



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO.941 OF 2016**

**EQUITY BANK LIMITED.....PLAINTIFF**

**VERSUS**

**KINJUNJE GARDENS LIMITED.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**LEAKEYS AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**PATRICK KANGETHE NJUGUNA.....5<sup>TH</sup> DEFENDANT**

**MARGARET WAMBUI KANGETHE.....6<sup>TH</sup> DEFENDANT**

**CONSOLIDATED WITH**

**ELC CASE NO. 947 OF 2016**

**COMMERCIAL BANK OF AFRICA LIMITED.....PLAINTIFF**

**VERSUS**

**WARDPA HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**LEAKEYS AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**PATRICK KANGETHE NJUGUNA.....5<sup>TH</sup> DEFENDANT**

**RULING**

I have before me a protracted dispute involving three banks, their customers, the Chief Land Registrar and a firm of auctioneers. The dispute has been brought to court by Equity Bank Limited (hereinafter referred to as "Equity") and Commercial Bank of Africa Limited (hereinafter referred to as "Commercial

Bank”)by way of two separate suits namely, ELC No. 941 of 2016 and ELC No.947 of 2016. In the two suits, Equity and Commercial Bank have sued, Co-operative Bank of Kenya Limited (hereinafter referred to as “Coop Bank”),Leakey’s Auctioneers (hereinafter referred to as “theauctioneer”), the Chief Land Registrar(hereinafter referred to as (“the Land Registrar”) and Patrick Kangethe Njuguna (hereinafter referred to as “Patrick Kangethe”) as common defendants. Equity has sued, Kinjunje Gardens Limited (hereinafter referred to as “Kinjunje”) and Margaret Wambui Kangethe (hereinafter referred to as “Wambui”) as additional defendants while Commercial Bank has sued Wardpa Holdings Limited (hereinafter referred to as “Wardpa”) as additional defendant.

#### Equity’s case:

Equity’s case is that by a letter of offer dated 9<sup>th</sup> December, 2014, it agreed to advance to Kinjunje a loan of Kshs. 200,000,000/- on the terms and conditions that were set out in the said letter. Equity has averred that the said loan was secured by among others, a first legal charge in the sum of Kshs. 80,000,000/- over the parcel of land known as Title No. Dagoretti/Riruta/2289(hereinafter referred to as “the suit property”). Equity has averred that after the said charge was registered against the title of the suit property, it took into its custody the original title deed for the property which it holds to date. Equity has averred that it carried out a search on the title of the suit property which confirmed that its charge had been duly registered.

Equity has averred that Kinjunje defaulted in its repayment of the loan facility and was indebted to Equity to the tune of Kshs. 364,227,096.21 as at 4<sup>th</sup> June, 2016. Equity has averred that it served Kinjunje with a statutory notice in preparation for the exercise of its statutory power of sale. Equity has averred that on 18<sup>th</sup> July, 2016 its attention was drawn to an advertisement which was carried in the Daily Nation Newspaper. In the said advertisement, the auctioneer had advertised the suit property for sale by public auction on 5<sup>th</sup> August, 2016 on behalf of Coop Bank which was described in the advertisement as chargee. Equity has averred that following this advertisement, it attempted to carry out a search on the title of the suit property but could not do so because the Land Registrar in breach of its statutory duty failed to a vail a certificate of official search. Equity has averred that on 2<sup>nd</sup> August, 2016, it requested Coop Bank to postpone the auction which was scheduled for 5<sup>th</sup> August, 2016 so that investigations could be carried out on the conduct of Kinjunje but it received no response.

Equity has averred that if at all any charge was created by Kinjunje in favour of Coop Bank, the same was created without Equity’s knowledge or consent and the same was not registered against the original genuine title deed for the suit property which is still in its possession. Equity has averred that any charge purported to have been registered in favour of Coop Bank over the suit property was registered on a parallel and fraudulent title that was issued at the instance of Kinjunje, the Land Registrar, Patrick Njuguna and Wambui. Equity has averred that the intended sale of the suit which is based on the purported charge and title held by Coop Bank is a nullity. Equity has averred that whereas the Land Registrar abdicated its statutory duty thereby allowing the creation of a fraudulent parallel title for the suit property and the registration of the purported charge in favour of Coop Bank, Coop Bank was negligent in failing to carry out proper due diligence on the documents that were presented to it by Kinjunje.

