



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 603 of 2012

MARY WANJIKU NGATIA.....1ST PLAINTIFF/APPLICANT

ANTHONY GEORGE KAMAU NJUGUNA.....2ND PLAINTIFF/APPLICANT

VERSUS

K-REP BANK LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. A brief statement of this matter is that the suit arises out of a loan agreement entered into between the 1st Plaintiff (hereinafter 1st Applicant) as the borrower, the 2nd Plaintiff (hereinafter 2nd Applicant) as the Chargor and personal guarantor and the Defendant (hereinafter Respondent) as the lending bank and Chargee. The 1st Applicant applied for a loan facility and overdraft with the Respondent on 16th February, 2011 and the same was approved through a letter of offer dated 17th March, 2011. The amounts were Kshs. 6,000,000/- by way of loan together with an overdraft facility of Kshs. 1,000,000/-, secured by a Legal Charge over property known as **L.R NO. KIAMBAA/KANUNGA/2007** Turitu Township, registered in the name of the 2nd Applicant (hereinafter “the suit property”). Further security required was a personal guarantee and indemnity executed by the 2nd Applicant and a Chattels mortgage over Motor Vehicles Registration Nos. KBE 972U and KAN 807H.

2. The 1st Applicant defaulted in making repayments on the facilities and in various missives from the Respondent, the latter made demands for the regularizing of the same. These were vide a letter dated 22nd November, 2011, a Final Demand dated 2nd December, 2011 and a Statutory Notice dated 30th January, 2012. On 2nd July, 2012 the Respondent, in exercising its statutory power of sale, issued instructions to auctioneers who on 12th July, 2012 prepared a Notification of Sale and Letter of Notice which were served upon the 2nd Applicant. The sale by public auction of the suit property was slated for 18th September, 2012. The Applicants, in objecting to the intended sale, filed the instant application. The same is dated 17th September, 2012 brought by the Applicants under the provisions of **Order 40 Rules 1, 2 and 3, Order 50 Rule 1** of the *Civil Procedure Rules (2010)*.

3. The 1st Applicant seeks for injunctive orders restraining the Defendant from selling, advertising for sale, charging, selling by private treaty or advertising for sale the suit property pending the hearing and determinations of her application and the main suit. The application is predicated on the grounds that the Respondent had moved in to sell the suit property and had advertised it for auction on 18th September, 2012. It is also the 1st Applicant’s contention that the Respondent refused to accept payment in arrears of Kshs. 390,000/- and threatened to recall the whole loan amount. This was after alleged consultations with the Respondent’s Manager on 14th September, 2012.

4. In a sworn affidavit dated 17th September, 2012 in support of the application, the 1st Applicant contends that she had been servicing the loan regularly but that the Respondent unilaterally varied the monthly installments by increasing them by Kshs. 40,000/-. The deponent admitted that the arrears as at 14th September, 2012 were Kshs. 390,000/- which, when this amount was offered in payment, the Respondent refused to accept. It is to be noted that the suit (the charged) property belongs to the 2nd Applicant who stands to lose it if the Orders sought are not granted.

5. In objecting to the application, the Respondent filed a Replying Affidavit of **JOSEPHINE MUSEMEBI**, its Legal Manager, sworn on 9th October, 2012. It is the Respondent's contention that the 1st Applicant failed to honour her obligations under the loan agreement, even after notice and demand letter were issued to her, and that the 1st Applicant has yet to make any payments on the outstanding debt which has continued accruing. It was also the Respondent's apprehension that the 1st Applicant being unable to pay the debt, any orders issued against the Applicants realizing the security would be prejudicial against them.

6. The grounds for an application for injunction are well set out in the case of **Giella v Cassman Brown (1973) E.A 358**. Spy, V.J (as he was then) held that at page 360;

“The conditions for a grant of an interlocutory injunction are now I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience.” (underlining mine).

The English Court also propounded the principles of granting interlocutory injunctions in the case of **Films Rover International Ltd & Others v Cannon Films Sales Ltd [1983] 3 All ER 772** where Hoffmann J held;

“In determining whether to grant an interlocutory injunction the question for the court was not whether the injunction sought was mandatory or prohibitory but whether the injustice that would be caused to the Defendants if the Plaintiff was granted an injunction and later failed at trial outweighed the injustice that would be caused to the Plaintiff if an injunction was refused and he succeeded at trial.” (Again underlining mine).

7. To succeed in such an application, the Applicants have to show what irreparable loss it is that they stand to suffer should the order not be granted. They also have to establish a *prima facie* case with a high probability of success. The court has to look at the merits of each application and the circumstances that surround the whole case. In the instant matter, the 1st Applicant alleged that the arrears and default in repaying the loan began after the Respondent unilaterally increased the installment amount to over Kshs. 200,000/- per month. In her affidavit in support of the application, she averred that she has struggled to pay the new installment amount increased by higher interest being charged by the Respondent, which subsequently led to her being in arrears. Further, she alleges that the Respondent bank did not issue her with a valid statutory notice of sale. Despite that, however, she was willing to pay the monthly installments if the Respondent bank co-operates. She does not specify what sought of co-operation she intends for the Respondent to engage her in.

