REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

COMMERCIAL CAUSE NUMBER 7 OF 2020

MWT.....APPLICANT

VERSUS

DTN.....1ST RESPONDENT

FAMILY BANK LIMITED.....2ND RESPONDENT

LAND REGISTRAR –THIKA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. The undisputed background to the motion filed on 19th March, 2020 by **MWT** (hereafter the Applicant) against **DTN**, **Family Bank Limited,** the **Land Registrar, Thika** and the **Hon. Attorney General,** the 1st to 4th Respondents, (hereafter 1st to 4th Respondents, respectively) is as follows. The Applicant and the 1st Respondent are a couple, residing in their own home at Ngoingwa, Thika. The home, which they consider their matrimonial home is erected on land parcel **No. Thika Municipality/Block [….] (Ngoingwa),** hereafter the suit property.

2. The suit property is registered in the name of the 1st Respondent. Prior to 2013, the 1st Respondent had, with the consent of the Applicant charged the suit property to secure a sum of Kshs. 500,000/- from the 2nd Respondent. The charge instrument was executed in December, 2009 and duly registered. This sum appears to have been substantially or fully paid. In November, 2013, the 1st Respondent applied for a further loan in the sum of Kshs. 2,100,000/- and a further charge created on 21st November, 2013.

3. A copy of the further charge is marked **"FBL2"** and attached the replying affidavit sworn on behalf of the 2nd Respondent by **Sylvia Wambari**, described as a Legal Officer in the said Respondent's legal department. Next to the further charge is a copy of an affidavit of consent of spouse to the further charge, purporting to have been executed by the Applicant on 20th November, 2013 (see annexure **"FBL2"**). It appears that by June 2018 the 1st Respondent had fallen behind in making payments under the charge and had made representations to the 2nd Respondent which culminated in the letter of offer dated 19th June, 2018, a copy of which is annexed as annexure "**FBL3"** in the replying affidavit.

4. By the date of the letter of offer, the total loan sum stood at Kshs. 2,589,913/=, but subsequently the 1st Respondent persisted in defaulting on payments and by 29th October, 2019 was in arrears prompting the 2nd Respondent to serve him with notices under the Land Act, resting with the 90-day notice under Section 96(2) of the Land Act and the 40-day notice of intention to sell. At the time of the latter notice, the arrears stood at Kshs. 462,176.15. In response the 1st Respondent had written to the 2nd Respondent through his lawyers on 12th November, 2019 proposing to be allowed to sell at a better price the charged property which he claimed to be *"a matrimonial home which he (was) currently occupying together with his family,"* who stood to be adversely affected by the realization of the security by the bank. He pledged to pay off the loan out of the proceeds of the proposed sale.

5. Although the bank allowed the 1st Respondent time to complete the proposed sale, nothing came of it and the 2nd Respondent proceeded with the process of realizing the security by instructing an auctioneer and undertaking valuation of the property with due notice to the 1st Respondent, and allegedly the Applicant. The auctioneer advertised the intended sale by public auction of the suit property in the Daily Nation Newspaper of 9th March, 2020. The public auction of the suit property was scheduled for 25th March, 2020.

6. On 19th March, 2020, the Applicant filed the instant application. Therein, she seeks an injunction to restrain the 1st to 3rd Respondents from *inter alia* interfering with her right of possession and/or access to, advertising for sale, disposing of or sale by public auction of the suit property pending the hearing and determination of the suit. The motion is expressed to be brought under Order 40 Rule 1 of the Civil

Procedure Rules. By her suit filed contemporaneously with the motion, she pleads fraud *inter alia* against the 1st to 3rd Respondents and prays for among other reliefs declarations to the effect that the further charge is null and void, that the suit property is matrimonial property and a permanent injunction to restrain the 1st and 2nd Respondents form interfering with her occupation and use of the suit property.

7. The key grounds on the face of the motion, and further expanded in the Applicant's supporting affidavit and arguments are that:

a) The Applicant and the 1st Respondent got married in 1995 and have three issues;

b) That in 2002 the couple established their matrimonial home at the suit property which they acquired jointly in 2001;

c) That the 1st Respondent deserted the matrimonial home in 2012;

d) That the 1st Respondent executed a further charge over the suit property in 2013 without obtaining the consent of the Applicant; and

e) That if the intended sale by public auction proceeds, the Applicant and her children will suffer irreparable damage.

