



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL CASE NO. 207 OF 2009

**DAMARIS KAVINZA OKEYO PLAINTIFF
-VERSUS-
EQUITY BANK LIMITEDDEFENDANT**

RULING

The application before court is dated the 23rd of December, 2009 brought by the applicant **DAMARIS KAVINZA OKEYO** as against the respondent **EQUITY BANK LIMITED**. The application seeks for a temporary injunction against the respondent; its agents and/or servants from selling and/or disposing of land parcel no. **KISUMU/NYALENDA "B"/1947** and costs.

The application is supported by the affidavit of the applicant and the grounds on the face of the application as follows; the sale was due to be on the 6th of January, 2010; the applicant is likely to suffered irreparable loss and damage; the purported sale is illegal and unlawful as the principal debtor **JADAMA ENTERPRISES** has cleared the debt.

The application was opposed by the respondent. The bank filed grounds of opposition and a replying affidavit on 3rd and 20th January, 2010 respectively. The nature of the opposition was that the application was vexatious as the applicant is guilty of laches and did not come to court with clean hands; the applicant has not met the necessary conditions for issuance of an injunction; the debt the applicant guaranteed is still due and owing to the tune of Ksh 1,346,637.85.

Having considered the pleadings and submissions by both sides the issue for determination at this point is whether or not the applicant has met the necessary conditions for the issuance of an injunction. I will consider the notable case of **GIELLA VS CASSMAN BROWN LTD** (1973) E. A in arriving at my ruling. The case set out the necessary condition as follows; Firstly, the applicant must show a prima facie case with a probability of success, secondly the applicant is likely to suffer irreparable loss and damage not likely to be compensatable by monetary terms and thirdly where the court is in doubt it should decide the case on a balance of convenience.

The gist of the case simply put is that the applicant guaranteed a loan granted to **JADAMA ENTERPRISES** By the respondent charging the property subject matter through a charge document registered in favour of the defendant for a sum of Kshs 1,620,000/= on the 10th of January, 2006. This fact is acknowledged by both parties. They also do agree that there is an outstanding amount towards this loan although the parties differ as to the actual outstanding amount. The applicant gives the outstanding amount as Kshs 54,763.85. She has however annexed photocopies of statements that indicate the balance outstanding as at 7th December, 2009 to be Kshs 1,346,637.85. The respondent on the other hand acknowledges the sum of Kshs 1,396,637.85 and disputes seeking for Kshs 13,012,340 from the applicant. It acknowledges that the principal owes much more that the applicant charged her property only to secure Ksh 1,620,000/=.

I find as a matter of fact that the amount due and owing is the sum reflected in the statement being the sum guaranteed and secured by the applicant to the time Kshs 1,346,637.45. The principal debtor may have paid in excess of Ksh 1.5 million however there are interest that accrued and continues to accrue. I also take judicial notice that the loan repayment as reflected in the applicant's annexure **DKO2** were inconsistent. Between 5th October, 2007 to 18th December 2008 no repayments were done at all. This indeed informs the huge balance being claimed and the interest that has escalated.

With the above background I am of the view that the plaintiff/applicant has not proved a prima facie case. I am also of the view that any loss or damage that may be occasioned can be compensated by way of damage. This therefore in my view is not a proper case deserving of orders of injunction. I decline to grant the application. The same is dismissed with costs.

DATED AND DELIVERED THIS 23RD DAY OF JANUARY, 2012.

**ALI-ARONI
JUDGE**

In the presence of:

..... present for Appellant

.....present for Respondent