REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

CIVIL SUIT NO 44 OF 2015

JANE WAMBUI MACHARIA……....…….PLAINTIFF

Versus

WAIS CAPITAL LIMITED…….....……..….1ST DEFENDANT

JOSEPH KAHOROMUNDIA

T/A UPSTATE KENYA AUCTIONEERS…….....….2ND DEFENDANT

RULING

[1] I have before the Court two applications by the Plaintiff. The first application is dated 4th February 2015 and the second is dated 18th March 2015. I will deal with each application as described above.

The first application

[2] The first application dated 4th February 2015 is brought pursuant to Order 40 Rules 1 & 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. In the said application, the Plaintiff sought the following orders inter alia;

1. **THAT this honourable Court do grant a permanent injunction restraining the Defendants, their servants and or agents in any manner howsoever selling and/or auctioning the parcel of land being LR No 1870/VI/158 Apartment B9 Bishan Plaza, Westlands Nairobi County pending the hearing and determination of the application inter-parties.**
2. **THAT this honourable Court do grant a permanent injunction restraining the Defendants, their servants and or agents in any manner howsoever selling and/or auctioning the parcel of land being LR No 1870/VI/158 Apartment B9 Bishan Plaza, Westlands Nairobi County pending the hearing and determination of the suit.**
3. **THAT the costs of this application be provided for.**

[3] The Applicant in the first application stated that the 1st Defendant advanced a loan facility to the Plaintiff upon security of a charge over the suit property. It was deposed to that the 1st Defendant purported to exercise statutory power of sale of the suit property by public auction, scheduled to take place on 10th February 2015. The auction was conducted without valuation of

the suit property and without the Plaintiff having executed any offer letter with the 1st Defendant. The application was further supported by the affidavit of Jane Wambui Macharia sworn on 4th February 2015. In addition to the above grounds, she averred that the Defendants completely fettered her right of redemption of the suit property and that the 1st Defendant was not mandated by the Central Bank of Kenya to lend money to borrowers and charge interest as a financial institution. She also contended that the 1st Defendant had not advanced the credit facility of Kshs 3,500,000/- as per the letter of offer, which was secured by a charge over the suit property.

The second application

[4] The second application is dated 18th March 2015 and is brought pursuant to Order 20 Rule 1 of the Civil Procedure Rules as well as Section 3A of the Civil Procedure Act. The Plaintiff sought for orders;

1. **THAT this honourable court to issue an order compelling the 1st Defendant to produce a running statement of account to the Plaintiff's credit account.**
2. **THAT the costs of this application be provided for.**

[5] The application is premised upon the grounds that the 1st Defendant had never disbursed funds to the Plaintiff on a loan facility which was secured by a charge over the suit property. It was averred that despite repeated demands by the Plaintiff for running statements of account of the loan facility, the 1st Defendant has failed and/or refused to give to the Plaintiff the said statements of account. The application was further supported by the affidavit of Jane Wambui Macharia sworn on 16th March 2015 in which she reinforced the above grounds. She averred that the Plaintiff was not aware of how the loan of Kshs 3,500,000/- which they had agreed was to be lent to the Plaintiff on the security of a charge over the suit property was disbursed.

Both applications were opposed

[6] Both applications were opposed by the 1st Defendant in its Replying Affidavits sworn on 20th February 2015 and 15th April 2015. It was deposed to that the Plaintiff had approached the 1st Defendant for a loan facility, and that the 1st Defendant advanced the sum of Kshs 3,500,000/- on or about 9th May 2014 to the plaintiff who acknowledged receipt thereof. The loan facility agreement was dated 10th April 2014. The loan was secured by a charge over the suit property. According to the 1st Defendant, the Plaintiff defaulted in repayment of the loan, necessitating the 1st Defendant to exercise its statutory power of sale under the charge. It was averred that all requirements of the law prior to exercising its power of sale had been fulfilled, including the issuing of a statutory notice, redemption notice and notice of sale. Further, it was contended that the Plaintiff had come to Court with unclean hands in claiming that the monies had not been disbursed to her and that therefore the equitable relief that she sought should not be awarded.

[7] The 1st Defendant emphasized that the Plaintiff falsely deposed that the loan was not disbursed, yet she acknowledged receipt of the same on or about 9th May 2014. Further, it was asserted that the Plaintiff, in an attempt to repay the amount, issued several cheques in favour of the 1st Defendant but which cheques were dishonoured.

DETERMINATION

[8] I will deal with both applications together as they are inextricably related. The Plaintiff's major contention is that the loan facility of Kshs 3,500,000/- was not disbursed to her. She also claimed that she had not executed any letter of offer for the loan facility and that in any event, the 1st Defendant had not provided statements of account with regards to the said loan. She did not stop there. She further contended that no valuation was carried out on the suit property before the

intended sale. She crowned it by stating that the 1st Defendant was not mandated as a financial institution. And, on those grounds she has sought for a permanent injunction against the Defendants.

