



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 773 OF 2012**

**KEZIAH NJAMBI MAINGI T/A ARRIVAL TEXTILE SHOP.....  
..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....  
.....1<sup>ST</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion application dated and filed on 20<sup>th</sup> December, 2012 the Plaintiff sought the following order:-
  - i. Spent
  - ii. Spent
  - iii. **That an Order of Temporary Injunction do issue restraining the Defendant whether by themselves, their authorized agents, servants, employees, workers or other otherwise howsoever from recalling the loan of Kshs. 16,000,000/= advanced to the Plaintiff and the late Samuel Mangi Kibe, charging any punitive penalty interest on the Mortgage Loan Account Number 2025607506 and/ or taking any steps toward realization of the charged security in respect to the property know as L.R No. 25404 Grant L.R 87128/1 Tigoni, and/or in any other manner whatsoever adversely dealing with the Mortgage Loan Account Number 2025607506 and/or acting in breach of the contract contained in the Letter of Offer dated the 29<sup>th</sup> June, 2012 and the Legal Charge dated the 6<sup>th</sup> August, 2012, pending the hearing and determination of this suit.**
  - iv. **That the costs of this application be provided for.**
2. The Plaintiff relied on several grounds to support her application. In summary, the Plaintiff contended that together with her husband, Samuel Maingi Kibe ( hereinafter referred to as deceased) who died on 1<sup>st</sup> September, 2012, they executed an equitable charge over LR No. 25404 Grant LR. 87128/1 Tigoni in favour of the Defendant on 8<sup>th</sup> August 2012 in respect of a Business Mortgage Loan in the sum of kshs. 16,000,000/= which they had applied for on/or about 25<sup>th</sup> May, 2012.
3. The Plaintiff further stated that on 12<sup>th</sup> July, 2012, they were found eligible by the Defendant's insurer, for the Group Mortgage protection Policy for the sum assured of kshs. 16,000,000/=. The premiums and those of the Fire Insurance Cover which were to be debited from their account

- Number 2025607506 and remitted directly to the Defendant's insurer.
4. She added that she believed she was not expected to make any further payments in respect of the loan as the risk insured had already materialized and she in fact began processing the mortgage life insurance cover taken out in respect of the deceased.
  5. It was the Plaintiff's argument that on 24<sup>th</sup> September, 2012, the Defendant wrote to its insurers M/S The Kenya Alliance Insurance Co Ltd requiring them to process the claims in respect of the outstanding loan amounts but on 9<sup>th</sup> November, 2012, the Defendant informed her that the proposal for protection was not finalised due to her own omission and/or commission as a result of which she was in breach of the undertaking and covenants contained in the charge dated 6<sup>th</sup> August, 2012. She attributed the state of affairs to the demise of the deceased.
  6. The Defendant had threatened to take steps to realise the suit premises. This would expose the Plaintiff to irreparable loss as the said sum demanded was not within her reach at the moment. In a subsequent Notice of Motion application dated and filed on 5<sup>th</sup> June, 2013, which the Plaintiff withdrew as it was spent, the Defendant had commenced the process of realising its security as was evidenced by a copy of the Notification of Sale dated 23<sup>rd</sup> May, 2013 by M/S Valley Auctioneers.
  7. The Plaintiff's supporting Affidavit sworn on 20<sup>th</sup> December, 2012 set out *in extenso* the aforesaid grounds. There will therefore be no need to reproduce the contents therein in this ruling.
  8. In a Replying Affidavit sworn on its behalf on 5<sup>th</sup> February, 2013 by its Legal Counsel, Waweru Mathenge, the Defendant contended that the aforementioned facility was advanced to two (2) individuals namely the Plaintiff and the deceased both t/a Arrivals & Textile Shop and that the business devolved upon the Plaintiff upon the demise of the deceased.
  9. The Defendant added that the death of one of the partners did not vitiate the duty of repayment by the borrower because such obligation was equal upon the Plaintiff and the deceased. It also averred that the security was jointly registered in the name of the Plaintiff and the deceased which devolved upon the Plaintiff upon the demise of the deceased.
  10. The Defendant argued that it reversed the debit of the premiums it was remit to M/S Pan Africa Life Assurance Co Ltd upon the instructions of the Plaintiff and the deceased as they preferred cover with Kenya Alliance Insurance Co Ltd and of which they said they would make payments directly to the said company. This reversal was done on 21<sup>st</sup> August, 2012 as was evidenced in the Statement of Account annexed to the said Replying Affidavit exhibit Marked "WM1".
  11. It was the Defendant's contention that the Plaintiff was aware that the reversal of the debits that the Defendant had effected on 13<sup>th</sup> August, 2013 and there not having been any mortgage protection policy, its right to realise its security had crystallised and that it was empowered to recall the said loan pursuant to Section 90 of the Land Act.
  12. In her written submissions dated 11<sup>th</sup> March 2013 and filed on 12<sup>th</sup> March 2013, the Plaintiff argued that she had made out a good case with high chances of success for the reason that together with the deceased, they had met all the contractual obligation and had in fact given the Defendant irrevocable standing order instructions to debit their account Number 2025607506 with the monthly repayments of Kshs. 329,627/= and the premiums in respect of the Mortgage Loan Life Protection Cover and Fire Insurance Cover. She further argued that it was the responsibility of the Defendant to have fully insured the loan with the Kenya Alliance Insurance Co Ltd under its Group Mortgage Loan Protection Cover.
  13. It was her submission that if indeed there was no cover with The Kenya Alliance Insurance Co Ltd, then the Defendant would not have bothered writing to the said insurance company for the Plaintiff's claim, which claim would have been a non-starter *ab initio*. The said letter was dated 24<sup>th</sup> September 2012.
  14. The Plaintiff further argued that even if the court were to find that together with the deceased husband they were to blame for lack of the loan protection assurance cover or they failed to avail the requisite insurance premiums when they fell due, her equitable right of redemption had not been extinguished. It was her case that it was premature for the Defendant to have exercised its options under Section 90 of the Land Act since she had not defaulted in paying the loan arrears demanded by the Defendant or breached any term or condition of the loan facility or contravened clause 7(a) of the charge.
  15. It was the Plaintiff's further submission that she would suffer irreparable loss and damage that