8. Although all the Respondents were duly served, only the 2nd Respondent filed a response. The application was opposed by the 2nd Respondent through the affidavit earlier referred to. The affidavit is taken up with events concerning the creation of the charge and default by the 1st Respondent. At paragraph 5 the 2nd Respondent asserts that the Applicant gave her consent to the further charge by executing the affidavit of spousal consent dated 20th November, 2013 annexed to the replying affidavit as annexure **"FBL2"**. The affidavit details the issuance and service of the requisite notices on the 1st Respondent at his last known postal address. The 2nd Respondent asserted that as of August 2020 the loan outstanding balance stood at Kshs. 3,317,824.58.

9. In their view, the instant application is an afterthought and is not merited. In a supplementary affidavit , (which is properly a further affidavit) sworn by the Applicant, she annexed a report prepared by one **Chania Geoffrey**, a document examiner in the Directorate of Criminal Investigations (DCI) dated 11th august, 2020 which contained the examiner's opinion that the signatures on the affidavit of spousal consent and the Applicant's identity card, driving license, statements and affidavits sworn herein were *"made by DIFFERENT authors"* and that the spousal consent was a forged document.

10. In a supplementary affidavit entitled, further affidavit the 2nd Respondent took issue with this report, pointing out that no report had been made to police by the Applicant upon alleged discovery of the further charge and that no investigations had been conducted by the DCI to support the allegations of forgery. The deponent, referring to the 1st Respondent's letter to the bank dated 12th November, 2019 and his failure to participate in this matter asserted that the contents of the former contradicts the Applicant's claim that the 1st Respondent deserted the matrimonial home in 2012, and suggests the possibility that the Applicant and the 1st Respondent are acting in collusion to defeat the 2nd Respondents statutory power of sale.

11. Pursuant to directions by the court, parties initially filed skeletal submissions and upon the introduction of the DCI report filed another set of submissions. These submissions were highlighted on 17/09/2020. The gist of the Applicant's submissions revolves around the disputed spousal consent to the further charge. Reiterating the Applicants' depositions, her counsel emphasized the assertion that the Applicant had neither executed the said consent before **Moses Muchoki** of **Muchoki Kang'ata & Co. Advocates** as purported therein, nor been aware of the existence of the further charge until January, 2020.

12. The counsel submitted that these denials had not been controverted and moreover that spousal affidavit format is liable to errors and additionally, it was improper that the same advocate who drew the further charge also drew and commissioned the spousal consent affidavit, raising the possibility of conflict of interest. Citing Section 79(3) of the Land Act and Section 12 (1) and (5) of the Matrimonial Property Act which make the consent of a spouse mandatory to a charge in respect of matrimonial property, the Applicant took the position that in the absence of such consent, the execution of the further charge herein is null and void, and there is therefore no valid further charge.

13. Thus, it was argued that the Applicant has demonstrated a prima facie case with a probability of success and the likelihood that she would suffer irreparable damage if the charged property were sold in the circumstances. Reliance was placed on the case of **Ochieng Rapuro v Tatu City Ltd (2019) eKLR** as to the applicable principles concerning the grant of injunctive relief, and on the decisions in **Susan Anna Karanja v. Lenana Towers Ltd (2014) eKLR and Joseph Kipng'eno Kirui & Anur v. Faulu Micro Finance Bank Ltd & Another (20202) eKLR** as to the effect of failure by a chargor and lender to obtain the consent of the chargor's spouse to a charge.