8. During the hearing of the application on 15th February, 2013, counsel for the 1st Applicant submitted that if the Respondent was to go back to the original monthly installments, then the 1st Applicant would never be in arrears. It was not in contention as whether she was able to pay but whether the Respondent should not have unilaterally increased the repayment amounts, without notice. Mr. Waiyaki for the Respondent submitted in response to the 1st Applicant's allegations, by stating that the 1st Applicant was in arrears even before the repayment amounts were increased. Under the letter of offer as well as the Charge, the Respondent reserved the right to change the installment amount, as well as having the power

to exercise its statutory power of sale.

9. I have taken into account further useful authorities including those of this Court in determining the issue of granting injunctive orders. In the case of **Eleonora Cozzi v Ali Hussein Motors H.C.C.C Malindi No. 16 of 2001** Onyancha, J held:

“Therein (Belle Maison Ltd v Yaya Towers Ltd) he (Bosire, J) thoroughly examined the circumstances under which the court has and will grant the remedy. I concur and adopt his reasoning therein. As I understand it, the jurisdiction must be exercised only in special circumstances which will obviously depend on the circumstances of each case. It is available not under Order 39 or under any order of the same but under the inherent power of this court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of this court as provided under Section 3A of the Civil Procedure Act.”

In the case of **Cambridge Nutrition Ltd v BBC [1990] 3 All E.R 523 CA**, it was held that an injunction would be granted to remedy an injury already suffered or to prevent an injury occurring. This was the position as reiterated in the case of **E. Muiru Kamau & Another v National Bank of Kenya Ltd (2009) eKLR** where it was held;

“... Some of the principle aims of the overriding objective include the need to act justly in every situation; and the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality for all is maintained and that as far as is practicable to place the parties on equal footing.”

10. Having considered the application, affidavits and documents, there is no dispute that the 1st Applicant was and is indeed in arrears and defaulted in making repayments to regularize the loan amounts. In her affidavit, at paragraph 11, she admits that she was indeed in arrears in the amount of Kshs. 390,000/-. I believe her when she says that she tried to make repayments to the Respondent, but which it refused to accept. She also deponed to the fact that her business did collapse over a certain period as between December, 2011 and April, 2012 but even so, she had continued to make repayments. The Respondent issued its first letter of warning to the 1st Applicant dated 22nd November, 2011, seeking payment of the outstanding arrears. From that letter, it can be deduced that the parties had previously communicated to try to regularise repayments. It reads in part:

“...the above matter has been subject to numerous telephone conversations between the bank and yourselves after the advance of Kes. Six Million (6,000,000). Note that the monthly installments have not been honoured as per the loan agreement.”

In her affidavit, at paragraph 4, the 1st Applicant details:

“4. THAT in February, 2012 the Defendant unilaterally varied the monthly installments increasing the same by Kshs. 40,000/- which I struggled to raise”.

11. From the letter from the Respondent to the 1st Applicant dated 22nd November, 2011 and by the 1st Applicant’s own admission in the Affidavit at paragraphs 4 and 5, the 1st Applicant had been in arrears before the increase in repayment amounts in February, 2012. Her inability to pay the amount, therefore, does not stem from the increase in repayment amounts but such was a pre-existing default. The 1st Applicant has also not been able to comply with the Court’s Orders issued on two occasions i.e. on 17th September, 2012 for the deposit of Kshs. 380,000/- into court and on 13th December, 2012 for the payment of Kshs. 167,000/- per month to the Respondent to off-set the loan. This inability to pay lends credence to the Respondent’s apprehension that the 1st Applicant may be unable to pay the outstanding balance. That is the real reason for its submission that allowing the application would not only be prejudicial, but also subject the Respondent to real and eminent financial detriment.

12. In following the principles propounded for the granting of interlocutory injunctions in the **Giella v**

Cassman Brown case (supra), I find that 1st Applicant has failed to establish a *prima facie* case with a probability of success and has thus failed to establish even the first condition for the granting of an interlocutory injunction. In my opinion, the Defendant must be allowed to exercise its statutory power of sale as the Plaintiffs herein have been given ample opportunity to regularise the loan position of the first Plaintiff with the Defendant bank. Consequently, I dismiss the Plaintiffs' Notice of Motion dated 17 September 2012 with costs to the Defendant.

DATED and delivered at Nairobi this 20th day of March 2013.

**J. B. HAVELOCK
JUDGE**