- could not be compensated by way of damages. She contended, that together with the deceased, they had spent a fortune purchasing the suit property which was to serve as a residential house as a result it was necessary to safeguard her interests as a widow.
16. The Plaintiff also argued that if the court was in doubt, then it could still decide this case on a balance of convenience. She averred that the Defendant would not suffer any prejudice as it still held on the security and that once restrained, the Defendant could not recall the loan or charge any punitive penalty interest.
17. It was therefore the Plaintiff's submission that she was entitled to an interlocutory injunction as she had satisfied the first two (2) tests in the case of **Geilla Vs. Cassman Brown**. She added that in **"Civil Appeal No 39 of 2002 Mrao Limited vs First Amerian Bank of Kenya Ltd it was held that A prima facie case in a civil application includes but is not confined to a genuine and arguable case."**
18. On its part the Defendant filed its submissions dated 13<sup>th</sup> March, 2013 on 14<sup>th</sup> March 2013. It argued that the Plaintiff had failed to establish that she had a *prima facie* case with probability of success because the Defendant was under no obligation to take out a life cover on behalf of the Plaintiff and the deceased. It relied on Special Condition (c) of the letter of Offer – Business Mortgage Loan dated 29<sup>th</sup> June 2012 marked "KNM 1" annexed to the Plaintiff Supporting Affidavit which stipulated as follows:-

**(c) That a Mortgage Protection Cover for Kshs. 16,000,000/= was to be taken over the borrowers and pro rata premium amount for the period up to the last day of the month of February was to be debited from the borrowers' account number 2025607506.**

19. It added that clause 6(e) of the charge also annexed to the said Supporting Affidavit and marked as "KNM 4" provided as follows:-

**"...that during the continuance of this Charge, the Chargors or borrowers shall;**

**e. Deposit with the bank the Chargor's and the Borrowers policies of insurance..."**

20. The Defendant further argued that in good faith but not bound debited the said account with premises which sums were remitted to M/S Pan Africa Life Assurance Co Ltd. The said debits were reversed after the Plaintiff and the deceased indicated that they preferred a cover with The Kenya Alliance Insurance Co Ltd and they were therefore to blame for having failed to effect insurance with their preferred insurer.
21. It was therefore the Defendant's case that it was the duty of the Plaintiff to take out the insurance cover and that it was not expressly bound by the Charge to either effect or keep up any insurance over the borrowers or chargers.
22. As regards the liability of the Plaintiff after the deceased died, the Defendant contended that the debit devolved to the Plaintiff as the partnership was the borrower of the monies from the Defendant. They relied on Section 46 of the Partnership Act that states that upon the demise of one of the partners, the business is devolved upon the surviving partner which is what purportedly happened in this case. It reiterated this point by referring the court to the case of **Marcy Munjiru vs National Bank Limited [2011] eKLR** the court in upholding Section 8 of the Partnership Act and liability of Partners stated:- **"One of the major characteristics of a partnership is each partner's personal liability for any legal actions and debts of the partnership.....the loan was actually advanced and used by the School. In the circumstances I agree with counsel for the Respondent on the law of partnership... the Appellant was clearly liable to the Respondent"**
23. The Defendant therefore argued that the Plaintiff was contractually liable to pay the said debt which she had defaulted in paying the virtue of Section 74 of the Registration of Titles Act ( now repealed) which provided as follows:-

**"Section 74(1) provides that: if default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the charge may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement,**

as the case may be.