14. On their part, the 2nd Respondent submitted as follows. That the further charge and indebtedness of the 1st Respondent were not disputed, and that paragraph 9 of the supporting affidavit indicates the Applicant's awareness of the further charge. The 2nd Respondent stood by the disputed consent and asserted that the same was executed by the Applicant and that it is not invalidated by the fact that it was drawn and witnessed by the same advocate who drew the further charge. The case of ***Mwaniki Wa Ndegwa* v *National Bank of Kenya Ltd* & *Another* (*2016) eKLR*** was relied on. It was pointed out that the signatures on the various documents examined by the document examiner were different and therefore the document examiner's report was inconclusive. And further that,the mere fact that the charged property was a matrimonial home was of no avail as stated in ***Andrew M. Wanjohi v Equity Building Society Ltd & 2 others (2006) eKLR.***

15. The 2nd Respondent further relied on the decision in **TWM vs. PKM & 2 others [2017] eKLR** where the court took issue with the fact that the Applicant in the matter who had alleged forgery of the spousal consent had not made a report to police or tendered cogent evidence that the document was a forgery. It was therefore submitted that the Applicant herein has not made out a prima facie case as defined in **Mrao Limited v. First American Bank of Kenya Ltd 2 Others [2003] eKLR**.

16. The 2nd Respondent further submitted that there is no evidence that the Applicant stands to suffer irreparable damage. It was argued that any damages suffered can be quantified and that under section 99(4) of the Land Act such damages are payable in instances of irregular exercise of the statutory power of sale. Moreover, that the 2nd Respondent being a financial institution had the means to make good any such damages.

17. Finally, it was argued that the balance of convenience tilts in favour of the 2nd Respondent as the 1st Respondent continues to be in default and has failed to file any response herein, suggesting collusion with the Applicant. It is therefore the 2nd Respondent's submission that the Applicant having not come to court with clean hands is not entitled to the equitable relief she seeks. The case of **Francis J. K. Ichatha v. Housing Finance Company of Kenya Civil Application No. 108 of 2005** was cited for the proposition that a court of equity will not aid a man to derive advantage from his own wrongdoing. The 2nd Respondent concluded by stating that the Applicant has moved to court for the sole purpose of defeating the 2nd Respondent's power of sale which was lawfully arisen due to the 1st Respondent's default. The court was urged to dismiss the application.

18. In a brief oral rejoinder, counsel for the Applicant submitted that the matter of authorship of signatures falls within the purview of an expert and it is not open to the 2nd Respondent to attempt to dispute the report of the document examiner as they have in their submissions despite the correspondence sent them by the Applicant in January 2020 disputing execution of the spousal consent.

19. The court has considered the material canvassed in respect of the motion dated 18th March 2020. The principles governing the grant of an interlocutory injunction as enunciated in **Giella vCassman Brown & Co. Ltd [1973] EA 358** are settled. Similarly, as to what constitutes a prima facie case, this is settled too since the decision in **Mrao v First American Bank of Kenya Ltd & 2 Others C. A. No. 39 of 2002; (2003) eKLR**. Both decisions have been reaffirmed and applied by superior courts in countless subsequent decisions including the recent decisions cited in this case by the parties.

20. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** restated the principles governing the grant of interlocutory injunctions enunciated in **Giella's** case and observed that the role of the Judge dealing with an application for interlocutory injunction is merely to consider whether the application has been brought within the said principle. The Court cautioned that such a court ought to exercise care not to determine with finality any issues arising

21. The Court expressed itself as follows:

> **"...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since Giella's case, they could neither be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:**
>
> **In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:**
>
> **a) establish his case only at a *prima facie* level**
>
> **b) demonstrated irreparable injury if a temporary injunction is not granted.**
>
> **c) allay any doubts as to (b) by showing that the balance of convenience is in his favor."**

22. In addition, the Court stated that the three conditions apply separately as distinct and logical hurdles to be surmounted sequentially by the Applicant. That is to say, that the Applicant who establishes a *prima facie* case must further establish irreparable injury, being injury for which damages recoverable could not be an adequate remedy. And that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, where no *prima facie* case is established the court need not look into the question of irreparable loss or balance of convenience.

