



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.E 374 OF 2019**

**ZIPPORAH WANJIRU NJENGA alias**

**ZIPPORAH WANJIRU KOIMBURI.....PLAINTIFF/APPLICANT**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**GARAM INVESTMENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is the Notice of Motion application, filed by the plaintiff **Zipporah Wanjiru Njenga alias Zipporah Wanjiru Koimburi**, and dated 18<sup>th</sup> October 2019. The plaintiff resides in the United States of America. The plaintiff seeks to stop by injunction the sale of her property.

2. It is not denied that the 1<sup>st</sup> defendant, Equity Bank of Kenya Limited, herein after the Bank, afforded the plaintiff loan facility by letter dated 8<sup>th</sup> January 2016. That facility was secured by a legal charge over the property Dangoretti/Riruta/1576. The plaintiff was required to hold sufficient funds in her saving/current account, with the Bank to ensure that the instalments due and payable on mortgage account were made on their due date.

3. The bank stated in this matter, and it is accepted by the plaintiff that there has been default in the repayment of the amount loaned.

4. When the Notice of Motion application was filed in court on 18<sup>th</sup> October 2019 the same was placed before me on 22<sup>nd</sup> October 2019. The hearing of that application was ex parte, because of the urgency. The urgency was that Bank had scheduled to sell the charged property by public auction. The affidavit in support of that application was sworn with the authority of the plaintiff by the plaintiff's brother. This is what he stated as the reason of default in repayment of the mortgage amount. The deponent, the plaintiff brother who is called John Karanja Njenga, stated that the plaintiff had been in default in her repayments because she experienced difficulties with online banking and she had notified the Bank of the same. Further it was deponed on behalf of the plaintiff that the bank had failed to serve the plaintiff with the requisite statutory notices before embarking on the auction of the charged property.

5. The replying affidavit of the Bank was sworn by Kariuki Kingori the legal manager of the Bank. He outlined all the statutory notices served by registered post, to the plaintiff's address in the USA, in compliance with Sections 96 of the Land Act 2012 and the notices served by the auctioneer.

6. The Bank through its manager stated that the plaintiff in approaching this court by her application was guilty of non disclosure and actively concealed facts.

7. The plaintiff did not file a further affidavit and accordingly the Bank's deposition that the plaintiff was served with all requisite statutory notices as far back as December 2016, when the mortgage account fell into default is uncontroverted.

8. The Bank was correct that the plaintiff is guilty of non-disclosure. She first wrongly stated that she experienced difficulty with online banking which was what led to the default. That now is clear was an untruth. The truth is that the plaintiff fell in arrear in the year 2016. The other truth is that the plaintiff was served with requisite statutory notices and not only served through the emails the plaintiff brought before court at ex parte stage.

9. At the ex parte stage the plaintiff needed to show utmost good faith (*uberrima fides*). This was what was stated in the case **Margaritta Villas Limited v Wananchi Credit Ltd & another (2019) eKLR** thus:

“The court of appeal discussed the need to provide relevant information at *ex parte* stage in the case: **UHURU HIGHWAY DEVELOPMENT LIMITED – VS- CENTRAL BANK OF KENYA & OTHERS CIVIL APPLICATION NO. 140 OF 1995**, where the justices had this to say:

“**Order 39 Rule 3 (1) of the Civil Procedure (revised) Rules (now Order 40 of the Civil Procedure Rules, 2010) permits the granting of ex parte injunctions but it must clearly be understood that a party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant material, including even material which is against his interest. The basis for this requirement is obvious. It is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders, whether they be injunctions or whatever, form an exception to this rule and for a party to benefit from the exemption, there must be a good and compelling reason for it.**

.... I would add my voice to that of my Learned brothers that there cannot be any legal authority for obtaining an ex parte injunction on one basis, and when it comes to the inter partes hearing of the application, a totally different or even a more detailed basis is advanced to support the ex parte order. A party who has obtained an ex parte order must be able to support that order, at the inter partes hearing, on the very same grounds upon which he was able to obtain it in the first place. I would also agree that the granting of ex parte injunctions should be the exception rather than that rule. Ole Keiwua, J. found as a fact that the applicant obtained the ex parte order of injunction by concealing from Githinji J. relevant material which it could have been in a position to disclose to the later learned Judge.”

10. The Plaintiff being guilty of material non-disclosure and not having utmost good faith is not deserving in this court’s exercise of its discretion in her favour.

11. Further through her submissions the plaintiff is disputing the amount due to the Bank alleging that the Bank illegally calculated the interest rate. It is trite that an injunction will not be granted because there is a dispute on the amount due – see the case of **Jim Kennedy Kiriro Njeru v Equity Bank (K) Limited [2019] eKLR**:

“In the case of **Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R)** (unreported), the court stated as follows: -

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see **Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725** and **Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.**”

The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in **Halsbury’s Laws of England Vol. 32 (4th Edition) paragraph 725** which says: -

“725. When mortgagees may be restrained from exercising power of sales—

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”

12. The Bank has proved the plaintiff is indebted to it, has shown the statutory notices were served on the plaintiff since there is default the bank cannot be restrained as plaintiff seeks.

13. The plaintiff has failed to meet the standard/principles of granting an injunction as held in the case **Giella va Cassman Brown & Co Ltd [1973] EA 358**. The plaintiff has failed to show a prima facie case with probability of success and has failed to show that she will suffer irreparable injury which cannot be compensated by an award of damages. Since I do not entertain in doubt on whether the plaintiff has met those conditions I will not consider where the balance of convenience lies.

14. There is no merit in the Notice of Motion dated 18<sup>th</sup> October 2019. It’s dismissed with costs. Mention is fixed for 29<sup>th</sup> July 2020 when orders will be made on case management conference and when a hearing date will be fixed.

**DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.**

**MARY KASANGO**

**JUDGE**

**ORDER**

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17<sup>th</sup> April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29<sup>th</sup>** day of **April, 2020**.

**MARY KASANGO**

**JUDGE**