



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 390 OF 2010

MARY SAFARI MUGENYA1ST PLAINTIFF

ERIC MUBWEKA MUGENYA2ND PLAINTIFF

VERSUS

CORNELIUS KAGUI THUKU 1ST DEFENDANT

SWIFTWAY ENTERPRISES2ND DEFENDANT

CFC STANBIC BANK.....3RD DEFENDANT

THAARA AUCTIONEERS..... 4TH DEFENDANT

THE REGISTRAR OF TITLES5TH DEFENDANT

THE ATTORNEY GENERAL.....6TH DEFENDANT

JUDGMENT

(Plaintiffs seeking orders for cancellation of the title of the 1st defendant to the suit property and the discharge of a charge created by the 3rd defendant over the suit property; the suit land having previously been owned by the plaintiffs; suit land transferred to 1st defendant who proceeded to charge it; plaintiffs claiming that the sale and transfer were fraudulent inter alia that the 1st defendant was duped to sign the sale agreement and transfer when what she intended to do was to charge the title; 2nd defendant claiming never to have signed the documents; proof of these claims being upon the plaintiffs as the law presumes that title is genuine unless proved otherwise; evidence on record showing that the 1st plaintiff is literate and experienced; court not persuaded that she was intending only to charge and not to sell the suit property; no evidence of any application for a loan; no evidence of any letter of offer; no evidence of any account with the 3rd defendant; evidence showing that the documents were sent to the 2nd plaintiff (1st plaintiff's son) to the USA for execution; no evidence to supplement the mere oral allegation of the 2nd defendant that he did not sign the documents; fraud; test for proving fraud; test not attained by the plaintiffs; 1st defendant making counterclaim for rent; counterclaim for rent allowed; plaintiffs' suit dismissed)

INTRODUCTION AND PLEADINGS

1. This suit was commenced through a plaint which was filed on 3 November 2010 and which plaint was later amended. The plaintiffs have pleaded that they are the owners of the land parcel described as Plot No. 2502(Original Number 152/13) MN Title No. CR 15229 situated in Nyali, Mombasa (the suit property). It is pleaded that this property originally belonged to one Aggrey Wanjala Mugenya (deceased) the late husband to the 1st plaintiff. The 2nd plaintiff is her son and it is averred that they are both co-executors of the estate of the deceased. It is averred that in the year 2007, the 1st plaintiff approached the 2nd defendant (Swiftway Enterprises) seeking their assistance to help her secure a loan with the suit property as security. It is pleaded that the 2nd defendant introduced the 1st plaintiff to the 1st defendant and she was informed that he too needed a loan of KShs. 5,000,000/= but did not have collateral. It is pleaded that since the plaintiff only needed KShs. 5,000,000/= the title could be used to facilitate the 1st defendant's loan as well and a further loan of KShs. 2,000,000/= to the 2nd defendant and that they would all pay their portion of the loan. In September 2007, she contends that the 2nd defendant summoned her and they went to a lawyer's office where she signed some documents, believing them to be loan forms. She avers that at no point was she asked to forward the documents to her co-executor the 2nd plaintiff. It is contended that the property was fraudulently transferred to the 1st defendant. The 2nd defendant contends that he is a stranger to the sale agreement dated 10 September 2007 and that he did not execute the

same, and further that the signature therein is a forgery. It is also pleaded that the 2nd plaintiff is a stranger to the transfer instrument. It is averred that the 1st plaintiff did receive a cheque of KShs. 12,000,000/= which she believed to be a loan, to be shared between herself, the 1st defendant and the 2nd defendant, with her receiving KShs. 5,000,000/=, the 1st defendant KShs. 5,000,000/= and the 2nd defendant KShs. 2,000,000/- following their gentleman's agreement. It is contended that upon receipt of the money, the 2nd defendant illegally deducted from her money the sum of KShs 800,000/= purporting to be service fees and she ultimately only got KShs. 4.2 Million. It is pleaded that the 1st plaintiff was given an account held with the 3rd defendant (CFC Stanbic Bank) to repay the loan, and that she started depositing money into the account, believing that she was paying the loan and trusting that the 1st and 2nd defendants were also paying their portion. It is pleaded that in 2009, she went to the Land office and discovered that the property had been transferred to the 1st defendant who had charged it on 9 October 2007 to secure the sum of KShs. 12 Million.

2. It is contended that the 1st plaintiff signed documents by mistake, believing them to be documents of a loan agreement, and not sale and transfer of the property to the 1st defendant. It is pleaded that the sale agreement dated 10 September 2007 was not witnessed by an advocate thus rendering the subsequent transfer null and void. It is contended that the suit property was fraudulently transferred to the 1st defendant, inter alia by the 1st and 2nd defendants causing the 1st plaintiff to execute documents believing that the same were for a loan, yet they were for transfer of the property, and that the signature of the 2nd plaintiff was forged. It is further pleaded that the property was transferred to the name of the 1st defendant without compliance with the Land Board or consent to transfer. It is also pleaded that the 5th defendant (the Registrar of Titles) did not exercise due diligence by not insisting that the sale agreement be witnessed before a lawyer to help curb fraud. The plaintiffs moved to court when the suit property was put up for sale by public auction by the 3rd defendant through the 4th defendant (Thaara Auctioneers). In the suit, the plaintiffs seeks the following orders :-