23. As to what constitutes a *prima facie* case, the Court of Appeal delivered itself as follows: -

> "**Recently, this Court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for** *"prima facie case"* **in civil cases in the following words**:
>
> ***"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 but the evidence must show an infringement of a right, and the probability of success of the Applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."***
>
> **We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. The invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The Applicant need not establish title, it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima***

facie **case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Applicant's case is more likely than not to ultimately succeed." (**emphasis added)

24. The Applicant seemingly abandoned or treated as peripheral other grounds of her motion and staked her case on one key ground. The key plank in the Applicant's case is that despite being a spouse to the 1st Respondent herein , albeit allegedly estranged at the material time, her consent was not sought concerning the further charge created over the suit property in 2013. She claims to have learned of its existence from the 1st Respondent in January, 2020. In her affidavit sworn in support of the motion on 18th March, 2020, the Applicant deposes *inter alia* that:

> **"9. THAT in the year 2013 while the 1st Respondent was still away from home further secretly charged the suit property with the 2nd Respondent…**
>
> **10. THAT the 1st, 2nd, and 3rd Respondents never sought my consent which is mandatory under Section 39 of the Land Act thus making the whole process null and void…**
>
> **14. THAT in the month of January, 2020, the 1st Respondent informed me about the existence of the further charge and through my advocate on record, I caused a letter to be written to the 2nd Respondent but they ignored it and proceeded to advertise the suit for sell by public auction..."** (sic).

25. When confronted with the copy of the affidavit of spousal consent annexed to the 2nd Respondents replying affidavit as annexure **"FBL2",** the Applicant submitted it and other documents, as she asserts in her supplementary affidavit sworn on 8th September, 2020 and filed on 9/09/2020, to the DCI ***"for comparison of signatures".*** These documents are annexed in a bundle, together with the document examiner's report, and marked annexure "**MWT1"**. The court has perused the said documents and the report.

26. The letter forwarding the documents to the DCI, and written by the Applicant's advocate, is dated 28/08/2020 and bears reference **CWM/3677.**It bears two *"received"* stamps endorsed on the face, the earliest dated 31st August, 2020 and the latest 8/09/2020. The stamp writings contain references to DCI. On the top right corner of the letter are two handwritten endorsements. The topmost states:

> **"C.I Mwongera**
>
> **Pls deal 626/20**
>
> **Signed**
>
> **4/9/20".**

The one below it reads:

> **"O/C DOC. EXAM.**
>
> **Deal**
>
> **Signed**
>
> **2/9."**

27. The report itself is dated **11th August, 2020** but nevertheless contains the following details, inter alia:

> **"WAITHIRA MWANGI & CO. ADVOCATES**
>
> **YOUR REF. CWM/CV/3677**
>
> **I refer to your letter DATED 28TH AUGUST 2020; ACCOMPANIED BY DOCUMENTS LISTED BELOW REQUESTING FOR FORENSIC ANALYSIS OF SIGNATORURES**
>
> **a. UNDISPUTED DOCUMENTS**
>
> **1. A1 – IDENTITY CARD NO. XXX23120**
>
> **2. A2- DRIVING LICENSE NO. XXX5226(A PHOTOCOPY)**
>
> **3. A3 – STATEMEENT SIGNED 18/3/2020**

4. A4 – VERIFYING AFFIDAVIT SIGNED 18/3/2020

5. A5 – SUPPORTING AFFIDAVIT SIGNED 18/3/2020

b. DISPUTED DOCUMENT

6. A6 – AFFIDAVIT OF CONSENT OF SPOUSE DATED 20TH NOVEMBER, 2013 (SCANNED COPY)

REQUEST

To examine and compare, in order to ascertain whether the SIGNATURE POINTED BY RED PEN ON the disputed document marked A6, was made by the SAME AUTHOR when compared with the KNOWN SIGNATURES POINTED IN RED pen on documents marked A1-A5

EXAMINER: MR CHANIA GEOFFREY M (ASP)

DATE OF EXAMINATION:11TH AUGUST 2020…

In my opinion, the signatures (in A1 – 5 and A6) were made by DIFFERENT authors.

NB. THE QUESTIONED DOCUMENT MARKED A6, IS A FORGED DOCUMENT…

Returned herewith is a copy of my report and exhibits submitted for your retention.

11/08/2020

WAITHIRA MWANGI & CO. ADVOCATES

Signed.