Equity has averred that the charge registered against the title of the suit property on the basis of the said fraudulent title deed is fake and irregular and should be cancelled. Equity has averred that it is owed a lot of money by Kinjunje and as such it stands to suffer substantial loss and damage through extinction of its security over the suit property should Coop Bank and the auctioneer continue with the sale of the suit property. Together with the plaint, Equity filed an application dated 3<sup>rd</sup> August, 2016 seeking a temporary injunction restraining Coop Bank and the auctioneer from selling the suit property pending the hearing and determination of this suit.

#### Commercial Bank of Africa’s case:

Commercial Bank of Africa’s (Commercial Bank) case is that on 24<sup>th</sup> July, 2013, it agreed to make available banking facilities to Wardpa comprising of a term loan of Kshs.100,000,000/- and asset finance

facility of Kshs. 8,100,000/-. Commercial Bank has averred that it was a term of the offer of the said facilities that the same were to be secured by a charge over the suit property that was registered in the name of Wardpa. Commercial Bank has averred that Wardpa furnished it with a copy of the title deed for the suit property among other documents and it proceeded to carry out a search and a valuation of the property. Commercial Bank has averred that the valuation report and the certificate of official search issued by the Land Registrar confirmed that the suit property was registered in the name of Wardpa. Commercial Bank has averred that it was after it received this confirmation that a charge was registered against the title of suit property on 23<sup>rd</sup> January, 2014 to secure the said banking facilities that were advanced to Wardpa. Commercial Bank has averred that Wardpa defaulted in its loan repayment and owed Commercial Bank a sum of Kshs. 105,872,240.26 as at 31<sup>st</sup> July, 2016. As a result of this default in loan repayment, Commercial Bank served Wardpa with a statutory notice that was followed with an auctioneers 45 days redemption notice.

Commercial Bank has averred that on or about 27<sup>th</sup> July, 2016, its attention was drawn to an advertisement that was carried in the Daily Nation Newspaper of 18<sup>th</sup> July, 2016 in which the auctioneer had advertised the suit property for sale by public auction on 5<sup>th</sup> August, 2016. Commercial Bank has averred that inquiries made following this advertisement revealed that the auctioneer was acting on instructions from Coop Bank which was said to have a charge over the suit property. Commercial Bank has averred that in the said advertisement, Patrick Njuguna was indicated as the registered owner of the suit property. Commercial Bank has averred that it sought an explanation from Wardpa regarding the existence of a parallel title to the one in its possession over the suit property and the purported charge over the property in favour of Coop Bank but received no response.

Commercial Bank has averred that any purported charge that was created over the suit property in favour of Coop Bank was without its knowledge and consent and the same was not registered over the original title deed for the suit property which is still being held by it. Like Equity, Commercial Bank has averred that the purported charge that was created in favour Coop Bank over the suit property was registered against a parallel fraudulent title at the instance of Patrick Njuguna in collusion with the Land Registrar. Commercial Bank has averred that as at the time of registration of a charge in its favour over the suit property, the property was registered in the name of Wardpa and there was no other security registered against the title. Commercial Bank has averred that the charge registered over the suit property in favour of Coop Bank is null and void the same having been rooted on a fraudulent and fake title. Commercial Bank has averred that in view of the foregoing, the intended sale of the suit property at the instance of Coop Bank is similarly null and void. Commercial Bank has averred that the creation of a fraudulent parallel title in respect of the suit property in the name of Patrick Njuguna and the registration of a charge against the same in favour of Coop Bank was as a result of the Land Registrar's abdication of duty.