- i. The defendants be jointly and severally restrained from selling, or dealing with the suit property.
- ii. A declaration that the plaintiff with her children are the legal owners of the suit property inherited from her late husband.
- iii. A declaration that the purported sale and/or transfer of the suit property to the 1st – 4th defendants is null and void.
- iv. Nullification of any transfer or purported transfer of the suit property to the 1st – 4th defendants.
- v. A declaration that the defendants acted fraudulently in transferring the suit premises from the plaintiff.
- vi. General damages for wrongful transfer and or possession of the suit property.
- vii. Costs of this suit.
- viii. A declaration that the agreement for sale dated 10 September 2007 is null and void for want of compliance with the mandatory requirements of law, to wit, the requirement that such a document be witnessed by an advocate.
- ix. A declaration that the signature purported to have been appended by the 2nd plaintiff on the said document, as well the one on the transfer are forgeries, hence no title could pass to the 1st defendant.
- x. A declaration that the contract entered into between the 1st plaintiff and the 1st defendant is vitiated by mistake and fraudulent misrepresentation and is thus null and void.
- xi. A declaration that by reason of the foregoing the plaintiffs are still the bona fide owners of the suit property.
- xii. A permanent injunction restraining the 4th defendant from acting on the 3rd defendant's instructions to sell the property.
- xiii. An order of restitution of title of the suit property to the plaintiffs, and an order to revoke the title of the 1st defendant.
- xiv. Exemplary damages for the wanton character of the 1st and 2nd defendants.
- xv. An order for restitution of title to the original owners.

3. The 1st and 2nd defendants filed a joint statement of defence which they later amended. It is pleaded that the suit property rightfully belongs to the 1st defendant having purchased it from the plaintiffs without any iota of fraud. The 1st defendant has pleaded that after he had bought the property, the plaintiffs were unable to give vacant possession and it was agreed that they could continue occupying it as they paid rent of KShs. 76,000/= per month, which they paid for some time in the account mentioned by the plaintiffs. It is pleaded that the 1st defendant bought the property through financing from the 3rd defendant, and that the 1st plaintiff personally appeared before an advocate, and executed the sale agreement and transfer, and took them so that she could send them to America for his son, the 2nd plaintiff, to execute the same, and that the documents were later brought back to the same advocate after duly being signed by the 2nd plaintiff. It is averred that if the 2nd plaintiff claims any forgery, this should be against the 1st plaintiff. It is pleaded that the 1st plaintiff approached the 2nd defendant, a real estate firm, and not a financial consulting institution, to find a buyer for the suit property, and that the 2nd plaintiff found the 1st defendant to purchase the suit property. It is pleaded that the 1st defendant paid a deposit of KShs. 1 Million and the KShs. 12 million balance was the financing from the bank. The 1st defendant filed a counterclaim for accumulated rent plus interest, physical structure wear

and tear and damage to the house, interest and costs.

4. The 3rd and 4th defendants in their joint statement of defence, pleaded inter alia that in the month of October 2007, the 1st defendant charged the suit property to the 3rd defendant (the bank) to secure some financial accommodation. There was default and the bank moved to sell the suit property. It pleaded that it was exercising its statutory right to sell and sought that the plaintiffs' suit be dismissed.

5. There was an application filed seeking orders of injunction pending the hearing of the matter and in a ruling delivered on 18 October 2013, the court (Mukunya J) ordered that the status quo be maintained until the suit is heard and determined.

EVIDENCE OF THE PARTIES

6. PW- 1 was the 1st plaintiff, Mary Safari Mugenya. She adopted her witness statement as her evidence in chief which I have gone through. In the statement, it is said that she and the 2nd plaintiff (her son), have sued together as administrators of the estate of the late Aggrey Wanjala Mugenya who died in August 1983. It is stated that the estate of her late husband comprised of the suit land and that she and her family have been living on the property since 1985. She has stated that within the property is a school called Marietop Educational Services (formerly Marietop Results Academy) which she started in the year 2004. In April 2007, she wished to take a loan to improve her school business and approached one Mohamed Mbaruku, a parent in the school. He informed her that he knew the 2nd defendant as an intermediary company that acted between banks and potential loan borrowers. Mr. Mbaruku then took her to the offices of the 2nd defendant, on 7th floor, NSSF Building, and she met Mr. Michael Mulwa (Mr. Mulwa), introduced as the owner of Swiftway Enterprises. Mr. Mulwa told her that his company deals with financial consultancy and acted as a loan broker with CFC Stanbic bank, and he gave her his business card, which described him as financial director. She was told to come back with some required documents, being the original title, copy of ID and copy of PIN certificate, 3 coloured passport size photographs, and two coloured photos of her son (standard size) together with a commitment fee of KShs. 3,000/=. She told Mr. Mulwa that her son is in the USA but she had his power of attorney. Later in October 2007, Mr. Mulwa, and one Simon, who was introduced to her as his business partner, took her to the offices of M/s Anjarwalla & Khanna Advocates where she met an advocate of Asian origin, whom she said was called Mr. Akash, who gave her some documents to sign, pointing at the places that she was required to sign, and that she did duly sign the same, believing that they were loan documents. In the same month, she was introduced to the 1st defendant and she was told that the 1st defendant is also seeking a loan of KShs. 5,000,000/= but did not have security. They requested if she could consider taking more than KShs. 5,000,000/= that she herself needed, to cover the 1st defendant's loan as well, and another sum of KShs. 2,000,000/= to Swiftway, with the understanding that each party would repay their loan. She thus agreed to borrow KShs. 12,000,000/=. They drove to the suit property, and a valuer later came, but she was never shown any valuation report. In November 2007, she was called by Simon and informed that her loan was ready, and she was taken to the offices of Anjarwalla & Khanna and given some documents to sign, and that she signed them believing to be loan documents. She claimed that she was not given a copy of the documents nor accorded a chance to read them and she was assured by Mr. Mulwa that they were standard loan documents from CFC Stanbic bank. Mr. Akash then gave Mr. Mulwa a cheque for KShs. 12,000,000/= written in the 1st plaintiff's name. Mr. Mulwa had given her a breakdown of how to spread the money as follows :-