MR. CHANIA GEOFFERY M(ASP) FORENSIC DOCUMENT EXAMINER

FOR: DIRECTOR CRIMINAL INVESTIGATIONS".(sic) (Emphasis added)

28. Below the signature is a seal reading:

"Examination supervised and approved by

ALEX MWONGERA

08 SEPT. 2020

(SIGNED)."

29. The Applicant's supplementary affidavit states that the DCI report was forwarded to her lawyers on 8/09/2020. Several questions arise from a cursory perusal of these documents and report. The replying affidavit purporting to carry the copy of spousal consent was filed on 26th August, 2020, the eve of the hearing date set for the motion. On 27/08/20 the Applicant's counsel indicated that though she was ready to proceed, some documents in the replying affidavit were illegible. She addressed the court as follows:

"It's not possible to read the document on page 8 -the spousal consent. We would wish to get a clear copy and to respond to the said document. It is a crucial one".

30. Whereupon counsel for the 2nd Respondent expressed willingness to supply legible copies and counsel for the Applicant pledged to collect the documents "soonest". The court then directed that:

"Within 5 days M/s Mwangi to organize to collect the spousal consent document from the offices of the 2nd Respondent's advocate and file/serve response if necessary.

Thereafter parties to simultaneously file skeletal submissions. Highlighting on 10/09/2020 at 2.30pm".

31. The page no.8 of documents attached to replying affidavit that supposedly contained the spousal consent is indeed blank and on 28/08/2021 the Respondents supplied to the court legible copies of the spousal consent and some parts of the charge document. These were forwarded by an email dated 28/08/2020. Although the application was slated to be heard on 10/09/2020, it had to be adjourned at the request of the 2nd Respondent's advocate who said that they were served with the Applicant's supplementary affidavit containing the document

examiner's report on 9/09/2020. Adjournment was allowed.

32. I understood the Applicant's case to be that she was unaware of and impliedly had no possession of the disputed spousal consent at the time of approaching the Court. From the above sequence of events, the earliest date on which the Applicant could have had possession of the disputed affidavit spousal consent would have to be 28th August, 2020, which is the date it was sent to the document examiner as per the Applicant's advocate's letter attached to the supplementary affidavit. How then was it possible that the document examiner purportedly examined on 11th August 2020 the documents, including the affidavit of spousal consent, submitted purportedly on 28th August,2020 and received at the DCI on 31st August. The date 11th August, 2020 is repeated twice in the report as the date of the report and of the examination, hence cannot be a typographical error. These anomalies cast doubt on the authenticity of this report.

33. Furthermore, given the nature of the dispute, the use of signatures on documents apparently signed and filed by the Applicant in this case as undisputed documents is not helpful for comparison, as these were primarily prepared to dispute the spousal consent by the Applicant. A cursory look at the copy of driving license allegedly submitted as an undisputed document reflects an obvious tampering with the signature, and notably a copy not the original was submitted for examination.

34. To be meaningful, the document examination should first have confirmed, through other known documents and specimens taken from the Applicant herself that signatures in the so-called undisputed documents marked **A1-A5** were indeed in her hand as indirectly asserted. Only then would it have been possible to make a meaningful and convincing comparison between the questioned document (spousal consent) and the so-called undisputed documents. On the face of it, the document examiner assumed that documents **A1-A5** were undisputed. Nowhere in her Supplementary affidavit has the Applicant identified the documents marked **A1-A5** as bearing her signature. That they bear her name is inconsequential.

35. Therefore, the document examiner's conclusion that his examination of the questioned signatures with the so-called known signatures revealed that the *"signatures were made by different authors"* is not helpful or conclusive. Nor indeed the further assertion that the questioned document (spousal consent) was forged. What if the so- called known signatures were procured to yield just that result? That is why samples taken by the examiner or other officer under him from the Applicant would have brought clarity to the matter. The court prefers to say no more on the so-called expert opinion except to state that *ex facie*, it raises more questions than answers.