Commercial Bank has averred that the existence of a parallel title and a charge over the suit property in favour of Coop Bank were as a result of acts of fraud perpetrated by Wardpa, the Land Registrar and Patrick Kangethe and, the negligence of Coop Bank which failed to carry out proper due diligence on the documents which were presented to it by Patrick Njuguna. Commercial Bank has averred that it is owed substantial amount of money by Wardpa and as such it would suffer substantial loss and damage through extinction of its security if the intended sale of the suit property is allowed to continue. Together with the complaint, Commercial Bank filed a Notice of Motion application dated 4<sup>th</sup> August, 2016 seeking a temporary injunction to restrain Coop Bank and the auctioneer from selling the suit property pending the hearing and determination of this suit.

The defendants in the two suits are yet to file their statements of defence to the claims by Equity and Commercial Bank. Coop Bank, Kinjunje, Patrick Njuguna and Wambui have however responded to the two applications for injunction by Equity and Commercial Bank.

#### Co-operative Bank's case:

Coop Bank filed separate affidavits sworn by Debra AjwangOgada on 10<sup>th</sup> August, 2016 in response to each of the applications. In the two affidavits, Coop Bank has contended that the two applications for

injunction are bad in law and amount to an abuse of the court process. Coop Bank has contended that the two applications are meant to vex and frustrate Coop Bank in its legitimate exercise of statutory power of sale. Coop Bank has contended that contrary to the allegations by Equity and Commercial Bank, it is the two banks which were defrauded in advancing loans to Kinjunje and Wardpa on the security of fake and fraudulent titles. Coop Bank has contended that on 8<sup>th</sup> April, 2010, Patrick Njuguna, Edward Njuguna Kangethe and George James Kireru Kangethe (hereinafter referred to jointly as “the borrowers”) applied to Coop Bank for a financial facility. After considering the application, Coop Bank offered to the borrowers equity release financial facility of Kshs.161,000,000/- and an overdraft facility of Kshs. 5,000,000/- on the terms and conditions that were contained in the letter of offer dated 10<sup>th</sup> May, 2010. The borrowers accepted the offer and offered a number of properties including, Title No. Dagoreti/Riruta/2289 (the suit property) as securities. Coop Bank has averred that following the acceptance of the said facilities by the borrowers as aforesaid, Patrick Njuguna deposited with Coop Bank the original title deed for the suit property dated 29<sup>th</sup> August, 1997 in his name over which Coop Bank created a first legal charge on 18<sup>th</sup> August, 2010. Coop Bank has averred that following the registration of a charge in its favour over the suit property, it carried out an official search on the title of the suit property which confirmed the registration of the said charge.

Coop Bank has averred that whereas its charge over the suit property was registered on 10<sup>th</sup> September, 2010 against a title deed in the name of Patrick Njuguna that was issued on 29<sup>th</sup> August, 1997, Equity’s charge was allegedly registered on 23<sup>rd</sup> January, 2015 against a purported title for the suit property that was issued in favour of Kinjunje on 23<sup>rd</sup> May, 2014 while the charge in favour of Commercial Bank was registered on 23<sup>rd</sup> January, 2014 on a title issued on 23<sup>rd</sup> October, 2012. Coop Bank has averred that Patrick Njuguna has acknowledged the existence of its charge over the suit property in Mombasa High Court Case No. 50 of 2016. Coop Bank has contended that Patrick Njuguna has tried to stop it from exercising its statutory power of sale but has failed. Coop Bank has averred that it is inequitable for Equity and Commercial Bank to belatedly come to this court to frustrate the exercise of its statutory power of sale without placing any evidence before the court showing that its charge over the suit property was illegally and fraudulently registered.

Coop Bank has contended that there is no way in which the suit property could have been registered in the name of Wardpa on 23<sup>rd</sup> October, 2012 and Kinjunje on 23<sup>rd</sup> May, 2014 while its charge over the suit property which was registered on 10<sup>th</sup> September, 2010 was still in existence. Coop Bank has averred that it never consented to the transfer of the suit property to Wardpa or Kinjunje or to anybody else and if there was any such transfer, the same could only have been carried out fraudulently. Coop Bank has averred that since it has never released the original title deed for the suit property which was issued in 1997 to anyone, the registration of Kinjunje and Wardpa as proprietors of the suit property and the creation of charges over the suit property by them in favour of Equity and Commercial Bank are fraudulent, illegal, null and void.

