



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. E034 OF 2020**

**ERIC KANJA WAIRIUKO .....PLAINTIFF/APPLICANT**

**V E R S U S**

**MARY MUTHONI NJUE .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENYA WOMEN MICROFINANCE**

**BANK LTD .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AND**

**EPICENTER AFRICA LIMITED .....INTERESTED PARTY**

**RULING**

(1) Before this Court is the Notice of Motion application dated 13<sup>th</sup> February 2020 by which ERICK KANJA WAIRIUKO the Plaintiff/Applicant seeks the following orders:-

1. SPENT

2. SPENT

3. THAT pending the hearing and determination of this application and the suit, the Honourable Court be pleased to issue an injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from advertising, selling, encroaching, entering, disposing or in any other way interfering with Land Parcels L.R Number 168/26 Rivers Edge Estate, Kianjogu Area, Limuru.

4. THAT pending the hearing and determination of this application and the suit the Honourable Court be pleased to issue an injunction barring the 2<sup>nd</sup> Respondent from publishing, forwarding or in any way listing the Applicant with the Credit Reference Bureau.

5. THAT pending the hearing and determination of the suit, the Honourable Court be pleased to suspend the interest on the loan facility held at the 2<sup>nd</sup> Respondent bank accruing until it's taken over by Barclays Bank.

6. THAT pending the hearing and determination of this application and the Suit, the Honourable Court be pleased to issue a mandatory injunction compelling the 1<sup>st</sup> Respondent to execute discharge of charge, transfer documents and any other documents that are necessary to transfer HOUSE NUMBER 12 situated on LR NUMBER 168/26 RIVERS EDGE ESTATE, KIANJOGU AREA, LIMURU to the Applicant.

7. THAT pending the hearing and determination of this application and the Suit, the Honourable Court be pleased to issue a mandatory injunction against the Respondents jointly and severally compelling them to grant the Applicant the option of first purchase over HOUSE NUMBER 12 LR NUMBER 168/26 RIVERS EDGE ESTATE, KIANJOGU AREA, LIMURU ROAD by private treaty to the Applicant herein at the prevailing market value and any excess funds after paying off outstanding loan be shared in pro-rata to the contributions made by each party.

8. THAT this Honourable Court be pleased to order that a status quo prevail and be maintained to the extent that the

**Applicant remain in possession of the suit property.**

**9. THAT this Honourable Court to grant such other or further order as it deems fit in the interest of justice; and**

**10. THAT costs of this application be provided for.**

(2) The application was premised upon **Article 40** of the **Constitution of Kenya, Sections 90 and 96** of the **Land Act, 2012. Order 40 Rule 1, 3, (2); 3, 4, 8 and 10** of the **Civil Procedure Rules, Sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21, Rule 3(1) and (2)** of the **High Court (Practice and Procedure) Rules** and all other enabling provisions of the law. The application was supported by the Affidavit of even date sworn by the Plaintiff/Applicant.

(3) **MARY MUTHONI NJUE** the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit dated **20<sup>th</sup> February 2020** in opposition to the application whilst **KENYA WOMEN MICROFINANCE BANK LIMITED** the 2<sup>nd</sup> Defendant/Respondent similarly opposed the application through the Replying Affidavit dated **24<sup>th</sup> February 2020** sworn by **BENARD KIPROTICH** a legal Counsel with the 2<sup>nd</sup> Defendant Bank. The application was canvassed by way of written submissions. Due to the interruption to Court sittings caused by the **COVID – 19** Pandemic the written submissions were not received by the Court until **December 2020**.

#### **BACKGROUND**

(4) Sometime in **December 2016** the Plaintiff/Applicant and the 1<sup>st</sup> Defendant/Respondent applied and obtained from the 2<sup>nd</sup> Defendant/Respondent (“**the Bank**”) a loan facility for the amount of **Kshs. 22,500,000/-**. The term of the loan facility was for **120 months** repayable at an interest of **23% per annum** by monthly instalments of **Kshs. 491,084/-**. The said facility was secured by a legal charge over the property known as **L.R. No. 186/26 (House No. 12)** situated in **Redhill Kiambu County** which property was jointly owned by the Plaintiff and the 1<sup>st</sup> Defendant. The Interested Party **EPICENTRE AFRICA LIMITED** a Company owned by the borrowers was to provide a duly executed corporate guarantee in favour of the Bank.

(5) The Plaintiff and the 1<sup>st</sup> Defendant resided in the suit property as a family together with their children until **14<sup>th</sup> August 2019** when the couple separated. The 1<sup>st</sup> Defendant averred that there is existing between the couple **Children’s Cause No. 1128 of 2019** as well as **Divorce Petition No. 804 of 2019**.

