff. According to PW2 it is not true that that she offered her signature on the disputed documents. She did not see the 1st Defendant and her son at her home seeking to use her husband's title deeds. She denied having seen the charge documents and that the signature hereon is not hers. Testifying that she has her National ID Card. PW2 did not know an Advocate called Esther Asati from Kisii. Lamenting that the purported affidavits allegedly signed by her are not dated. PW2 testified that her address is Ngoleni and not Emali. She relied on her witness statement in which she signed.
19. In cross-examination, it was testified that the plaintiff owns the parcels of land and that her statement confirms that the titles belong to the plaintiff. He did not see auctioneers at home. she accompanied her husband to the police to lodge complaint and did not visit the 2nd Defendant's offices she did not know one Esther Asati Advocate but she has not sued her.

THE DEFENDANT'S CASE

20. DW1 was Newton Ruinge Njoroge. He testified that he works for the 2nd Defendant as a relationship officer at OTC branch. He sought to adopt his statement dated 1/11/2020 in his evidence and also sought to rely on the documents in the list dated 11/10/2020 by 2nd Defendant. According to DW1, a customer presents to them his title in search for loan. They start the process of searches and carrying out valuations thereon before a charge is prepared and registered against the titles. The 1st Defendant approached them for a loan of Kshs. 2,950,000/- which was secured by third party securities. They referred him to their lawyers Kibatia & Co. Advocates to prepare the conveyance documents. They did so. Further he told court that spousal consents were also secured, the charge instruments were registered as confirmed by the searches. He testified that Registration took place on 22/02/2017. According to DW1 the 1st Defendant later defaulted in repayment. It was his testimony that the bank sent a notice of demand dated 19/12/2017. The 1st Defendant failed to pay up the arrears. He further told court several notices were issued as provided by the law and later the matter was handed over to the auctioneer who issued the requisite 45 days notice. As per DW1 before the sale took place, the Plaintiff rushed to court. There have not been any complaints lodged against the bank of a criminal nature. They maintained that the documents and notices were proper and the arrears have not been settled to date which is about Kshs. 3.4 million as at 7/03/2020. It was his testimony that the Plaintiff is the one who offered securities to the borrower and that the registration of the charge under Section 87 of the *Land Act* is captured in the searches. The auctioneer did not reach the valuation stage since he was stopped by the court order. No report of forgery has been presented to the 2nd Defendant. DW1 wanted the case dismissed.
21. In cross-examination, it was DW1's testimony that he is a relationship officer for six and a half years. In 2017 he worked in Nyahururu office in the same capacity. They collect the title deed and valuation letter thereafter prepare letter of offer then hand over matter to the legal department. He told the court that only one letter of offer was issued and properties in issue were issue were L.R. 2863 and 2976. If the value of properties is less than the sum borrowed, then an addendum is made for more properties securities. He told the court further that any security not listed in listed in the letter of offer and addendum cannot be seized for sale. DW1 did not have the valuation report and addendum on any of the securities before a letter of offer is issued. According to charge document on L.R. 2976 is dated 22/02/2017 and registered the same date. It is normal for conveyance documents to be processed the



same day depending on the efficiency of the Advocate handling the same. He testified that he is aware that stamp duty is payable on every charge which was paid on 28/02/2017. Further that stamp duty has to be paid before the charge is registered. DW1 stated that the stamp duty was paid after registration of the charges and that one of the charges does not have a date the Advocate witnessed the signature of the borrower/chargor. DW1 maintained that chargor signed the charge document and likewise the borrower and that the affidavit by spouse does not have a date. He claimed that all the notices had been sent to an Email address as it was the one provided to them and they assumed that they shared an address. According to DW1 the bank has a duty to ensure that the charge documents are properly done before releasing their money. He maintained that that the bank did its part in securing its money. He disagreed that the bank was duped in the process. Testifying that the charge documents were prepared by Kibatia Advocates and none of the Advocates has been sued over the alleged malpractices and that the Lands Registrar registered the charges further valuation must be done on the properties and further it is the advocate who do the attestation of documents and payment of stamp duty.

