**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL SUIT NO.211 OF 2007**

**JAMES KARANJA MWAURA …….....…….……. APPLICANT**

**VERSUS**

**OL KALOU FARMERS SACCO BANK LTD. …….....…… 1ST RESPONDENT**

**C0-OPERATIVE BANK OF KENYA LTD. …….....……..... 2ND RESPONDENT**

**RULING**

The applicant has instituted this action simultaneously with the present application against the respondents seeking that they be restrained from selling, alienating or interfering with title **No.NYANDARUA/UPPER GILGIL/582** pending the determination of the main suit herein. The applicant who is the registered owner of the suit property contends that in or about 1999 he deposited the title document of the suit property with the 1st respondent, Ol Kalou Farmers Sacco Bank Limited for safe custody. To his surprise, in 2004 he received a letter from the 2nd respondent, Cooperative Bank of Kenya Limited giving him notice that it would exercise its statutory power of sale over the suit property claiming that he had guaranteed a loan by the 2nd respondent to the 1st respondent. The applicant has denied any knowledge of such guarantee or transaction. He has disowned the signatures on the charge documents and in the application to the Land Control Board purported to have been signed by him. He has sworn that he has never met the advocate, Njeri Wamithi before whom he is alleged to have executed the documents; that he never attended the Land Board Control for consent to charge the property; that he could not have guaranteed the loan having been suspended by the 1st respondent at the time it is said to have been advanced. It is his case that the signatures were forged.

The 1st respondent did not enter appearance or file a defence. Accordingly an interlocutory judgment was entered against it. For its part the 2nd respondent is categorical that the applicant, who was a member of the 1st respondent, at the request of the latter, executed a charge over the suit property to secure a sum of Kshs.450,000/= to enable the rescheduling of the former's debt of Kshs.6.5 million which was due and owing to the 2nd respondent. Both the 1st respondent and the applicant failed to service the loan which stood at Kshs.9,713,923.05 as at 19th January 2004 when the statutory notice was issued. This figure had escalated to Kshs.16,223.851/= by 30th May, 2007.

The 2nd respondent has maintained that the applicant executed charge documents, applied and obtained the consent from the Land Control Board; that he executed the documents before Irene Njeri Wamithi, an advocate of this court. Irene Njeri Wamithi has sworn an affidavit to confirm the fact that the

applicant, who was known to her, executed the charge before her.

I have duly considered the submissions and the authorities cited by learned counsel for the 2nd respondent.

It is common ground that the title deed to the suit land is with the 2nd respondent. How did it end up being with them? They have averred that it was surrendered to them as security by the applicant for a loan facility extended to the 1st respondent. The 2nd respondent has argued that the surrender was voluntary.

For his part the applicant has denied participating in any such transactions maintaining that he deposited the title deed for safe custody with the 1st respondent and further that the signatures purporting a voluntary act on his part to charge the suit property are forgeries.

Those are the questions that will be determined with finality at the trial. At this stage I need only emphasis by dint of order 39 of the Civil Procedure Rules under which the application is premised. A temporary injunction will issue where it is shown that the suit property is in danger of being wasted, damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or where the defendant is threatening to commit a breach of contract or other injury of any kind.

These principles have been explained in the celebrated **Giella v Cassman Brown & Co. Ltd. (1973) EA 358** to the effect that the court will grant an order of temporary injunction if the applicant demonstrates a *prima facie* case with a probability of success, that he is likely to suffer irreparable loss which cannot be compensated by an award of damages. But should the court be in doubt it must decide the application on a balance of convenience. In considering whether nor not the applicant has a *prima facie* case there must be no definite determination of matters of fact or law. See **Mrao Ltd vs First American Bank**.

The applicant has stated categorically that he has:

**"…… never in my lifetime executed any charge instrument to secure any credit facility in favour of the 1st defendant."**

He has also deposed that should the suit property be sold he would suffer irreparable loss and damage as it is part of his matrimonial home and only source of his livelihood with his family and that he would be rendered homeless. If that be so, it is inconceivable that way back on 19th January 2004 he has made no report of forgery of his signature, a criminal offence, to the police. That apart, the foundation of the applicant's claim is that the signatures on the documents were not his. His counsel urged the court to compare the signatures in order to see the difference promising to call a handwriting expert.

A court adjudicating on a dispute cannot convert itself to be an expert witness. It cannot determine whether or not the signatures are those of the applicant. Instead of asking the court to engage in such an unusual venture or promising to avail evidence of an expert at a later stage, it was for the applicant to do so now as his claim stand or falls on this single question. Secondly the 2nd respondent has called evidence that the applicant executed the charge before Irene Njeri Wamithi, advocate who has sworn to this fact and also to the fact that prior to this date the applicant was known to her having done some work for the 1st respondent when the applicant was a member of the former's committee.

Apart from denying that he has never met Irene Njeri Wamithi, advocate, the applicant had all the time to seek to cross-examine the advocate over her averments as was provided for **Order 18 rule 2** of the repealed **Civil Procedure Rules** (now order **19 rule** 2 of the **2010 Rules**).

The applicant has contended that he deposited the titled deed for safe custody with 1st respondent in 1999 at annual fees.

If indeed his concern in depositing the title deed with the 1st respondent was its safety, how is it that he was not issued with any document signifying the fact of that deposit; where are the annual receipts for the fees paid to the 1st respondent for this service? In the result I find that the applicant has not shown a *prima facie* case.

No irreparable loss will be suffered by him if an injunction is not granted as the 2nd respondent has undertaken to restitute should the applicant's suit succeed. On this the holding in case of **Sambai Kitur v Standard Chartered Bank & 2 others**, Eld. HCCC. NO.50 OF 2002 is instructive. The court emphasised that:

**"It must also be noted that when a chargor lets loose its property to a chargee as security for a loan or any other commercial facility on the basis that in the event of a default it be sold by a chargee, the damages are foreseeable. The security is henceforth a commodity for sale or possible sale."**

The accrued sum in 2007 was Kshs.16,223,851/= and continues to grow. It is the 2nd respondent who is suffering loss and the scale of convenience is certainly on its side.

The application for the reasons stated fails and is dismissed with costs.

**Dated and delivered at Nakuru this 16th day of July, 2012.**

**W. OUKO**
**JUDGE**