(6) On or about **September 2019** the Plaintiff/Applicant approached the Bank with a request to restructure the loan. At the same time the 1<sup>st</sup> Defendant/Respondent informed the Bank that she was not able to continue servicing the loan facility due to the financial difficulties being experienced by the Interested Party.

(7) Thereafter on or about **November 2019** the Plaintiff informed the Bank that he had negotiated with **Barclays Bank of Kenya Ltd** who had approved a mortgage loan to be granted to the Plaintiff in order to take over the loan facility with the 2<sup>nd</sup> Defendant Bank. Accordingly a Discharge of Charge was prepared to be executed by the Plaintiff and the 1<sup>st</sup> Defendant. However according to the Plaintiff the 1<sup>st</sup> Defendant maliciously refused to execute the documents to facilitate the Discharge of Charge from the 2<sup>nd</sup> Defendant and the charge of the suit property to **Barclays Bank of Kenya**. That this refusal by the 1<sup>st</sup> Defendant has left the take-over of the loan by Barclays Bank in limbo.

(8) With the facility still in arrears the 2<sup>nd</sup> Defendant Bank issued a demand letter to the Plaintiff and the 1<sup>st</sup> Defendant. Despite this demand the Plaintiff and 1<sup>st</sup> Defendant persisted in their failure to service the loan. It is at this point that the Plaintiff/Applicant filed the present application.

#### **ANALYSIS AND DETERMINATION**

(9) I have carefully considered the application before me the submissions filed by the parties as well as the relevant law. The fact that the Plaintiff and the 1<sup>st</sup> Defendant obtained a loan facility of **Kshs. 22,500,000/-** from the Bank is not in dispute. A copy of the Facility Letter dated **19<sup>th</sup> December 2016** is annexed to the 2<sup>nd</sup> Defendant’s Replying Affidavit dated **24<sup>th</sup> February 2020** (Annexure **BK”2”**). It is also not in dispute that the suit property which was jointly owned by the Plaintiff and the 1<sup>st</sup> Defendant was charged to the Bank in order to secure the debt. A copy of the legal charge appears as (Annexure **EKW’9’**) to the Supporting Affidavit dated **13<sup>th</sup> February 2019**. It is further not in dispute that the facility granted to the borrowers by the Bank fell into arrears and as a consequence the Bank did issue to the borrowers a demand letter dated **8<sup>th</sup> January 2020** (Annexure **‘BK4’**) to the Replying Affidavit dated **24<sup>th</sup> February 2019**.

(10) The Plaintiff /Applicant has sought orders of interim injunction to prevent the 1<sup>st</sup> and 2<sup>nd</sup> Defendant/Respondent from advertising, selling, encroaching, entering, disposing or in any other way interfering with the suit property. As pointed out by the 1<sup>st</sup> Defendant in her written submissions, as is a joint owner of the suit property, and not being an employee and/or agent of the Bank, the 1<sup>st</sup> Defendant has no capacity to advertise, sell or dispose of the suit property in order to recover the amount due on the loan. This is a right which the charge document bestows upon the bank alone (as chargee). Secondly this Court is sitting as a Commercial Court and thus the question of the 1<sup>st</sup> Defendants right of access to the suit property is one which properly lies before the Family Division. Accordingly the orders which the Plaintiff/Applicant seeks against the 1<sup>st</sup> Defendant cannot be granted by the Court in this Commercial suit.

(11) The Plaintiff/Applicant seeks interim injunctive orders as against the Bank. The principles upon which interim injunctive orders may be granted by this Court were clearly laid down in the case of **GIELLA –VS- CASSMAN BROWN & COMPANY [1973]** as follows:-

- (i) The Applicant must show a prima facie case with a probability of success.
- (ii) The Applicant must show that he stands to suffer irreparable loss if the orders sought are not granted.
- (iii) If in doubt the Court shall determine the application on a balance of probability.

(12) It is important to note that at this stage the Court is **not** required to make conclusive determinations on the questions in issue. In **NGURUMAN LIMITED –VS- JAN BONDE NIELSEN & 2 OTHERS [2014]eKLR** the Court of Appeal sated as follows:-

**“... in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the Applicant’s case is more likely than not to ultimately succeed.”**  
[own emphasis]

### **PRIMA FACIE CASE**

(13) The definition of a “prima facie” case was given in the case of **MRAO –VS- FIRST AMERICAN BANK LIMITED & 2 OTHERS [2003]KLR** where the Court held:-

**“... it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ... a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

(14) The Bank advanced to the Plaintiff and the 1<sup>st</sup> Respondent the sum of **Kshs. 22,500,000/-**. The contract between them provided that this amount was to be repaid in **120** equal monthly instalments of **Kshs. 491,084/-**. The borrowers failed to adhere to this and the facility fell into arrears. It is pertinent to note that neither the Plaintiff nor the 1<sup>st</sup> Defendant deny that the facility is currently in arrears. The consequences of failure to pay are made clear in the charge document which was duly executed by the borrowers.