Coop Bank has averred that the borrowers defaulted in the repayment of the loan and overdraft facilities that were advanced to them even after the same were restructured at their request. Coop Bank has averred that it served the borrowers with all requisite statutory notices but the borrowers did not rectify their default even after making several promises to do so. Coop Bank has averred that after the default continued, it carried out a valuation of the suit property and thereafter instructed the auctioneer to put up the same for sale by public auction to recover a sum of Kshs. 198,501,121.69 that was owed to it by the borrowers as at 20<sup>th</sup> May, 2016.

Coop Bank has averred that after the borrowers were served with the redemption notice by the auctioneer, they filed a suit against Coop Bank in Mombasa, namely, Mombasa High Court Civil Suit No. 50 of 2014, Patrick Kangethe Njuguna & 2 others vs. Co-operative Bank of Kenya & 2 others seeking injunction to restrain Coop Bank from selling among others, the suit property. Coop Bank has averred that the borrowers were granted a conditional temporary injunction which lapsed when they failed to meet the condition thus paving the way for the sale of the suit property.

Coop Bank has averred that there were obvious discrepancies in the documents which were presented to Commercial Bank by Wardpa when seeking a loan and if Commercial Bank had exercised due diligence and reasonable care, it would have realized that it was dealing with fraudsters and/or fake documents. Coop Bank has contended that Equity and Commercial Bank have not made any allegation of fraud against it in relation to the registration of its charge over the suit property. Coop Bank has averred that the titles for the suit property against which Equity's and Commercial Bank's charges were registered were issued several years after the title for the suit property dated 29<sup>th</sup> August, 1997 against which Coop Bank's charge was registered. Coop Bank has averred that it is improbable that the title against which Coop Bank's charge registered could have been fraudulently acquired before the titles against which Equity's and Commercial Bank's charges were registered came into being. Coop Bank has averred that Commercial Bank had realized that it was a victim of fraud by Wardpa and Patrick Njuguna and lodged a complaint against them with the Land Fraud Department of the Directorate of Criminal Investigations which is in the process of investigating the legality of the title deed held by Commercial Bank in respect of the suit property. Coop Bank has averred that investigation on the legality of the said title was stopped by the Court through an order that was issued on 14<sup>th</sup> July, 2016 in Mombasa High Court Judicial Review No. 54 of 2016. Coop Bank has averred that Commercial Bank having acknowledged that it may have been a victim of Wardpa and Patrick Njuguna's acts of fraud, cannot be allowed to delay or interfere with Coop Bank's exercise of its statutory power of sale. Coop Bank has averred that Equity and Commercial Bank have not satisfied the conditions for grant of the injunctive reliefs sought in their applications before the court.

#### Kinjunje, Patrick Njuguna and Wambui's cases:

Kinjunje, Patrick Njuguna and Wambui filed grounds of opposition in ELC No. 941 of 2016 in opposition to Equity's application for injunction. They have contended that the application is defective and filed for the sole purpose of vexing the defendants.

#### The submissions:

On 11<sup>th</sup> October, 2016, the cases by Equity and Commercial Bank were consolidated. On 28<sup>th</sup> November, 2016, the court directed that the injunction application dated 3<sup>rd</sup> August, 2016 by Equity filed in ELC No. 941 of 2016 and the injunction application dated 4<sup>th</sup> August, 2016 by Commercial Bank filed in ELC No. 947 of 2016 be heard together by way of written submissions. Commercial Bank filed its submissions on 31<sup>st</sup> January, 2017. Equity filed its submissions on 8<sup>th</sup> February, 2017 while Coop Bank filed its submissions on 2<sup>nd</sup> February, 2017. The other parties did not file submissions.