36. But even more disturbing is the conduct of the Applicant herself. Her initial affidavit contained general statements to the effect that her consent was *not obtained* in respect of the further charge. However, and this is telling, when confronted with the copy of spousal consent, she made a beeline to the DCI, not to report that her signature had been forged, which she would have immediately known, and which is a crime, but to request a private examination of selected documents that she supplied to the DCI. Secondly, by her supplementary affidavit filed after alleged receipt of the examiner's report, the Applicant does not make a single express averment that she did *not* execute the spousal consent or that the signatures on the so-called undisputed documents belonged to her. The closest she came to this matter was to state at paragraph 3 of the Supplementary affidavit that: -

"….. on 8/09/2020 the Directorate Criminal Investigations forwarded to my advocate *their report that I did not sign the documents.* ***The report is annexed hereto…."***

37. Whether or not she had ever signed the disputed affidavit spousal consent is a matter within the Applicant's knowledge. See Section 112 of the Evidence Act. One would have expected her to make a direct and unequivocal statement in her subsequent affidavit either denying or admitting signature of the spousal consent, or at least the so-called undisputed documents. It is true as pointed out by the Applicant's counsel that the 2nd Respondent did not file an affidavit by the advocate who allegedly commissioned the affidavit of spousal consent.

38. However, the onus of establishing a *prima facie* case that the Applicant did not execute the document lay first and foremost with her. When the Applicant falls short of making an unequivocal assertion concerning the spousal consent, and worse, relies on a document examiner's report that is riddled with discrepancies and gaps, it cannot be said that the burden had shifted upon the 2nd Respondent to make a rebuttal. See **Mrao Ltd.** case where the court emphasized that it was not merely sufficient to raise issues but to adduce evidence showing infringement of a right sufficient to call for an explanation or rebuttal from the opposite party and that the standard of proof required is higher than an arguable case.

39. In **Nguruman's** case, the Court of Appeal said that:

> **"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."**

40. As earlier stated herein, and also emphasized by the Applicant herself at the hearing, the substance and pith of her case rested upon the alleged failure by the 1st and 2nd Respondents to obtain her consent to the further charge. A review of her material proffered in demonstration of this allegation leads to serious doubt as to its credibility. All that the Applicant appears to have done is make vague depositions herself while throwing at the Court dubious pieces of so-called evidence in an attempt to vicariously make assertions that she herself shied away from making. In the circumstances, the Court is not persuaded that the Applicant has made out a prima facie case.

41. I should add that a party seeking an equitable remedy is obligated to come to court with clean hands and to demonstrate utmost candour in pleading her case. Given the Applicant's conduct herein and the studious reticence by her spouse, the 1st Respondent, despite being served with the application, the suggestion by the 2nd Respondent that the two parties are working in collusion may not be farfetched. Notably, the Applicant did not tender any concrete proof of the 1st Respondent's alleged desertion of the matrimonial home for a period of 8 years.

42. The Court of Appeal stated in **Nguruman Ltd** that where no prima facie case is established, the Court need not consider the questions of irreparable damage or balance of convenience. This court however observes that the question whether or not the charged property is a matrimonial home becomes irrelevant the moment the Applicant failed to demonstrate prima facie, that she did not execute the spousal consent dated 20th November 2013. On the material before the Court and on the face of the said disputed document, it would seem that the Applicant's denials are doubtful. The charged property became a chattel liable to be sold in the event of default, which in this case is not denied. See **TWM v PKM &2 others (2017) eKLR.**

43. Besides, any losses resulting from an irregular realization of the security by the 2nd Respondent is quantifiable in damages and the said Respondent as a financial institution capable of making restitution to the Applicant and/or the 1st Respondent. On the other hand, the growing debt may soon outstrip the value of the suit property thereby exposing the bank to more losses.

44. The court finds no merit in the motion dated 18th March 2020 and will dismiss it with costs. However, in view of the time it has taken to dispose of the motion and other intervening circumstances such as the onset of the Covid-19 pandemic, the court directs that although the 2nd Respondent is at liberty to proceed to realize the security by way of public auction, a fresh forced sale valuation by a valuer must be undertaken before any such public auction can take place.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 13TH DAY OF MAY 2021.

C. MEOLI

JUDGE

In the Presence of:

For the Applicant: Mr Maina h/b for Ms. Mwangi

For 2nd Respondent: Mr Isinta

Kevin Ndege: Court Assistant