22. The Plaintiff confirmed receipt of the notices vide his witness statement. He told court that the address was provided by the borrower and chargor. He claimed that Kibatia & Co. Advocates were talked to do the conveyance. No complaint has been lodged against the land Registrar and searches have been contested by Plaintiff.
23. The matter was canvassed by written submissions.

SUBMISSIONS

PLAINTIFF'S SUBMISSIONS

24. The Plaintiff in his submissions dated 2nd May,2023 and filed in court on 16th May,2023, wherein the counsel for the plaintiff raised the following issues for determination.
 - i. Whether the charges over the listed properties were lawfully executed and registered.
 - ii. Whether there was a valid spousal consent properly executed to warrant registration of the charge.
 - iii. Whether statutory notices were served and whether 2nd Defendant could sell the Plaintiff's property.
25. As to Whether the charges over the listed properties were lawfully executed and registered counsel submitted that the letter of offer dated 28th September,2016 on the Security indicates that the First Legal Charge of Kshs 2,950,000/= over land title deed number Mitaboni/Miumbuni Ngoleni/2063 and Mitaboni/Miumbuni Ngoleni/2976 to be registered and stamped in favour of Faulu Microfinance Bank Limited. Contending that there are Charges however registered over two more parcels Mitaboni/Miumbuni Ngoleni/3325 and Mitaboni/Miumbuni Ngoleni/3308.
26. It was submitted that the letter of offer did not state expressly that the borrower was to create a legal charge over the two additional suit property in favour of the 2nd Defendant hence according to the Plaintiff there was no valid charge on Mitaboni/Miumbuni Ngoleni/3325 and Mitaboni/Miumbuni Ngoleni/3308. Contending that this confirmed by the evidence of DW1 who testified that any security not listed in the letter of offer and addendum cannot be seized for sale. To buttress this point, credence was placed on the case of Geoffrey Kinuthia Mungai & Another Vs Progressive Credit Limited [2021] eKLR.
27. It was submitted that the charges registered over the subject parcels were never properly executed. Contending that the Plaintiff testified that the purported signature on the charge documents Pexhibit



- 2 did not belong to him. Reliance was placed on Section 109 and 112 of the Evidence Act on the burden of proof. Averring that evidential burden of proof can shift depending on the circumstance of the case. To buttress this position counsel relied on the case of Raila Amolo Odinga & Another Vs Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR.
28. It was submitted that the Land Control Board Consent [if any] used by the Defendants to register a charge was invalid. It was the contention of the Plaintiff that he never signed any application for Land Control Board Consent to charge his properties and he has never appeared before the Land Control Board as it is required.
 29. On whether there was a valid spousal consent properly executed to warrant registration of the charge, counsel submitted that the Plaintiff has never been served with the statutory notices. According to the Plaintiff the Statutory Notice to sell was sent by the 2nd Defendant through registered mail. Averring that the plaintiff indicated that his Postal Address is in Kathiani and the same was unchallenged.
 30. It was the case of the Plaintiff that the Defendants furnished the court with a copy of Receipt of postage showing Notification of sale was sent by Auctioneer to Joshua Musau Mutiso, the Plaintiff at post office box 216-90128. The Destination on top of the receipt indicates Emali]90121[postal code this according to plaintiff, the notices by the 2nd Defendant were not served upon the Plaintiff neither was the Notification of Sale by the Auctioneer properly served as required.
 31. It was submitted further that the 2nd Defendant relied upon the address that had been issued by the 1st Defendant in the Charge Instrument to send all the Statutory notices hence, the plaintiff was unaware of the fraudulent activities leading to creation of the charge and the addresses provided therein. Submitting that the issue of notification of sale and the 45 days redemption notice, the same were sent to the address of the 1st Defendant and not the Plaintiff's address. Reliance was placed on the case of James Kipruto Lagat & Another Vs Consolidated Bank Limited [2016] eKLR, to buttress his position. No demand whatsoever has been served upon the Plaintiff. The demand notice under Section 90 of the Land Act dated 19th December 2017 was sent to the 1st Defendant via registered mail and not the Plaintiff. The Notice to sell under Section 96 of the Land Act dated 5th April, 2018 was allegedly sent to the Plaintiff by registered mail but no documentary evidence have been tendered by the 2nd Defendant to show that the same was served. To cement this limb counsel relied on the case of Stephen Boro Gitiha Vs Nicholas Ruthiru Gatoto [2017] eKLR where the court stated that non service of a notice is a fundamental breach.
 32. It was the submission of the Plaintiff that no notice was issued in line with the provisions of Section 96 (2) of the Land Act which is a 40 days' notice issued by the chargee before the sale as the same was posted to a wrong postal address which is different from the redemption notice issued under Rule 15 of the Auctioneers Act.
 33. Further, counsel relied on Section 90 (1) and 96 (2) of the Land Act and Section 15 (d) of the Auctioneers Act and the case of Zipporah Wanjiku Kariuki Vs Progressive Credit Ltd & 2 Others [2018] eKLR.
 34. It was submitted that the suit property was not valued hence the process of creating a charge on 4 suit properties was illegal. Contending that no way a property can be used as security for a loan yet its value is unknown that there was failure to conduct a property forced valuation thus failure to discharge duties to the Plaintiff as stipulated under Section 97 of the Land Act, and Section II (b) (x) of the Auctioneers Rules. The Bank had not undertaken a forced sale valuation of the suit properties as required by Section 97 (2) as read with Section 97 (3) of the Land Act which prohibits the sale of the subject properties