To Simon and Mulwa – KShs. 430,000/=

To Mr. Thuku (1st defendant) – KShs. 1,091,320/=

To Mr. Thuku (1st defendant) – KShs. 4,305,000/=

To herself – KShs. 6, 173,680/=

TOTAL – KShs. 12,000,000/=

7. She had an inactive account with Habib Bank and she banked this cheque here. She then immediately withdrew KShs. 430,000/= and handed the same to Mr. Mulwa as his commission. The next day, she applied for a banker's cheques in favour of Swiftway for KShs. 2,000,000/=; KShs. 4,305,000/= to Mr. Thuku; and a further KShs. 1,091,320/= to Mr. Thuku; meaning that from the total loan of KShs. 12,000,000/= she only ended up with KShs. 4,173,680/=. She later inquired from Mr. Simon and Mr. Mulwa on how the loan is going to be repaid and she was given a letter dated 23 November 2007 addressed to Mr. Thuku and copied to her tabulating a repayment schedule as follows :-

Mrs Mary Safari Mugenya (Share of KShs. 7,280,000) Instalment – KShs. 86,204.70/-

Mr. Cornelius Thuku (share of KShs. 4,720,000) Instalment – KShs. 55,890.90/=

8. She explained that Mr. Mulwa and Mr. Simon did not appear in the loan repayment schedule because their monthly loan instalment would be included in hers and paid together. She stated that the arrangement between herself and Mr. Mulwa and Mr. Simon was that they would together give her KShs. 23,000/= every month, to repay their part of the loan, which was KShs. 2,000,000/=. Thus what she was actually to pay from her pocket was KShs. 63,204.70/=. She stated that Mr. Mulwa and Mr. Simon were faithful on their part of the deal, and paid in advance KShs. 230,000/= and KShs. 100,000/=, for November to August 2008. She was given two petty cash payment vouchers from Swiftway as evidence of payment of their instalments. She subsequently deposited every month, the sum of KShs. 87,000/= into an account No. *****1 (full account number redacted and henceforth described as account No. 8*1) held by Mr. Thuku (1st defendant) at Stanbic Bank. She displayed some deposit slips so as to prove that she made the claimed monthly bank deposits. In the year 2009, she did a routine check on the rates and she found that the print out now bore the name of Mr. Thuku as owner. She went to Mr. Mulwa who seemed genuinely surprised that the property is now in the name of Mr. Thuku. She procured the services of an investigator who found out that the property came to be registered in the name of Mr. Thuku and that he had taken a loan of KShs. 12,000,000/= with the bank. She avers that it is at this point that it dawned on her why Mr. Mulwa and Mr. Simon had asked her to repay her share of the loan through Mr. Thuku's

account. It is also then that she came to know why she had been asked to supply her passport photographs, for these were used to transfer the property to Mr. Thuku. She believed that her son's photographs were cropped to appear like passport size photographs. She later reported the matter to the police and other institutions but no action has been taken. In August 2010, she was called by Mr. Thuku and informed that the property is at threat of being auctioned for failure to repay the loan. She was shocked because she had never defaulted. She categorically denied selling the suit property and contended that she could not sell the same at KShs. 12 million yet it is valued at KShs. 100 million. She asserted that what she took was a loan. She denied being tenant to the 1st defendant.

9. It is instructive to state that the notes said to have been written by Mr. Mulwa as requirement for getting the loan, and the alleged breakdown of how the KShs. 12 million was to be distributed, were never produced in evidence as there was an objection to the same.