[9] When a permanent injunction is sought at interlocutory stage, the Court has to carefully consider the facts of the case before it grants the relief because grant of such orders may determine the matter completely. Doubtless, an order for permanent injunction usually pre-empts the Defendants' right to a trial, and the Court would therefore grant such reliefs at interlocutory stage only on exceptional circumstances. See **Lansing Linde Ltd v Kerr [1991] 1 WLR 251**, that to obtain such relief, the claimant must show a *"more than arguable case"* or *"more than a merely serious issue to be tried."*But, the actual applicable test here should be the same as the one applicable in grant of mandatory injunctions at interlocutory stage as stated in ***Halsbury's Laws of England*** (4th Edition) at para 948 that:-

> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the Plaintiff … a mandatory injunction will be granted on an interlocutory application".**

[10] Therefore, in my view, the exceptional circumstance which prompts the court to consider issuance of a permanent injunction adds to the balance of convenience very important additional element. The court must be satisfied that the case is a clear one which the court thinks it ought to be decided at once without having to wait for trial. Also, if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the Plaintiff, the court will grant a permanent injunction at interlocutory stage. But, a case is a clear or the act is simple one or the defendant merely wants to steal a match from the plaintiff will depend on the nature of the case and the circumstances of each case. I will apply the above test in this case.

[11] These are the visible facts of this case. In the Replying affidavit sworn on 20th February 2015 in response to the Plaintiff's allegations, the 1st Defendant annexed a Credit Application and Agreement Form dated 10th April 2014. At Section 7 thereof, the Plaintiff executed the agreement, agreeing to the terms and conditions set out therein. Further at Section 8, the 1st Defendant approved the loan facility to be disbursed to the Plaintiff, and at Section 9the loan was to be disbursed in cash to the Plaintiff on 9th May 2014. The Plaintiff acknowledged receipt of the loan facility on 9th May 2014 as shown by the Acknowledgment of the same date. To secure the loan, a charge was created over the suit property and the entry thereof entered on the title on 27th June 2014.

[12] On 28th July 2014, the 1st Defendant issued a Statutory Notice pursuant to the provisions of Section 90 of the Land Act, Act No 6 of 2012. I see that a valuation of the suit property was carried out by Standard Property Services on 24th October 2014. On 24th November 2014, the 1st Defendant instructed the 2nd Defendant to dispose of the suit property to recover the loan on which the Plaintiff had defaulted. On 8th December 2014, the 2nd Defendant issued and served upon the Plaintiff a 45 days' redemption notice of intended sale of the suit property. The property was then advertised on 26th January 2015for sale by public auction. The auction was scheduled for 10th February 2015.

[13] Save for the contention that the 1st Defendant was not licensed to carry on lending business, the documents produced before the Court explicitly show that the Plaintiff and 1st Defendant had entered into an agreement in which the sum of Kshs 3,500,000/- was advanced to the Plaintiff. The Plaintiff defaulted in the repayment of the loan and she issued several cheques in favour of

the 1st Defendant but the cheques were dishonoured. Statutory notices were issued herein. Therefore, one wonders the purposes of issuing cheques in favour of the 1st Defendant. All these things are really entangled like wool and there is nothing that is clear. The facts of the case will need to be laid bare on full scale trial if they are to be determined effectually and completely. I do not think that the Plaintiff has shown that she has established a strong case for the grant of a permanent injunction. There are no exceptional circumstances that have been shown in order to compel the Court to warrant the orders prayed for. See **Parnas/Pelly v Hodges (1982) FSR 329** and **Aracia v Fallon (2011) EWCACiv 668**.

[14] After careful consideration of the application, I find that the issues raised are substantial especially; (1) whether the 1st Defendant is a financial institution which can lend money at interest and take security by way of charge; and (2) whether the loan was disbursed. These issues will need the court to probe evidence before determining them, and so I favour resolution thereof in a trial rather than in an interlocutory application. Accordingly, I decline to issue a permanent injunction at this stage. Thus, the first application is dismissed. However, given the issues at hand, a request for running accounts on the loan is not unreasonable at this stage. Such is an act or order which can comfortably be sought and issued even at pre-trial conference as part of discovery. Also, there will no prejudice that will be suffered by the 1st Defendant who claims the loan was disbursed and the plaintiff defaulted on repayment. Accordingly, I order the 1st Defendant to provide to the plaintiff a running statement of account in respect of the loan herein within 45 days of today**.** The upshot is that the second application succeeds to the extent expressly stated above. But, I will not make an order for costs in any of the applications given the circumstances of the case. It is so ordered.

Dated, signed and delivered in Court at Nairobi this 29th day of July 2015.

F. GIKONYO

JUDGE