



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Civil Suit 320 of 2012**

**JOEL NJEMA WARUIRU.....1<sup>ST</sup> PLAINTIFF/APPLIANT**

**NANCY WAMBUI NJEMA.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ROBERT KIBUNJA.....DEFENDANT**

**RULING**

The undisputed facts in this matter can be summarized as follows:

- i) the 1<sup>st</sup> plaintiff/applicant was the registered proprietor of NYANDARUA/OL KALOU WEST/563 (the suit property) and the 2<sup>nd</sup> plaintiff/applicant is his wife;
- ii) on 8<sup>th</sup> October, 2007 the 1<sup>st</sup> applicant and the respondent who was operating Roki Micro-Finance entered into an agreement in which the latter agreed to advance Kshs.30,000/=to the former on the security of the suit property;
- iii) the title deed to the suit property was deposited with the respondent;
- iv) it was a term of the agreement the advanced sum would be repaid at the interest rate of 18% or 25% upon failure by the applicant to repay within the stipulated period;
- v) it was a further term that the 1<sup>st</sup> applicant would forfeit the suit property if he failed to repay the principle sum or the interest thereon;
- vi) the 1<sup>st</sup> applicant has defaulted in the repayment of both the principle sum and the interest and upon further discussion the respondent caused the suit property to be transferred into his name.

The applicants have now moved the court for orders that the transfer of the title to the respondent be declared fraudulent, null and void and for the cancellation of the title deed issued to the respondent and subsequently the rectification of the register. In the meantime, the applicants have brought the present application for temporary orders of injunction pending the determination of this dispute. The applicants have challenged the powers of the respondent to transfer the property to himself on the ground of breach of contract.

The respondent for his part has maintained that the 1<sup>st</sup> applicant was bound by the terms of the contract and even sanctioned the transfer by surrendering the title deed to the respondent; that the 1<sup>st</sup> applicant obtained the consent of the Land Control Board before the transfer was effected and hence cannot be

heard to argue that the transfer was fraudulent.

I have considered these arguments and reiterate that I have no doubt in my mind that the 1<sup>st</sup> applicant borrowed Kshs.30,000/= and executed a written agreement which was witnessed.

This being an application for temporary injunction, I am at this stage only concerned with the issue of whether or not the applicants have a *prima facie* case with a probability of success and whether an award of damages will be adequate compensation. Of course if there is doubt then the court will consider the balance of convenience. See **Giella V. Cassman Brown & Company Limited** (1973) E.A 358.

The applicants have contended that the suit property constitutes their matrimonial home and that since there was no registered charge or mortgage on the property, the respondent could not transfer it to himself. The property is registered under the Registered Land Act (now repealed).

Without expressing a definite position at this stage, under that Act a charge to secure the payment of a debt must be in a prescribed form and must contain an acknowledgment that the chargor understands the chargee's remedies in case of a default. The Act further provides, in the alternative that the chargor will not transfer the land charged unless he was sued for the recovery of the money secured by the charge and the chargee is enjoined to exhaust all his other remedies against the charged property.

In other words, the respondent has not demonstrated that there was a charge or mortgage in terms of the Act to entitle him to transfer the suit property to himself. There is also no evidence that the procedure for the exercise of statutory power of sale was complied with. But more importantly is the question of the respondent's capacity in the transaction in question.

Lending of money in the manner reflected in the agreement in question is a preserve of recognized financial institutions. It will be recalled that before the repeal in 1984 of Money-Lenders Act (enacted in 1933 as an ordinance) due to lack of formal lending institutions, individuals could lend money and charge interests.

There were no regulations to check the activities of such individuals. For instance their interest rates were not regulated leading to serious abuse and suffering of the borrowers prompting the Legislature to repeal the Act. That brought the era of loan sharks or *shylocks* in Kenya to an end.

It would appear from the respondent's business name (ROKI MICRO-FINANCE) he considers his business a micro-finance. Again, at this stage, he has not demonstrated that his business is registered and he is licenced under the Micro-Finance Act, 2006.

For the reasons stated, I come to the conclusion that the applicants have demonstrated a *prima facie* case with a probability of success. The property is their matrimonial home and will suffer loss if the orders sought are not granted. They cannot be compensated adequately by an award of damages. For the same reason, the balance of convenience tilts in their favour.

In the result, there will be a temporary injunction in terms of paragraph 3 of the motion dated 23<sup>rd</sup> August, 2012.

Costs in the cause.

**Dated and Signed at Nakuru this 18<sup>th</sup> day of January, 2013.**

**W. OUKO  
JUDGE**

**Dated, Signed and Delivered at Nakuru this 5<sup>th</sup> day of February, 2013 by Hon. Justice M. J.**

**Anyara Emukule.**

**JUDGE**