below 25% of the market value. To buttress this position reliance was placed on the case of Beatrice Atieno Onyango Vs Housing Finance Company Limited & 3 Others [2020] eKLR.

35. It was the case of the Plaintiff that the 1st Defendant's fraudulent actions could not bind the Plaintiff the 2nd Defendant could not therefore exercise its statutory power of sale against the Plaintiff's property as there was no binding contract between it and the Plaintiff.

2ND RESPONDENT'S SUBMISSIONS

36. The 2nd Respondent in its submissions dated 22nd June,2023 and filed in Court on 27th June,2023 wherein counsel for the 2nd Respondent raised the following issues for determination:
- Whether Plaintiff has proved fraud on the part of the 2nd Defendant?
 - Whether the 2nd Defendant properly issued statutory notices to the Plaintiff?
 - Whether the 2nd Defendant has a right over the Plaintiff's property?
37. As to Whether Plaintiff has proved fraud on the part of the 2nd Defendant, counsel submitted that the plaintiff's allegation that he did not consent to his property being charged is false as he duly executed the charge instrument in the presence of an advocate and further, the 2nd Defendant wouldn't have obtained the original titles to the properties without the plaintiff's consent.
38. It was submitted by the counsel that the plaintiff's voluntarily offered the suit properties as security for the loan advanced by the 2nd Defendant to the 1st Defendant. Contending that the plaintiff made a serious allegation of fraud that he did not sign the charge and that his wife did not sign any spousal consent and their signatures were forged. Opining that fraud must be specifically pleaded and proved. To buttress this argument, reliance was placed on the cases of Vijay Morjaria Vs Nansingh Madhusingh Darat & Another [2000] eKLR and Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited Vs West End Butchery Limited & 6 Others [2015] eKLR.
39. It was the counsel's submission that the Plaintiff only made general allegations which are insufficient for this court to amount to an averment of fraud. The plaintiff did not tender any evidence to substantiate the allegation of fraud, and placed reliance on Sections 107, 108 and 109 of the *Evidence Act* Cap 80 to support the position of burden of proof.
40. It was contended that the Plaintiff did not produce any expert report to prove that his signatures and that of his wife was forged. He did not tender any evidence to prove that the Signature appended on the charge instruments was different from his known signature. To buttress this argument, reliance was on the case of Estate of Julius Mimano (Deceased) [2019] eKLR.
41. On Whether the 2nd Defendant properly issued statutory notices to the Plaintiff, counsel submitted that the notice was served upon the Plaintiff, the first defendant and the Plaintiff's wife, Esther Ndele Musau. Reference was made on page 49 of the 2nd Defendant's bundle. Averring that the 2nd Defendant complied with Section 90 of the *Land Act* by issuing this notice.
42. Submitting that the 1st Defendant did not make any effort to settle the outstanding loan within three months which prompted the 2nd Defendant to serve a mandatory notice to sell as provided under Section 96 of the *Land Act*. The notice to sell according to the 2nd Defendant is dated 5th April,2018 and was also served upon the Plaintiff, the 1st Defendant and the Plaintiff's wife, Esther Ndele Musau. Reference was made on Page 52 of the 2nd Defendant's bundle of documents.