10. Cross-examined, she stated inter alia that she was a nurse by profession and able to read and write. She had been employed as a nurse with the East African Community, Leprosy Research before embarking on business. She acknowledged that she had been sued by one Suleiman Chaka and his wife on a separate debt and there was a proclamation for her property. She stated that she paid KShs. 446,000/= on this loan and that part of the money was obtained from the loan. She did concede that she signed documents at the advocate's office, but contended that she did not see what she signed, and that there was no discussion. She never lodged any complaint against the advocate. She claimed that it was on 20 October 2007 that she was introduced to the 1st defendant. She stated that she did not pay the loan in full, as she noted some anomalies, but that she has paid approximately KShs. 1 Million. She stated that she still has a balance. She mentioned that she still lives on the suit property. The property was previously registered in the name of herself and her son.

11. PW-2 was Eric Mubweka Mugenya, the 2nd plaintiff. He disclosed that he resides in Tanzania. He testified that he never signed any document transferring the suit property and never signed the sale agreement of 10 September 2007, nor the transfer document. He testified that between 2001 and 2009 he was based in the USA, and that he was in the USA on the dates noted in the sale agreement and transfer. He denied visiting the Kenyan embassy to meet one Lawrence Karanja for purposes of attesting the documents. He was cross-examined on the sale agreement and he stated that what appears there is his old passport number, but asserted that he never signed the document. Neither was he aware of any loan to the bank. He conceded that he has not lodged any complaint of forgery to the police. He stated that he became aware of the transfer in the year 2010 when he came from the USA. He stated that he has never met the 1st defendant.

12. With the above evidence, the plaintiffs closed their case.

13. DW-1 was Antony Michael Mulwa (Mr. Mulwa). He stated that he is a director of Swiftways Enterprises, the 2nd defendant, which he described as a company dealing with properties. He relied on his statement vide which he stated that in the year 2007, the 1st plaintiff came to his company seeking a buyer for the suit property. He managed to get the 1st defendant who was buying the property using bank financing and the price of KShs. 12,000,000/= was agreed upon. A sale agreement was then drawn and signed by the bank's lawyer. He stated that the 1st plaintiff is feigning illiteracy yet she is a trained nurse and runs a school, and it is a pure lie for her to say that she signed documents which she did not understand. He is of opinion that the plaintiffs' lies should not be entertained. In his oral evidence, he stated that his role was only to connect the seller and the buyer. He was not involved in the signing of the agreement and transfer. Cross-examined by counsel for the plaintiffs, he acknowledged that the company has another director by name of Simon Saroni Nauru (Mr. Simon). He did not recall issuing the 1st plaintiff with a receipt of KShs. 3,000/- as commitment fee. He refuted issuing the 1st plaintiff with a business card that the plaintiffs displayed in their documents (showing that he dealt with financing). He acknowledged that the company advised clients on financial matters including where to obtain financing. He however denied that the 1st plaintiff came to the company for assistance on financing. The company was a limited liability company and closed in the year 2015; it no longer operates. He denied authoring the letter dated 23 November 2007, which the plaintiffs claimed tabulated the amounts payable for the loan of KShs. 12,000,000/=. He stated that the letterhead on which the letter was written was not their letterhead, since Swiftway was a limited liability company, but the letterhead showed "Swiftway Enterprises" as a business name. He admitted that the 1st plaintiff paid the company KShs. 2,000,000/= comprised of 10% commission for the sale of the land being KShs. 1.2 million, and KShs. 800,000/- being repayment of a friendly loan advanced to the 1st plaintiff. He denied issuing the petty cash vouchers displayed by the plaintiffs alleging that they were loan repayments. He stated in re-examination that the 1st plaintiff was in financial distress and that is why she came for financial assistance.

14. DW-2 was Cornelius Kagui Thuku the 1st defendant. He also relied on his witness statement which inter alia averred that he was informed by Mr. Mulwa that the plaintiff (meaning 1st plaintiff) was selling property. They negotiated the price and he approached the 3rd defendant for a loan to finance the purchase. Due to financial constraints he loaned the plaintiff (meaning 1st plaintiff) KShs. 4,000,000/= which was returned later. He signed the sale agreement and transfer in the presence of Mr. Devani advocate and the plaintiff. He then leased out the house to the plaintiff but she defaulted on the payment of the loan (probably meant rent) and she later filed this suit. He produced as exhibits the sale agreement and the lease agreement with the 1st plaintiff. Cross-examined, he stated that he borrowed the sum of KShs. 12,000,000/= to purchase the suit property and he signed a legal charge. The money was paid directly to the plaintiff. The documentation was done by M/s Anjarwalla & Khanna Advocates, who were the bank's lawyers. He acknowledged defaulting on the loan and that the property was put up for sale. He stated that he never met the 2nd plaintiff and never saw him sign the sale agreement. What he did was to go to the advocate to sign his part. He trusted the bank to undertake the whole transaction. The agreement did note that the plaintiffs were signing as executors but he did not ask for the will. He stated that it was false that the money borrowed from the bank was to be shared. He explained that before purchasing the suit property he had a business relationship with the 1st plaintiff and had loaned her some KShs. 4,000,000/= as she had some financial difficulties. She later came for some additional KShs. 1,500,000/=. This money was owed at the time of sale. He testified that the selling price was KShs. 13,000,000/=. He did not give the 1st plaintiff KShs. 1,000,000/= as she owed him KShs. 5.5 million. The cheques that the 1st plaintiff gave him totalled KShs. 5,396,320/=. On what he borrowed from the bank, the bank was to deduct money for repayment from his primary account. He denied that he fabricated the lease agreement, that he produced in evidence, between himself and the 1st plaintiff, to justify why money was being paid by the 1st plaintiff into his account. He asserted that the 1st plaintiff became his tenant and that she would deposit rent into his account. She had a school which was running at the time. He however had difficulties with explaining the lease agreement, which shows that it was signed before Chudasama Advocate, as he stated that he never appeared before the said advocate.