**(2) If the charger does not comply, within three months of the date of service, with a notice served on him under sub-section (1), the charge may –**

- a. **appoint a receiver of the income of the charged property; or**
- b. **sell the charged property:**

24. The Defendant also referred the court to the cases of **Insignia Limited Vs. Tadock East Africa Ltd & 3 others [2012] eKLR, Hccc. 570 of 1998 Pelican Investment Ltd Vs National bank of Kenya Ltd** (unreported) and **National Bank of Kenya vs Alfayo Onyango Riako [2012] eKLR** where parties are bound by the terms of the contracts they entered into and that the mortgagee will not be restrained from exercising its statutory power of sale unless the mortgagor pays the amount due.

25. The question of whether the Plaintiff had *locus standi* to bring the proceedings herein come into sharp focus. The Defendant pointed out that the Further Charge marked as “KNM 4” expressly defined the parties to the charge and therefore contended that the Plaintiff herein had no legal rights over the subject of the suit and was thus denied the *locus standi* to institute the proceedings herein. It emphasised that the borrower was not the charger therein.

26. It relied on the case of **Insignia Limited vs Zadock East Africa Ltd & 3 others [2012] eKLR, HCCC. 570 of 1998 Pelican Investment Ltd vs National bank of Kenya Ltd**

( unreported) and **National Bank of Kenya vs Alfayo Onyango Riako [2012] eKLR** where the court relied on the case **Venture Capital & Credit Ltd vs Consolidated Bank of Kenya Ltd. Civil Application No Nai 349 of 2003** the Court of Appeal held:

**“where the suit property does not belong to the applicant, and the owner is not a party to the suit and has not challenged the intended exercise of the statutory power of sale by the bank, the applicant has not shown that if the injunction is not granted, the appeal, if successful will be rendered nugatory so that even if the suit property is sold, the applicant will not lose any proprietary right to the property and in the circumstance, if the appeal succeeds damages would be the only relief appropriate to the applicant if it is not said that the Respondents’ bank has no means to pay compensation that may be ordered.”**

27. The Defendant therefore urged the court to find that the Plaintiff had not satisfied the tests of **Geilla Vs. Cassman Brown Co. Ltd [1973] EA 358.**

- a. The criteria set out in the **Geilla Vs. Cassman Brown Co. Ltd case (supra)** is that a court must be satisfied that:-
- b. **The applicant had established a prima facie case with probability of success;**
- c. **The applicant stood to suffer irreparable loss which could not be compensated by an award of damages; and**
- d. **The court was in doubt and that the application would be decided on a balance of convenience.**

28. The court’s role is limited to establishing whether or not an Applicant of an interlocutory injunction has been able to satisfy the conditions of the said case. An injunctive order is granted to preserve the subject matter of a suit pending the hearing and determination of the case.

29. The court has carefully considered the pleadings and the parties’ submissions and noted that it was apparent that there was no Mortgage Life Protection Cover. There were accusations and counter accusations as to who was liable for not having effected the Insurance Policy.

30. It is evident from the Statement of Account that premiums in the sum of 106,256/= were deducted on 13<sup>th</sup> August 2012 but the entry was reversed on 21<sup>st</sup> August 2013. The Defendant contended that these premiums were paid to M/S Pan Africa Insurance Co Ltd but were reversed to the instruction of the Plaintiff and the deceased. There was no documentation showing how M/S Pan Africa Life Ltd came into the picture on 13<sup>th</sup> August 2013 because as at 7<sup>th</sup> June 2011 and 12<sup>th</sup> July 2012, The Kenya Alliance Insurance Co Ltd had already accepted to issue a Group Mortgage protection Policy for the deceased and the Plaintiff respectively. What is clear, however, is that in