43. It was submitted further that the notices were served by way of registered post to the address provided by the Plaintiff at the time of executing the charge instruments. Averring that the Plaintiff, the 1st Defendant and the Plaintiff's wife all share the address P. O Box 216-90128 Emali hence the Plaintiff cannot contend not to have received the statutory notices issued by the 2nd Defendant. To substantiate this point, reliance was made on the case of National Bank of Kenya Limited Vs Isaac Malika Lubanga & Another [2018] eKLR, Counsel urged the court to apply the doctrine of estoppel to bar the Plaintiff from disputing the address provided by him while executing the charge instruments.
44. Regarding Whether the 2nd Defendant has a right over the Plaintiff's property, counsel relied on the cases of Jopa Villas LLC Vs Overseas Private Investment & Others [2009] eKLR and National Bank of Kenya Ltd Vs Pipe Plastic Samkolit (K) Ltd and Another [2002] EA 503, and submitted that the courts should not rewrite contracts for parties but only enforce their mutual covenants. Averring that by signing the charge instrument, the Plaintiff and the 1st Defendant bound themselves to the terms set thereon and by defaulting on repayment, they are in breach of contract and this court cannot aid the Plaintiff in breach of the contract.
45. The 2nd Defendant prayed that this Court dismisses the Plaintiff's suit with costs to the 2nd Defendant.

DETERMINATION/ANALYSIS

46. The Court considered the pleadings and submissions on record and the issue(s) to be determined are as follows;

Whether the loan by the 1st Defendant and the security and registration of the charge over the suit properties was obtained through fraud or not

Whether the statutory notices were served to the Plaintiff registered owner of the land in question or not

Whether permanent injunction restraining the 2nd defendant, its agents, servants or anyone acting through it from conducting the sale, advertising for sale or other dealing in the title to the suit property that is prejudicial and or adverse to the Plaintiff's proprietary interests should be granted or not.

FRAUD

47. The Plaintiff PW1 and his wife PW2 in their pleadings and testimonies during the hearing stated that the Loan facility Agreement was executed between the 1st & 2nd Defendant respectively. The properties used as security to the loan belong to the Plaintiff and his wife and were used as security without their knowledge and/or consent. Therefore, the transaction comprising of the loan advanced to 1st Defendant was fraudulently executed and unlawfully using the properties of the Plaintiff. The evidence on record was not controverted by pleadings or evidence advanced by 1st Defendant.
48. In R. G. Patel v. Lalji Makanji (1967 EA 314), the former Court of Appeal for Eastern Africa stated thus:-

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”