(15) The Plaintiffs plea that he has reached an understanding with **Barclays Bank of Kenya** to take over the facility from the 2<sup>nd</sup> Defendant is neither here nor there. It is also immaterial that the 1<sup>st</sup> Defendant has failed and/or declined to execute the documents required to facilitate said transfer of the facility. The Plaintiff and the 1<sup>st</sup> Defendant approached the Bank jointly as borrowers. The fact that the two later fell out and cannot agree on how to deal with the overdue facility is not a valid ground upon which to seek injunctive orders.

(16) The Plaintiff/Applicant portrays himself as the victim pitted against the Bank on the one hand and the 1<sup>st</sup> Respondent on the other. This is **not** the case. The Bank had no prior relationship with the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent is **not** an employee or agent of the Bank. It was the Plaintiff who **together with** 1<sup>st</sup> Respondent approached the Bank for a loan facility. The parties cannot now seek to inconvenience the Bank on account of their own internal squabbles. The existence of a dispute between the joint borrowers is not valid ground for restraining the Bank from exercising its statutory power of sale. The fact of the matter is that the loan facility is in arrears and so long as the arrears remain outstanding the Bank is entitled in law to sell the suit property pursuant to **Section 90 and 96 of the Land Act, 2012**. In the premises I find that the Applicant has failed to show a prima facie case with any chance of success.

### **IRREPARABLE HARM**

(17) Courts will not ordinarily grant injunctive orders unless it can be shown that the Applicant is likely to suffer irreparable harm that cannot be adequately compensated by an award of damages in the event that the orders being sought are not granted. The Plaintiff/Applicant did not in my view argue let alone prove this point. Instead he goes off on a tangent blaming the 1<sup>st</sup> Defendant (with whom he borrowed the money) for their failure to service the loan facility. In the case of **JOHN NDUATI T/A JOHESTER MERCHANTS –VS- NATIONAL BANK OF KENYA LIMTIED (2006)I E.A 96**, the Court held that:-

**“A bank has no money of its own and it is axiomatic that it uses funds to trade with. The Applicant having obtained a large amount of those funds and had full benefit of it and having offered securities knowing fully well that they would be sold if he defaulted on the terms stated in the security documents, cannot be heard to say that the securities are unique and special to him as the bank is capable of refunding such sums as may be found due to the Applicant, if any, and that capacity has not been challenged.”**

(18) Likewise in **THOMAS NYAKAMBA OKONGO –VS- CO-OPERATIVE BANK OF KENYA LIMTIED [2012]eKLR**, it was held:-

**“Charged properties are intended to acquire or are supposed to have commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgages houses are**

**increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities .... Loss of the properties by sale is clearly contemplated by the parties even before the security is formalized. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the Respondent cannot pay damages should it become necessary.**” [own emphasis]

(19) The value of the charged property is quantifiable. In event that the suit is decided in favour of the Plaintiff, the value can be assessed and I am confident that the 1<sup>st</sup> Defendant being a commercial bank is in a position to compensate the Plaintiff for any loss that may be suffered as a result of such sale. This limb of irreparable harm has not been proved.

#### **BALANCE OF CONVENIENCE**

(20) This is a facility which by the admission of the borrowers themselves is in arrears. There has been no demonstration by either borrower of any steps taken to offset the debt. Indeed the 1<sup>st</sup> Defendant wrote to the Bank on 22<sup>nd</sup> August 2019 indicating that she was unable to make any more payment in respect of the loan facility (Annexure EKW’8’ to the Replying Affidavit dated 20<sup>th</sup> February 2020). The Plaintiff similarly has not taken any steps to pay the amount due. Instead he has resorted to clouding issues by raising in this application matters which properly belong to the **Family Division** of the High Court. In the **NGURUMAN LIMITED Case** [supra] the Court held as follows:-

**“... If the Applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the Court must further be satisfied that the injury the Respondent will suffer, in the event the injunction is not grant, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the Respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the Applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”** [own emphasis]

(21) Banks are not charitable institutions. They are in business to make profits and therefore default by a client in replying a facility adversely impacts on the business of the financial institution. In my view therefore the balance of convenience tilts in favour of the 2<sup>nd</sup> Respondent Bank.

(22) The Plaintiff/Applicant has prayed for mandatory injunctions to issue against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. This Court cannot and will not compel the 1<sup>st</sup> Respondent to execute any documents whatsoever. Just as the 1<sup>st</sup> Respondent freely approached the Bank in order to secure the loan she cannot be under any compulsion regarding her interactions with the Bank or with the Plaintiff.

