



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ENVIRONMENT AND LAND NO. 120 of 2013

ZIPPORAH WAMBETI KINYUA &
ANO.....APPLICANTS/PLAINTIFFS

VS

K-REP BANK LTD &
ANO.....RESPONDENTS/DEFENDANTS

RULING

The application herein is dated 13th May, 2013. Prayers 1 and 2 are spent. Prayers 3 and 4 seek orders:

3. THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of injunction restraining the 1st defendant their agents, servants, employees and whomsoever acting on their behalf or instructions from selling, auctioning, advertising for sale or in any manner whatsoever from dealing with Land Reference No.

KARINGANI /NDAGANI/4571.

4. THAT the costs of this application be provided for.

The applicants claim that the 1st defendant has engaged the 2nd defendant to advertise, sell and/or auction Land Reference No. KARINGANOI/NDAGANI/4571 on which they run a school business in the name of Sweet Angels Chuka Primary School. The applicants do concede that they obtained a loan in the sum of Kshs 3,200,000/=

from the 1st defendant. They, however, claim that the repayment installments per term were varied by the 1st defendant without any written notification or explanation. They argue that the variation of the rate of interest and levying of illegal charges has contributed to their present predicament. Indeed, in the plaint they pray for declaration that the variation in interest and other charges be declared illegal and unlawful. The applicants have submitted that they merit the order sought as they would suffer

irreparable damage, had established a Prima Facie case and that the balance of convenience tilted in their favour.

The 1st defendant's case is that there is no dispute that the applicants had obtained a loan, had been unable to service it, thereby occasioning default and hence it had a right to redeem the security offered by the applicants. The 1st defendant explained that, although the applicants were denying it, due process had been followed.

I have looked at the averments of the parties. Their submissions and the authorities they have preferred. There is no dispute that the applicants obtained a loan from the 1st defendant. Indeed in her supplementary affidavit sworn on 13th day of June, 2013 at paragraph 13, she admits indebtedness and says; “ **THAT we are willing to negotiate with the 1st Defendant/Respondent on the way forward in this matter. However, it is our contention that no one should be allowed to unjustly benefit from any illegal and unlawful acts**”

Many of the issues raised herein can only be fully ventilated during the hearing of the suit. I agree that the authorities relied upon are good law including the case of *Mrao Limited Vs American Bank of Kenya Limited and 2 others* which the respondents referred to, to postulate that “**a dispute as to the amount owing or interest charged is not a ground for grant of the orders sought**”. One of the prayers sought by the applicants in their plaint is a declaration that “**the interest and other charges on account of the 1st defendant and the variation of interest rates without notifying the plaintiffs and increasing repayment installments without any written notification or explanation to the plaintiffs is illegal and unlawful.**” As I have already said, claims such as this one can only be determined after the hearing of the case. I, however, do not deem this claim by the applicants as just a dispute. It is central to the eventual determination of this suit.

The classic case in the area of injunctions is *GIELLA verses CASSMAN BROWN (1973) E.A 388*. The following principles are enunciated therein.

- 1. An application should show a prima facie case with a probability of success.**
- 2. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss and,**
- 3. when the court is in doubt, it will decide the application on the balance of convenience.**

I am satisfied that the applicants have satisfied the court that they have a prima facie case. Their claim regarding alleged unconscionable variation of interest rates and

other charges require ventilation during the hearing of the suit. Loss of school premises such as the one the applicants are running on the suit land, where as deponed by the 1st Applicants, there are even Class 8 K.C.P.E candidates who may be affected if the intended auction takes place, may amount to irreparable loss. By saying so, I am not absolving borrowers from their obligations to repay loans. I, therefore, urge the applicants, as they have intimated they wish to do, to negotiate successfully with the 1st defendant, if they can. This should not be seen to be pre-empting the hearing and determination of this case on its substantially veritable merits.

Having said that, to me the balance of convenience tilts in favour of the applicants, They are running a school on the suit land and its auction will be prejudicial to them even beyond monetary compensation. That the 1st respondent, a bank, can pay monetary compensation to the applicants should it succeed in this suit is not in doubt. However, not in all circumstances, can the capacity to compensate by way of monetary damages, be an overriding consideration before an order of injunction can be granted.

In the circumstances, the application dated 13th may, 2013 is allowed. Parties are directed to comply with Order II of the Civil Procedure Rules within 60 days and list the case down for hearing on priority basis.

Costs shall be in the cause.

**Delivered in Open Court at Meru this 20th day of August 2013 in the presence of; Court clerk;
Mwonjaru**

Nyenyire present for Plaintiffs/Applicants

Mburugu holding brief for Muriuki for defendants

P.M. NJOROGI JUDGE