#### Analysis of the parties' respective cases:

I have considered the applications by Equity and Commercial Bank together with the affidavits that were filed in support thereof. I have also considered the replying affidavits by Coop Bank and the grounds of opposition by Kinjunje, Patrick Njuguna and Wambui that were filed in opposition to the applications. Finally, I have considered the written submissions by the parties' respective advocates and the various authorities that were cited in support thereof. What Equity and Commercial Bank have sought in the applications before me is a temporary injunction restraining Coop Bank from selling the suit property pending the hearing and determination of the consolidated suits. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In the case of Giella vs. Cassman Brown & Co. Ltd (1973) EA 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and that he might suffer irreparable injury which cannot be adequately compensated by an award of damages unless the order is granted. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR that was cited by Coop Bank, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 that was cited by Equity and went further to state as follows:-

*“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. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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.”*

The dispute before the court is principally between Equity Bank Limited (Equity), Commercial Bank of Africa Limited (Commercial Bank) and Co-operative Bank of Kenya Limited (Coop Bank). The dispute revolves around the validity of the securities (charges) that the three banks have created at different times over the parcel of land known as Title No. Dagoretti/Riruta/2289 (“the suit property”). From the material before me, the following facts are not in dispute. At all material times, the suit property was registered in the name of the Patrick Njuguna. The property was registered in the name of Patrick Njuguna on 29<sup>th</sup> August, 1997 as entry number 5 in the proprietorship section of the register of the property. On 18<sup>th</sup> August, 2010, Patrick Njuguna executed a charge over the suit property infavour of Coop Bank to secure a sum of Kshs. 94,500,000/-. The charge was registered on 10<sup>th</sup> September, 2010 as entry number 5 in the encumbrance section of the register of the suit property. On the same day, the Land Registrar issued a certificate of official search confirming that a charge had indeed been registered against the title of the suit property in favour of Coop Bank to secure the said amount of Kshs. 94,500,000/-.

On 23<sup>rd</sup> October, 2012, the suit property was transferred and registered in the name of Wardpa Holdings Limited (Wardpa) as entry number 9 in the proprietorship section of the register for the suit property. On 22<sup>nd</sup> January, 2014, Wardpa created a charge over the suit property in favour of Commercial Bank to secure a sum of Kshs. 100,000,000/-. The charge was registered on 23<sup>rd</sup> January, 2014 as entry number 4 in the encumbrance section of the register for the suit property.

On 23<sup>rd</sup> May, 2014, the suit property was once again transferred and registered in the name of Kinjunje Gardens Limited(Kinjunje) as entry number 11 in the proprietorship section of the register for the suit property. On 22<sup>nd</sup> January, 2015, Kinjunje executed a charge in favour of Equity to secure a sum of Kshs. 80,000,000/-. The charge was registered on 23<sup>rd</sup> January, 2015 as entry number 1 in the encumbrance section of the register for the suit property.

The loan by Coop Bank that was secured by a charge over the suit property was advanced to Patrick Kangethe, Edward Kangethe and George Kangethe Trading as Patrick Kangethe & Sons. The directors of Kinjunje who sought and were advanced a loan by Equity were, Patrick Kangethe Njuguna and Margaret Wambui Kangethe. The directors of Wardpa who sought and obtained a loan from Commercial Bank were Edward Njuguna Kangethe, George James Kireru Kangethe and Gladys Njeri Kangethe. It is clear from the foregoing that all the loans that were advanced on the security of the suit property were advanced to people who knew each other or were related and were working together in pursuit of the said loans.

As I have stated earlier in this ruling, the contention by Equity and Commercial Bank is that the intended sale of the suit property by Coop Bank in exercise of its statutory power of sale is illegal, null and void on the grounds that the charge infavour of Coop Bank over the suit property was created without their consent and that the same was not registered against the original title for the suit property but against a parallel fraudulent fake title which was created by Patrick Njuguna in collusion with the Land Registrar. The onus was upon Equity and Commercial Bank to place evidence before the court in proof of these allegations. I am in agreement with the submission by Coop Bank that, if some of the charges created over the suit property were created and registered on parallel fraudulent titles, the said charges could only be those that were created in favour of Commercial Bank and Equity and not the charge that was created in favour of Coop Bank. It is clear from the history of the various charges that I have narrated above that