15. DW-3 was Antony Kobia, the 3rd defendant's bank manager at its Digo Branch, Mombasa. He also relied on his witness statement which provided inter alia that the 1st defendant charged the suit property to secure a loan of KShs. 12 million. He stated that the property was sold by the plaintiffs and they happily received and utilized the proceeds of sale. He stated that the debt to the 1st defendant is still outstanding and that is why they appointed an auctioneer to sell. Among the documents that he produced was the sale agreement and the charge. Cross-examined, he stated that they released the money to the 1st plaintiff as she had a power of attorney from the 2nd plaintiff though he did not have a copy of the said power of attorney. The sale agreement and the charge were drawn by the same firm of advocates M/s Anjarwalla & Khanna. He did note that the sale agreement provides the date of 10 September 2020 although the 2nd plaintiff is said to have signed the same on 31 August 2007.

16. No witness was called on the part of the Attorney General, and with the above evidence, the defendants closed their case.

SUBMISSIONS OF COUNSEL

17. I invited counsel to file their written submissions which was done. I have taken note of these. In a nutshell, it was the submission of Mr. Koech, learned counsel for the plaintiffs, that what was intended was a loan agreement, only that one party was innocent and unsuspecting, and the other sly and callous, which resulted in a fraudulent transfer of the suit property, and a forged lease agreement. He described it as a "thriller." He was of opinion that Mr. Thuku was the mastermind of the fraud. He thought his evidence was incoherent and confused.

18. On his part, Mr. Mwaniki Gitahi, learned counsel for the 1st and 2nd defendants, submitted inter alia, that the plaintiff (sic) is a trained nurse and a proprietor of a school, and she cannot feign ignorance, and/or purport that she signed documents which she did not know what they meant. He submitted that the plaintiff (meaning 1st plaintiff) appears to be feigning ignorance and illiteracy at her own convenience. He submitted that the documents were released to the 1st plaintiff to send to her son in the USA and they were returned duly executed. He saw nothing wrong with the sale and the subsequent alleged lease to the 1st plaintiff. He submitted that the payments made into the 1st defendant's account by the 1st plaintiff were in respect of rent. He pointed out that the plaintiffs have not tabled any loan agreement with the bank. He submitted that the plaintiffs have not proved the ingredients for an injunction following the case of *Giella vs Cassman Brown (1973) EA 358*.

19. On the part of counsel for the 3rd and 4th defendants, Mr. Waweru, learned counsel, inter alia submitted that the bank was not a party to the arrangements between the plaintiff and the 1st and 2nd defendants. He was of opinion that the evidence shows that there was a purchase of the suit property for valuable consideration and the cheque of KShs. 12 million was paid to the 1st plaintiff. He thought that the bank has been wrongly dragged into this proceeding. He pointed out that there was no privity of contract between the bank and the plaintiffs. He also referred me to *Giella vs Cassman Brown (supra)*.

20. For the 5th and 6th defendants, Mr. Makuto, learned State Counsel, inter alia submitted that no iota of evidence was led to support the allegation of fraud against the Registrar of Titles. He submitted that the 5th defendant merely performed his duties when he registered the transfer of the property, and referred to portions of the evidence of the plaintiffs and submissions of counsel for the plaintiffs, stating that they have no quarrel with the 5th defendant.

21. As I have said, I have taken note of these submissions.

ANALYSIS AND DECISION

22. Before I delve into the main issue, I am rather surprised that the case of *Giella vs Cassman Brown (supra)* was referred to me by both Mr. Mwaniki and Mr. Waweru. With the utmost of respect, *Giella vs Cassman Brown* is a case that applies to interlocutory injunctions only, that is, injunctions pending the hearing of the suit. It is here where the court assesses whether there is a prima facie case displayed that can be the basis of a grant of an order of injunction, and whether the applicant has demonstrated that he/she stands to suffer irreparable loss if the injunction is not granted. Of course where the court is in doubt, it assesses the application on a balance of convenience. *Giella vs Cassman Brown* is spent once the court has dealt with an application for an interlocutory injunction. Issues such as demonstration of a prima facie case, or irreparable loss, or balance of convenience, have completely no application when a court is considering whether or not to grant a permanent injunction after a full hearing. At this juncture, what applies is whether the plaintiff has proved the case on a balance of probabilities. That is why I was rather taken aback by two fairly senior and experienced counsel presenting before me the case of *Giella vs Cassman Brown* at the conclusion of the hearing of the matter. It is non-issue, in the determination of the case, but it would have been remiss for me not to point out to counsel, the inapplicability of the case, if only to save them future embarrassment. I hope that my reprimand will be taken kindly and in good faith.