49. In *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, Tunoi, JA. (as he then was) stated as follows:
- “It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
50. The Court cannot infer fraud from the facts/evidence in a case. The burden of proof lies with the one who alleges fraud to prove the claim. It is the duty of the court therefore to determine if the Plaintiff has successfully proved fraud on the part of the Defendants.
51. In the instant case, the Agreement of 22/2/2017 between Joshua Musau Mutiso & Faulu Microfinance Bank Limited secured advances to Cyrus Robert Sala Nzibu; 1st Defendant.
52. The Agreement was drawn by Kibatia & Company Advocates. The Agreement was to charge Mitaboni /Miumbuni/Ngoleni/3308 with Joshua Musau Mutiso as Chargor, Faulu MicroFinance as Lender and Cyrus Robert Sala Nzibu as Borrower. The Agreement is executed by Plaintiff Joshua Musau Mutiso and Borrower Cyrus Robert Sala Nzibu before Advocate Samuel Rugendo Mlemwa. There is Spousal Consent by Esther Ndele Musau signed before Esther Arati Mrs Advocate/ Commissioner for Oaths.
53. A similar Agreement of same date parties was executed in relation to suit property Mitaboni/ Miumbuni/Ngoleni/2863, Mitaboni/ Miumbuni/Ngoleni/3325, Mitaboni /Miumbuni/Ngoleni/ 2976.
54. The letter of offer of 26/9/2016 from Faulu Microfinance Bank Ltd to Borrower Cyrus Robert Sala Nzibu of P.O. Box 213-90128 Emali was for advance of Ksh 2.950,000/= with 1st Legal Charge over suit properties Mitaboni/Miumbuni/Ngoleni/2863, Mitaboni/Miumbuni/Ngoleni/2976 supported by personal guarantee and indemnity by Joshua Musau Mutiso (the Plaintiff). However, the said Agreement is executed by 1st Defendant & 2nd Defendant respectively and not the Plaintiff.
55. From the above outline of Documents/Agreements executed with regard to the Loan Facility advanced to the 1st Defendant Cyrus Robert Sala Nzibu but secured by properties registered and owned by the Plaintiff strongly suggest the possibility of fraud by 1st Defendant who submitted titles of properties from the Plaintiff as security without the Plaintiff's knowledge and/or consent.
56. Of concern to this Court, the Complaint was filed on 14/12/2018 served to the 1st Defendant Cyrus Robert Sala Nzibu at Kitengela along Nairobi-Namanga Road where 1st Defendant operated an Mpesa shop, who was not present but was served through his wife and 1st Defendant was contacted via phone on 0715334224.
57. The 1st Defendant did not file Defence but a Replying Affidavit of 19/12/2018 narrating events that led to acquiring the loan facility for his Uncle the Plaintiff and Auntie the 2nd Plaintiff through their son and his bosom friend one Meshack Kyalo.
58. Since the loan facility Agreement was between the 1st & 2nd Defendant and advances of funds were made to the 1st Defendant as per the Statement of Account attached by 2nd Defendant, at this stage, this Court is satisfied from the uncontroverted evidence on record that there was a possibility of



fraudulent use of Plaintiff's titles to obtain loan facility from the 2nd Defendant bank without the Plaintiff's Knowledge or consent.

TEMPORARY INJUNCTION

59. In the celebrated case of *Giella –vs- Cassman Brown and Co. Ltd* [1973] [EA 358] the court set out the principles for grant of Temporary injunctions as follows: -
- i) The plaintiff must establish that he has a prima facie case with high chances of success;
 - ii) That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages.
 - iii) If the court is in doubt, it will decide on a balance of convenience.
60. In *Mrao Limited –vs- First American Bank of Kenya Limited* [2003] KLR 125, the Court stated;
- ‘In civil cases, a prima facie case is a case in which on the material presented to the Court, a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.....’
- “A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”
61. In *Mureithi vs City Council of Nairobi* [1976-1985] EA 331 Madan JJA referred to *L Diplock in American Cyanamid Co vs Ethicon Ltd* [1975] 1All ER 504 and stated as follows;
- “The object of Interlocutory injunction is to protect the plaintiff against injury by violation of his right of which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favor at the Trial....”
62. The authorities prescribe that an Applicant has the burden of proof to establish a prima facie case, irreparable damage that cannot be compensated by damages and if not the case for the Court consider the grant of injunction on a balance of probabilities.

Has the Plaintiff proved a prima facie case?