the first charge that was registered against the title of the suit property was in favour of Coop Bank. When the said Charge was registered on 10<sup>th</sup> September, 2010, Patrick Njuguna was the registered owner of the suit property. The title of the suit property in the name of Patrick Njuguna against which the said charge was registered was issued on 29<sup>th</sup> August, 1997. Coop Bank has contended that the loan that was secured by the said Charge has not been paid and that the suit property remains charged to it as a security for the payment of the said loan. Coop Bank has contended further that it is still in possession of the original title for the suit property in the name of Patrick Njuguna and that Patrick Njuguna has not contested its charge over the said property.

There is no evidence before the court that Patrick Njuguna paid the loan that was advanced to him and his co-borrowers by Coop Bank and that Coop Bank discharged the charge over the suit property before the same was purportedly transferred to Wardpa and subsequently to Kinjunje. It is not disputed that in order of priority, Coop Bank's charge was the first security registered against the title of the suit property. The titles for the suit property against which the charges in favour of Commercial Bank and Equity were registered were not in existence when the charge in favour of Coop Bank was created and registered. It is therefore far-fetched to claim that the title of the suit property against which Coop Bank's charge was registered was parallel to the titles for the suit property in the names of Wardpa and Kinjunje against which the charges in favour of the two were registered. It is also absurd to suggest that Coop Bank should have sought permission or consent from Commercial Bank and Equity before registering a charge against the title of the suit property.

In my view, Commercial Bank and Equity have not demonstrated that they have a right over the suit property which has been threatened with violation by Coop Bank. The rights if any which they have over the suit property are secondary to that of Coop Bank for the reasons that I have given above. In the case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal cited with approval the High Court case Gitwany Investment Limited vs. Tajmal Limited & 2 others, (2006)eKLR where the court stated that:

*“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported)” – is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A. 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity...*

*What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again my view is that the answer lies in Section 23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appear, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere.”*

The Charge in favour of Coop Bank was created and registered under the provisions of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed). Section 42(1) of the said Act provides that:

*“Interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry, irrespective of the dates of the instruments and notwithstanding that the actual entry in the register may be delayed:*

*Provided that where an instrument is prepared in the registry it shall be deemed to have been presented on the date on which application for its preparation was made to the Registrar”.*

Section 70 of the Registered Land Act on the other hand provides that:

*“Where a charge contains an agreement, express or implied, by the chargor with the chargee that he will not transfer the land, lease or charge the land or any part thereof without the written consent of the chargee, the agreement shall be noted in the register, and no transfer by the chargor shall be registered until the written consent of the chargee, verified in accordance with section 110, has been produced to the Registrar”.*

As I have stated above, the Charge in favour of Coop Bank was the first in time. That charge must prevail against the subsequent charges registered against the title of the suit property. The charge in favour of Coop Bank had an agreement that Patrick Njuguna who was the chargor would not transfer, lease or charge the suit property without the written consent of Coop Bank. The existence of that agreement was noted in the register of the suit property. There is no evidence that Coop Bank consented to the transfer of the suit property to Wardpa or Kinjunje or to the charging of the same in favour of Commercial Bank or Equity.

Having carefully considered the evidence before me, I am not persuaded that Commercial Bank and Equity have a prima facie case with a probability of success against Coop Bank. I am unable to see any reason why Coop Bank should be stopped or delayed from exercising its statutory power of sale which has arisen. Commercial Bank and Equity have put forward a very strong and persuasive argument that since there is apparent evidence that Patrick Njuguna, Margaret Wambui Kangethe (Wambui), Wardpa and Kinjunje were involved in the fraudulent creation of parallel title deeds for the suit property, it is necessary that the sale of the suit property be stopped pending the hearing of the suit at which the court would be able to determine the validity of the various titles held by the parties. Whereas I am in agreement with the contention by Commercial Bank and Equity that there is a high likelihood that the persons mentioned above fraudulently with collusion of the Land Registrar created parallel title deeds for the suit property which they used to defraud Commercial Bank and Equity of hundreds of millions of shillings, there is no evidence that the transaction between Coop Bank and Patrick Njuguna was affected by the alleged fraud or that Coop Bank was involved. I am not persuaded that the charge in favour of Coop Bank may be nullified at the trial of the suit at the instance of Commercial Bank and Equity. This is because, there is no dispute that Patrick Njuguna was the registered owner of the suit property as at 18<sup>th</sup> August, 2010 when he charged the property in favour of Coop Bank and when the said charge was registered on 10<sup>th</sup> September, 2010. There is also no dispute that Coop Bank has not discharged that charge and that its statutory power of sale has arisen.