23. Having put aside that small misadventure, let me get back to the meat of the matter. The case of the plaintiffs is that they were previously the registered proprietors of the suit land as executors. The 1st plaintiff claims that she needed to take a loan of KShs. 5 million to sort out some financial distress and that she was introduced to the 2nd defendant as a broker for bank loans. It is claimed that a loan was negotiated on her behalf, but in the course of it, the 1st defendant was introduced as also needing a loan of KShs. 5 million but he did not have collateral. The 2nd defendant is alleged to also have sought to ride on the collateral of the plaintiff, so that at the end of the day, what the 1st plaintiff applied for, was not exactly a loan of KShs. 5 million, which is what she required, but a loan of KShs. 12 million, to also accommodate the 1st and 2nd defendants. The plaintiffs allege that this loan was acquired from the 3rd defendant bank and the 1st plaintiff indeed acknowledges that she was given a cheque of KShs. 12 million by the 3rd defendant. What the plaintiff claims is that all along, she signed documents which she believed to be loan forms, and that she never signed a sale agreement or a transfer of the suit property. The 2nd plaintiff alleges that he signed nothing, not a loan agreement, not a sale agreement, not a transfer. He says he is a stranger to all these transactions. It is on the basis of the above that the plaintiffs claim that they were duped of the suit property and that the transfer of the suit property to the 1st defendant was fraudulent and thus needs to be nullified. With that, the charge to the bank also needs to be nullified and the property to revert back to the proprietorship of the plaintiffs with no strings attached.

24. The position of the 1st defendant is that he simply purchased the suit property after being informed by the 2nd plaintiff that the 1st plaintiff is keen to sell. He states that he did not have money and he thus approached the bank for financing and this was done. The money was then given to the seller. He of course claims that there was a previous soft friendly loan that of KShs. 5,500,000/= (KShs. 4 million and later KShs. 1.5 million) that he had personally given the 1st plaintiff, and thus when the 1st plaintiff got the money, she first discharged this debt to him. The position of the 2nd defendant is that the company merely acted as a broker for the purchase. The director of the 2nd defendant also claims to have lent some KShs. 800,000/= to the 1st plaintiff to sort out some financial distress, and was entitled to KShs. 1.2 million (10% of the purchase price) as commission. That is why out of the KShs. 12 million that the 1st plaintiff got, he was handed over the sum of KShs. 2 million.

26. The bank's position is that it was not involved in the transactions between the plaintiffs and 1st and 2nd defendants, and that all it did, was to facilitate the purchase by the 1st defendant of the suit property from the plaintiffs. The Land Registrar, argues that he has done nothing wrong.

26. Now, I have assessed the respective positions of the parties. My conclusion is that not all the truth, or at least not all material facts, has been presented as between the plaintiffs and the 1st and 2nd defendants. I ask myself a lot of questions and I am unable to find the answers. Assuming that the property was actually being sold by the plaintiffs to the 1st defendant, and if the 1st plaintiff already owed the 1st defendant some odd KShs. 5.5 million, why would the 1st plaintiff need a broker to sell her property to the same person that she is indebted to? Why would she want to pay an extra KShs. 1.2 million as broker fees yet she could simply have approached the 1st defendant who she was indebted to and asked whether he is ready to pay for the property? I also find it to be quite interesting that the 1st plaintiff would also owe the 2nd defendant, or its director, a sum of KShs. 800,000/=, yet it is claimed that they did not know each other before. Assuming that this was actually a loan (an issue that I will of course address in a short while), I also find it curious, if not unbelievable, that a person would take out a loan of KShs. 5 million, then allow others, who she has never met before and has no known relationship with, to ride on her collateral to borrow the sum of KShs. 7 million, without any written document and no disclosed benefit to such person. Who would be that generous? I have too many questions in my head and I do not for one moment believe that the plaintiffs and the 1st and 2nd defendants have been entirely forthright in their evidence. There is something not being said about their relationship and/or dealings and it is them who know all the facts, which unfortunately, they, for their own reasons, chose not to disclose to the court.

27. The plaintiffs and the 1st and 2nd defendants could have done better with their evidence to seal some unanswered questions. I would have been happier to have more evidence but there is nothing the court can do about this. I will have to make judgment based on what is on record. However, it is the plaintiffs who have come to court, and I will simply revert to the law in determining this case, even with the rather limited evidence that the parties chose to present.

28. It is trite that he who alleges bears the burden of proving, and in this case, it is the plaintiffs who allege that their property was fraudulently transferred, and they thus have to prove that, to the required standard. Fraud is pleaded here, and it should be recalled that the burden of proof in fraud, is slightly higher than that of a balance of probabilities (See the case of *Patel v Makanji (1957)EA 314*). The 1st plaintiff claims that the true nature of the transaction was one for a loan and she was duped to sign the sale agreement and transfer. She thus does not deny signing these documents, only that she claims that she did not know what she was signing, or at least, thought that she was signing loan forms. She claims that the advocate did not inform her of the nature of documents that she was signing. The 2nd plaintiff on his part categorically denies signing any document, whether it be a loan or a sale or transfer.