63. The Plaintiff/Applicant’s issue is that the statutory notices prescribed by Section 90 & 96 *Land Act* and Rule 15 of Auctioneers Rules were not served on /to the Plaintiff. Therefore, the execution of statutory power of sale by the 2nd Defendant was irregular/illegal. The Court finds that the issue of statutory notices can only be canvassed after the issue of fraud/forgery is established by evidence.
64. For these reasons pending establishment of the truth of the matter and in the glaring absence of defence by 1st Defendant despite service with no explanation, representation, attendance or participation in these proceedings this Court finds that the matter merits preservation of the subject-matter; the charged properties while the attendance, participation of the 1st Defendant is sought first and foremost while the subject-matter of the suit the said properties namely;
- Mitaboni/Miumbuni/Ngoleni/2863
Mitaboni /Miumbuni/Ngoleni/2976
Mitaboni/Miumbuni/Ngoleni/3325



Mitaboni /Miumbuni/Ngoleni/3308

Shall be preserved vis temporary injunction pending the appearance, participation and/or response of the 1st Defendant and/or joining of proposed 3rd Party; and testimony of sworn affidavits of advocates who commissioned the documents relevant to loan facility or witnessed signing of the same by the parties involved.

65. Order 40 (6) CPR 2010 imposes life of a temporary injunction as 1 year thus the same shall subsist apply herein.
66. Order 22 rule 18 & rule 32 of CPR 2010, mandate a notice to show cause and/or warrant of arrest to issue against judgment debtor/1st Defendant as the 2nd Defendant is entitled by law to proceed to recover loan facility by statutory power of sale in default of servicing the loan or making repayments by 1st Defendant borrower herein.
67. This is 2018 matter, never prosecuted to its logical conclusion due to absence of the 1st Defendant whom despite service did not file Defence within the statutory period. The relief sought by Plaintiff against defendants is not a liquidated amount nor a matter to be resolved by formal proof after entry of interlocutory judgment as the issue of fraud is raised by pleadings and evidence on record.
68. In the absence of 1st Defendant's participation of these proceedings and the Court granting order of statutory power of sale to be executed by 2nd Defendant while the contention by the Plaintiff is not confirmed or denied would be to use the law for an unlawful purpose. The 1st Defendant is the Borrower, by design/default has gone underground and/or disappeared conveniently so as to have the Plaintiff's properties disposed off for a loan the 1st Defendant took and benefitted from but wants the Plaintiffs to bear the brunt. This would amount to abuse of the Court process.

DISPOSITION

Therefore, the orders that commend themselves in this matter are;

1. A temporary injunction is granted prohibiting any advertisement, sale, transfer, subdivision of the suit properties;

Mitaboni/Miumbuni/Ngoleni/2863

Mitaboni /Miumbuni/Ngoleni/2976

Mitaboni/Miumbuni/Ngoleni/3325

Mitaboni /Miumbuni/Ngoleni/3308

Pending the conclusion of this matter on fraud/forgery by 1st Defendant as per pleadings and evidence of PW1 & PW2

Respectively.

2. By virtue of Order 22 Rule 18 & 32 CPR 2010, NTSC/Warrant of Arrest is issued to 1st Defendant Cyrus Robert Sala Nzibu by Deputy Registrar Machakos High Court to be executed by 2nd Defendant Bank Plaintiffs through Machakos Police Station, Emali Police Station & Kitengela Police Station for the 1st Defendant to appear in Court on 18/4/2024.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 7/3/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI



JUDGE

IN THE PRESENCE /ABSENCE OF:

MS LUMUMBA H/B MS. WACHIRA FOR THE PLAINTIFF

MR. MUCHOKI - FOR 2ND DEFENDANT

NO APPEARANCE - FOR 1ST DEFENDANT

GEOFFREY/PATRICK - COURT ASSISTANTS

(JUDGE BEREAVED)

JUDGMENT RELEASED TO REGISTRY ON 3/4/2024.

M.W.MUIGAI

JUDGE

HIGH COURT CIVIL SUIT 30 OF 2018 FINAL MARCH 2024 MHC	0
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