Commercial Bank and Equity have pointed out that a search conducted on the title of the suit property on 3<sup>rd</sup> February, 2016 revealed that there is in existence yet another title for the suit property issued on 20<sup>th</sup> November, 2007 in favour of Patrick Njuguna t/a Patrick Kangethe & Sons, Edward Njuguna Kangethe and George James Kangethe. Even the existence of this alleged fourth title cannot persuade me to stop the sale of the suit property. The alleged title was issued about 10 years after the title in favour of Patrick Njuguna against which a charge was created in favour of Coop Bank. It is the same Patrick Kangethe Njuguna, Edward Njuguna Kangethe and George James Kangethe who admitted in Mombasa High Court Civil Case No. 50 of 2016 that the suit property was charged to Coop Bank and that they owed Coop Bank Kshs. 198,501,121.69. If these people have admitted that the suit property was charged to Coop Bank in 2010 by Patrick Njuguna who acquired the title to the suit property in the year 1997, how can they be said again to have acquired the same property in the year 2007? I wish to add that, apart from showing that the Kangethes' may have been involved in the creation of multiple titles for the suit property which were used to defraud several banks, the existence of the said fourth title adds no weight to the case that has been pleaded by Commercial Bank and Equity against Coop Bank.

The next issue which I need to consider is whether Commercial Bank and Equity would suffer irreparable injury which cannot be compensated by an award of damages if the orders sought are not granted. I am in agreement with the submission by Coop Bank that the possible loss to Commercial Bank and Equity is quantifiable and as such can be compensated in damages. There is no evidence placed before the court that Coop Bank would not be able to pay damages to Commercial Bank and Equity should it turn out at the trial that Coop Bank had no right to sell the suit property.

Conclusion:

In view of the findings that I have made above, the two applications before me are not for granting. Commercial Bank and Equity have failed to satisfy the conditions for granting the injunctive reliefs sought. The upshot of the foregoing is that, the Notice of Motion dated 3<sup>rd</sup> August, 2016 by Equity Bank Limited and the Notice of Motion dated 4<sup>th</sup> August, 2016 by Commercial Bank of Africa Limited are dismissed. The costs of the two applications shall be in the cause.

**Dated and Delivered at Nairobi this 19<sup>th</sup> day of December, 2017**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

N/A	for the plaintiff in ELC No.941 of 2016
N/A	for the 1 <sup>st</sup> , 5 <sup>th</sup> and 6 <sup>th</sup> defendants in No. 941 of 2016
Mr. Wilson	for the 2 <sup>nd</sup> defendant in ELC No. 941 of 2016
N/A	for the 3 <sup>rd</sup> defendant in ELC No. 941 of 2016
Ms. Fatma	for the 4 <sup>th</sup> defendant in ELC No. 941 of 2016
Ms. Maina	for the Plaintiff in ELC No. 947 of 2016
N/A	for the 1 <sup>st</sup> and 5 <sup>th</sup> defendants in ELC No. 947of 2016
Mr. Wilson	for the 2 <sup>nd</sup> defendant in ELC No. 947 of 2016
N/A	for the 3 <sup>rd</sup> defendant in ELC No. 947 of 2016
Ms. Fatma	for the 4 <sup>th</sup> defendant in ELC No. 947 of 2016
Catherine	Court Assistant