29. I do not for once believe that the 1st plaintiff did not know what she was signing, and in fact, I do not believe her narrative that to her knowledge, she was acquiring a loan. I can take judicial notice that when one is applying for a loan, one makes an application to the bank. No application was ever referred to me by the 1st plaintiff. The bank also usually issues a letter of offer for the loan which the customer then accepts by signing it. This document is given to the customer. The 1st plaintiff had no such letter of offer. Further, the 1st plaintiff does not state that she holds any account with the 3rd defendant, yet following her narrative, it is the 3rd defendant who was going to issue the loan, and that the sum of KShs.12 million, according to her was a loan. How would the bank issue a loan to her if she did not even have an account with that bank even for purposes of repayment? When a bank issues a loan, it would ordinarily disburse it into a loan account, or pay on behalf of the customer, and manage a loan account on his/her behalf. There is no loan account, or as I have mentioned, any account proved to have been held by the 1st plaintiff in the 3rd defendant bank. The whole narrative of the 1st plaintiff, that she was signing for a loan, sounds to me like a fairy tale that was not very well thought out. There was even the introduction in her tale of a broker for bank loans; that the 2nd plaintiff was acting as a broker for the 3rd defendant's bank loans. I have never known that the bank has brokers for loans, not that I can claim to know everything under the sun, but if there was such a broker, I would expect that this also be organised and be professional, so that you would have some documents of appointment as a broker, an agreement for commission or fees, etc. I wouldn't take the rather casual style that the plaintiff described the 2nd defendant, as describing a person who is brokering loans for the bank. Where are documents if indeed the 2nd defendant was acting as a loan broker? There are none. Even if the loan was being brokered, you would still expect the bank to see an application for a loan, see the person that is taking the loan, agree on what amount of loan and the repayments, and the security being offered. The 1st plaintiff is also a mature person, who said she was 68 years when she was giving evidence, thus about 60 years or so, when she was taking the alleged loan. This would not be someone who is wet behind the ears. She did say that she is a trained nurse and has even worked internationally. This is someone who has not only gone to school but has good experience under her belt. She is certainly no novice. I would expect such person to understand what a loan agreement is and what a sale agreement is. She was also in business and one would reasonably expect that she knows bank protocols and procedures, and that includes those for taking a loan. I do not believe for one moment that she was taking any loan from any bank and that she took the 2nd defendant as a bank broker for loans. She spun a tale before this court which this court is unable to buy. My finding is that the 1st plaintiff has not proved to this court her claim that she was duped to sign a sale agreement and transfer, when all along she thought she was signing bank loan documents. Since the 1st plaintiff did not deny signing the sale agreement and transfer agreement, then the same would be binding upon her.

30. What about the 2nd plaintiff? His narrative was that he was in the USA all along when all these dealings were entered into and he knows nothing about them. He of course claimed that he never signed the documents. Now, it is one thing alleging, and it is another thing proving,

to the required standard. I will reiterate that the plaintiffs' case is one of fraud. The 2nd plaintiff alleges that his signature was forged and that he never appeared before anyone in the Kenyan embassy in the USA to sign any document. He does not deny that he was in the USA all this time. The claim that the signature is forged needs proof. This could have been done, for example, by presenting the opinion of a handwriting expert to demonstrate that the signature in these instruments is not his signature. He could also have brought correspondence from the Kenyan embassy in the USA demonstrating that the person said to have attested the documents, a Mr. Lawrence Karanja, is a stranger, or that he does not exist. He could also have procured the said Mr. Lawrence Karanja to come to testify to say that he never attested his signature. Not even what the 2nd plaintiff would allege is his proper signature was presented before this court. If we are to hold that a person's signature has been forged, by that mere statement alone, with nothing else to back that up, then we will develop a dangerous precedent, and anybody wishing not to be bound by a land instrument will simply say that he never signed it and that his signature was forged, and by that statement alone, the instrument would be nullified. That really would be an extremely low threshold and certainly more was required from the 2nd plaintiff to prove to the required standard that the signature in the sale agreement and/or transfer instrument is forged. There was the further claim that the sale agreement bears the date 10 September 2007 yet the signature of the 2nd defendant is shown to have been placed on paper on 7 August 2007. There is a simple explanation to that. The document was first sent to the 2nd plaintiff for him to sign before it was brought back for the other parties to sign. Of course it doesn't look pretty that the document is said to have been drawn later, for which counsel who drew it should have known better, but to me, this does not prove any fraud or forgery. There was certainly some lack of finesse on the part of the advocate who drew the agreement and who placed the date. It could have been done better, but nothing arises out of that misnomer in the date of the sale agreement. It was, in the pleadings, alleged that the documents are not attested, but I can see an attestation signature and nothing arises out of that. In any event, the plaintiffs have not been bold enough to sue the advocate, who they claim duped them to signing documents.

31. It was claimed in the pleadings that there was no consent of the Land Control Board, but this is a town property and not agricultural land and the provisions of the Land Control Act, Cap 302, do not apply. Neither was it demonstrated by the plaintiffs that the transfer was effected without the requisite consents or payment of required taxes. All this was for the plaintiffs to prove, not the defendants to disprove, and no evidence whatsoever was led.