- correspondence relating to the said insurance policy, the Defendant communicated with the said insurance company and would have been expected to have affected the debits as it had been instructed in the Letter of Offer.
31. The Plaintiff referred to a letter of 24<sup>th</sup> September 2012 from the Defendant Exhibit marked “KNM 6” in which it had requested The Kenya Alliance Insurance Co Ltd to process the claim in respect of the outstanding loan amounts. This was on the ground that the customer Samuel Maingi Kibe was deceased. It did not refer to the Plaintiff herein, and nothing is before this court to explain what could have transpired between that time and when the Plaintiff filed suit. It was also not clear why the initial debits for the premiums were reversed or whether any other premiums were deducted from the aforementioned account as there were no other statements of Accounts that were submitted to this court.
  32. However, from the said letter of offer it appears that the Plaintiff and the deceased had applied for financing of the premiums and to have the same added to the loan. The court therefore finds itself persuaded by the Defendant’s submission that it was not the obligation of the Defendant to obtain cover for the Plaintiff and the deceased. What the Defendant appears to have received were merely insurance payment instructions. However, the court at the same time agrees with the Plaintiff’s submission that the Defendant was mandated to deduct the said premiums as per the instructions in the letter of offer.
  33. From the facts of this case there does appear to have been an omission and/or commission in respect of taking out the Mortgage Loan Life Protection Cover. The question that arises is who was liable. Was it the Plaintiff, the deceased or the Defendant? This is however, not an issue that can be determined from the scanty information before the court. This would indeed have been a triable issue that would satisfy the court to grant an interlocutory injunction to enable the court interrogate the issue further in a full trial. The court will, however, not grant an interlocutory injunction for the reasons that will be addressed later on in the ruling.
  34. The reality on the ground is that there was no insurance cover as aforesaid. As was rightly pointed out by the Defendant, the liabilities of the business of Arrival Textiles now devolved upon the Plaintiff upon the demise of the deceased. The court finds that the Plaintiff was therefore liable to service the facility that she and the deceased took from the Defendant.
  35. Having said so, the question of whether the Defendant could recall the outstanding amounts is pertinent. The Plaintiff did submit that she had not defaulted in paying the loan arrears or breached any terms of the charge. According to the letter dated 19<sup>th</sup> September 2012 and certificate of Death annexed to the Plaintiff’s Supporting Affidavit and marked “KNM 5” and “KNM 6” respectively, the deceased died on 1<sup>st</sup> September 2012. It did appear that as at the time M/s Muriu Mungai & Co Advocates for the Defendant wrote to the Plaintiff, no payment towards the loan had been made. The contents of the letter are contradictory as it is dated 10<sup>th</sup> August 2012 while it seems to give the Plaintiff ten (10) days to pay the outstanding balance which was 20<sup>th</sup> December 2012 failing which the Defendant would proceed to realise the security
  36. The loan was disbursed to the Plaintiff and the deceased on 13<sup>th</sup> August 2013 and it could therefore not have been in lawful and justified for the Defendant’s advocates to have demanded payment of the loan as the borrowers could not have been said to have defaulted in liquidating the said loan by 10<sup>th</sup> August 2012. This is an inconsistency that would have been resolved both hearing both parties before the court could make a determination. For all purposes and intents, it does raise a triable issue and of which the court could have once again been inclined to grant an interlocutory injunction pending the determination of the suit save for the reason given hereinbelow.
  37. The court finds itself in difficulties to grant such an injunction for the reason that the Plaintiff had no legal interest in the charged property. The court does find itself taking the view of the Court of Appeal in **CA Nai No 349/2003 Venture Capital and Credit Ltd vs Consolidated Bank of Kenya Ltd** ( unreported) that the Plaintiff herein did not have any proprietary interests over the suit premises and in the circumstances not being the Charger, cannot enjoy interlocutory injunction as she has sought.
  38. The court is therefore satisfied that the Plaintiff did not meet the threshold set in the **Geilla Vs. Cassman Brown Case ( Supra)**. From the Plaintiff’s documents placed before me, the court notes that the Plaintiff continues to be in default. With interest and penalties continuing to accrue,

there is a high likelihood of the outstanding loan exceeding the value of the charged premises to the detriment of the Defendant.

39. Having said the above, the court is of the view that the Defendant is at liberty to exercise its statutory right of Sale against the Chargor herein provided that it strictly complies with the law as regards the issuance of the requisite notices under the Land Act 2012. The Chargor is also at liberty to exercise her equitable right of redemption as seen in the **Pelican case (Supra)** and as permitted by the law.

40. In conclusion therefore, the court finds that the Plaintiff's Notice of Motion application dated and filed on 20<sup>th</sup> December 2012 is not merited and in the circumstances the same is hereby dismissed with costs to the Defendant.

41. It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of September 2013**

**J. KAMAU**

**JUDGE**