



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.E002 OF 2019

JULIANA KINYA M'IKIUGU.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

1. Before this Court is the Notice of Motion dated **12th March 2019** by which **JULIANA KINYA M'IKIUGU**, (the Appellant/Applicant) seeks the following Orders that:-

“1. SPENT

2. THAT this Court be pleased to stay the Ruling and orders of the Magistrate’s Court issued on the 26th day of February 2019 until the Appeal is heard and determined.

3. SPENT

4. THAT the cost of this application be provided for.”

2. The Application which was premised upon **Section 3A, 1A, 1B the Civil Procedure Act and Orders 23, 40 and 43** of the **Civil Procedure Rules 2010**, was supported by the Affidavit sworn by the Plaintiff on even date.

3. KENYA COMMERCIAL BANK LTD, the Respondent filed a Replying Affidavit dated **26th April 2019**, sworn by **TOM OGOLLA**, the Head of the Litigation Department in the Bank, in which they opposed the Application for stay of execution.

4. The application was canvassed by way of written submissions. The Appellant/Applicant filed her written submissions on **2nd April 2019**, whilst the Respondents filed their submissions on **29th April 2019**.

BACKGROUND

5. This Appeal arises from the decision of the lower Court in **CMCC No.4211 of 2018** delivered on **26th February 2019**. In that decision the learned trial magistrate declined to grant an injunction restraining the Respondents, their agents and/or servants from dealing with the property known as Land Reference **Nairobi/Block 82/9044, Springfield Park Estate Maisonnets Number 2** pending the hearing and determination of the suit.

6. Being aggrieved by the decision of the trial Court the Appellant/Applicant filed the Memorandum of Appeal dated **12th March 2019**. The Appellant/ Applicant now seeks a stay of the ruling and Orders of the Magistrates’ Court pending the hearing and determination of the said appeal.

ANALYSIS AND DETERMINATION

7. I have carefully considered the submissions filed by both parties in this matter. The Appellant/Applicant submits that she has an arguable appeal. She further pleads that should the stay not be granted she stands to suffer irreparable harm as the suit property is the family home.

Lastly it is argued that the present application has been brought without delay.

8. On its part the Respondent Bank opposes the grant of any stay. They submit that the Appellant/Applicant does not have an arguable appeal and submitted that the balance of convenience favours the Bank.

9. The conditions upon which an injunction may be granted by the Court were set out in the case of **GIELLA –VS- CASMAN BROWN 1973 E.A** as follows:-

1. Whether one has a prima facie case.
2. Whether one stands to suffer irreparable harm due to failure to grant the injunction.
3. If in any doubt the case will be decided on a balance of convenience.

10. The Appellant/Applicant does not deny having benefitted from the facility granted by the Respondent Bank. Nor does the Applicant deny the fact that she is currently in arrears. There has been a continuing breach since the year 2017. The fact that the Appellant/Applicant is challenging the amount being claimed by the Respondent Bank cannot amount to sufficient ground for the issuance of an injunction to prevent the lender from exercising its statutory power of sale.

11. The Applicant pleads that if the injunctive orders sought are not granted, then she is likely to suffer irreparable harm. The plea that the suit property is the family home is merely an emotional argument. In **BII –VS – KENYA COMMERCIAL BANK**, the Court held that once a property has been offered as security for a loan facility it becomes a commodity for sale. The value of the suit property is quantifiable and in the event the Applicant succeeds in her appeal, then an award of damages would be adequate compensation. The Respondent is a Bank and I have no doubt they would be in a position to pay any damages awarded by the court.

12. The Respondent Bank did issue to the Applicant the requisite statutory notices, a fact which is not disputed by the Applicant. On the whole I find no merit in the present application for stay pending appeal and dismiss the same in its entirety and award costs to the Respondent.

Dated in **Nairobi** this 25th day of **November, 2019**.

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Justice Maureen A. Odera