32. We should not forget that the law presumes that the person who is registered as title holder genuinely obtained title. The title in issue is registered under the Registration of Titles Act, Cap 281, (RTA) (repealed in 2011). The matters herein and indeed the suit was filed when the RTA was operative. Section 23 (1) of the RTA provided as follows :-

S. 23. (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.

33. The current law is prescribed in the Land Registration Act, Act No. 3 of 2012, which provide as follows :-

Section 26.

Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

34. It will be seen from the above, that the law has, and still is, very protective of title and indeed, the law does presume that the title holder genuinely has a good title. The person who claims that title was not properly obtained must remember that he is swimming against the current, and that he has a heavy onus of demonstrating that a title was illegally obtained. That is not done by merely stating orally that a title is illegal. Tangible and cogent evidence must be presented to court before a court can nullify title. The nullification of a title is not a casual exercise, but serious business, for the law is extremely protective of title. I am not persuaded that the plaintiffs have demonstrated to me that the registration of the 1st defendant as proprietor was done through fraud, or misrepresentation, or even mistake, to enable this court cancel his title and have it reverted back to the plaintiffs.

35. From the foregoing, it will be seen that I am not persuaded that the plaintiffs have proved their case to the required standard. My holding is that the plaintiffs have not proved that they did not voluntarily sign the sale agreement and transfer of the suit property to the 1st defendant. No fraud or misrepresentation has been proved against the 1st defendant. The plaintiffs cannot therefore succeed in their suit and the same is hereby dismissed.

36. What of the counterclaim of the 1st defendant ? The case of the 1st defendant is that after purchasing the suit property, the 1st plaintiff asked to rent the same, and he thus rented it out to the plaintiff. He produced a lease agreement which purports that the suit property is leased out to the 1st plaintiff for a period of 5 years and 3 months from 1 December 2007 to 28 February 2013. The rent is KShs. 70,000/= (I would assume per month) from 1 December 2007 to 30 November 2009; KShs. 84,000/= from 1 December 2009 to 30 November 2011; and KShs. 100,800/= from 1 December 2011 to 28 February 2011. I am not too sure about this lease instrument, for the plaintiff himself stated that he did not appear before N.J Chudasama advocate, who is noted in the instrument to have attested it. The document is also not registered. It

would have been helpful to the 1st defendant if he had called Advocate Chudasama to come and testify on the veracity of this instrument but he did not. Given his own evidence, I am unable to say that the lease instrument has been proved.

37. But, it does not escape me that the 1st plaintiff has continued being in possession of the suit premises. It is premises that I have held belongs to the 1st defendant. She must pay some money to the 1st defendant for her possession. It was not claimed that the premises cannot be rented out for the sum of KShs. 70,000/= or indeed for any of the amounts noted in the lease instrument. The plaintiffs themselves claimed that the property is worth KShs. 100 million, and if this is so, rent of KShs. 70,000/= per month would not be unreasonable. The rent indeed, as is the practice, would go up with time. The 1st plaintiff cannot be heard to complain if I utilise my discretion to peg mesne profits, as rent payable, at KShs. 70,000/= per month from the time the property became registered in the name of the 1st defendant. The registration, from what I can see was done on 12 October 2007, and I therefore order that the rent payable commence in November 2007 to date. The rent to November 2019 is 12 years which is the sum of KShs. 10,080,000/=. From December 2019 to end of May 2019 is 6 months hence KShs. 420,000/=. The total payable is thus KShs. 11, 220,000/= and this will attract interest at court rates from the time the counterclaim was filed till payment in full. I will also direct the 1st plaintiff to give vacant possession to the 1st defendant, within 3 months of this judgment, and for which period the 1st plaintiff must also pay the sum of KShs. 70,000/= as rent per month. After this 3 month period, she must give vacant possession to the 1st defendant, or negotiate a lease with him, if she wishes to continue being in possession. There was a claim for damages for repairs but no evidence was led and I am unable to make any orders in respect of this claim.

38. What of the bank ? This was not a suit brought by the property owner to stop the chargee from exercising its statutory right of sale. It was the plaintiffs who wished to have the property back which they have failed. Barring any other order from a competent court, the relationship between the 1st defendant and the 3rd defendant remains that of bank and customer, chargor and chargee, and the bank is at liberty to claim its money or enforce its rights under the charge. The plaintiffs' suit against the bank and the auctioneer (4th defendant) is otherwise dismissed.

39. I have seen nothing to hold the Registrar of Titles culpable and the suit against the 5th and 6th defendant is thus dismissed.

40. The end result is that the plaintiffs' suit against all the defendants is hereby dismissed. The plaintiffs will shoulder the costs of the suit against the defendants. The counterclaim of the 1st defendant succeeds to the extent that I have pronounced myself above. I will award the 1st defendant the costs of the counterclaim payable by the plaintiffs.

41. Judgment accordingly.

DATED AND DELIVERED THIS 10TH DAY OF JUNE, 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT

MOMBASA.