(23) Secondly it is trite law that except in very exceptional circumstances Court will not issue mandatory injunctions at the interlocutory stage. In **MUCHA -VS- RIPPLES (Civil App. No. 186 of 1992)** Unreported, **Hon. Justice Cockar JJA** (as he then was) held as follows:-

**“A mandatory injunction need not be given at the interlocutory stage. It could be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it would not normally be granted. However, it would be granted if the case was; (a) clear and one which the Court (determined) to be decided at once, or (b) if the act done was a simple and summary one which could easily (b) remedied or (c) if the Defendant attempted to steal a match on the Plaintiff.”** [own emphasis]

(24) Similarly in **ROBAI KADILI AGUFA & ANOR VS KENYA POER & LIGHTING CO. LTD (2015)eKLR** which referred to **KENYA BREWERIES & ANOR –VS- WASHINGTON OKEYO (2002)eKLR (Supra)**, it was held that:-

**“Mandatory injunction cannot be granted in the absence of the existence of special circumstances.”**

(25) Further in **KENYA AIRPORTS AUTHORITY –VS- PAUL NJOGU MUNGAI & 2 OTHERS [1997]eKLR** referred to **SHEPHERD HOMES LTD –VS- SHADAHU 1971 1 Ch 34 Megarry J** held:-

**“It is plain that in most circumstances a mandatory injunction is likely, other things being equal, to be more drastic in its effect than a prohibitory injunction. At the Trial of the action the Court will of course grant such injunction as the justice of the case requires; but at the Interlocutory stage, when final result of the case cannot be known and the Court does the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is to enforce a contractual obligation.”**

(26) The Plaintiff/applicant herein has not demonstrated the existence of any special circumstances to warrant the grant of the mandatory injunctions prayed for. Accordingly I decline to grant prayers (6) and (7) of the application.

(27) The Plaintiff/Applicant has cited the **COVID-19** Pandemic as a ‘**force majeure**’ which affected his capacity to repay the loan. He seeks that the interest payable on the loan be suspended as a result. **Black’s Law Dictionary** defines ‘**Force Majeure**’ as “an event or effect that can be neither anticipated nor controlled. The term includes both acts of nature (e.g floods and hurricanes) and acts of people.” Undoubtedly the **Covid-19** Pandemic was an unexpected and devastating occurrence. However it is trite law that parties are bound by the contracts that they voluntarily sign.

(28) In **PANKAJ TRANSPORT PVT LIMITED –VS- SDV TRANSAMI KENYA LIMTIED [2017]eKLR** it was held that:-

**“A party pleading force majeure must prove that the failure to perform an obligation was a result of an impediment beyond his control and that he could not reasonably be expected to have taken the impediment and its effect upon his ability to perform the contract into account at the time of the conclusion of the contract and that he could not reasonably have avoided or overcome it or out load some of its effects.”**

(29) The Applicant has not shown exactly how the **Covid-19** Pandemic affected his ability to service the loan or how it affected his business. To simply plead force majeure is not enough. I find no valid and /or persuasive reasons to suspend payment of interest on the loan facility. It is pertinent to note that this loan facility fell into arrears way before the **Covid-Pandemic** struck the world. The Applicant cannot rely on the Pandemic (which occurred **after** the facility fell into arrears) as the reason for his failure to service the loan.

(30) The Plaintiff sought orders to prevent the Bank from listing him with the **Credit Reference Bureau**. He pleaded that the Kenya Government had prevented the listing of defaulters with the **CRB** during the **Covid-19** Pandemic. Under the **Banking (CRB) Regulations, 2020** a lender has an **obligation** to forward to the **CRB** names of customers who were in default. During the **Covid-19** Pandemic the Central Bank of Kenya in response to emergency measures announced by the Government of Kenya issued a **Gazette Notice No. 3096 of 8<sup>th</sup> April 2020** suspending for **six (6) months** listing of borrowers whose loans fell into arrears from **1<sup>st</sup> April 2020** to **30<sup>th</sup> September 2020**. However the Plaintiffs loan had fallen into arrears well before the **Covid-19** Pandemic struck. The Bank had issued a demand letter way back in **January 2020** three (3) months before the measures announced by the President on **25<sup>th</sup> March 2020**. Therefore the Plaintiffs loan **was not** covered by the said emergency measure and thus he cannot rely on this to prevent the Bank from giving his name to the **CRB** as is required by law.

(31) Finally based on the foregoing I find no merit in the present application. The Notice of Motion dated **13<sup>th</sup> February 2019** is dismissed in its entirety. Costs are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

Dated in **Nairobi** this 22<sup>ND</sup> day of **JANUARY, 2021**.

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**MAUREEN A. ODERO**

**JUDGE**