



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 188 of 2010

JOYCE WANGUI KAMAU ..... PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED .....DEFENDANT

R U L I N G

By this application, the applicant prays for the following orders-

1. *...(spent)*
2. *That a temporary injunction be issued restraining the Defendant/Respondent whether by itself, Officers, Directors, Servants and/or its agents Messrs Garam Investments or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with L.R. No. Ngenda/Kahuguini/866/Kiambu District in any manner whatsoever pending the hearing and determination of this application.*
3. *That a temporary injunction be issued restraining the Defendant/Respondent whether by itself, officers, Directors, servants and/or its agents Messrs Garam Investments or whomsoever is acting on its behalf from selling advertising for sale, transferring and/or dealing with L.R. No. Ngenda/Kahuguini/866/Kiambu District in any manner whatsoever pending the hearing and determination of this suit.*
4. *That Costs be in the cause.*

The application is brought under **Sections 3 and 3A** of the **Civil Procedure Act, Order XXXIX Rules 2, 3, 4, and 5** of the **Old Civil Procedure Rules**, and all other enabling provisions of the law.

The application is supported by the annexed affidavit sworn by the Applicant on 25<sup>th</sup> March, 2010 and is based on the following grounds -

1. **That Plaintiff/Applicant has made entire payments to the Defendant/Respondent towards the settlement of the loan facility due and owing to the Defendant/Respondent**
2. **That the amount claimed by the Defendant/Respondent relates to illegal interests, Commissions, Bank Charges and Penalty charges which were not provided for in the Contract Agreement and the Letter of Offer and which sums the Plaintiff/Applicant has requested the Defendant/Respondent to account for but to no avail**

3. **That the Plaintiff/Applicant stands to suffer irreparable loss and damage that is incapable of being compensated by damages should the illegal, unlawful and unprocedural sale of her property be allowed to proceed.**
4. **That the Defendant/Applicant is in breach of the terms of the Charge Document and as such the Plaintiff/Applicant has been discharged from the obligations thereunder.**
5. **That should the intended sale scheduled for any time upon the expiry of the Notice served upon the Plaintiff/Applicant and the Defendant/Respondent be allowed to proceed as planned, then the Plaintiff/Applicant's application herein will be rendered nugatory and futile.**
6. **That the Charge Document the Defendant/Respondent intends to rely on in its exercise of its Statutory Power of sale did not provide for the charges interest and penalties the Defendant has levied upon the Plaintiff.**
7. **That the Defendant/Respondent has been charging unconscionable Bank Charges Commission and unlawful penalty fees on the Plaintiff/Applicant's accounts in violation of the law.**

In its replying affidavit sworn on 23<sup>rd</sup> April, 2010 by Allan Onyango, a Legal Officer with the Respondent, the latter acknowledges that it advanced a loan to the Applicant and a charge was created in its favour on 29<sup>th</sup> July, 1996 over the suit property. The Applicant stopped repaying the loan in March, 2001 without having completed repayment of the amount due to the Respondent, and the latter proceeded to exercise its statutory power of sale of the suit property in order to realize its security, thereby precipitating this action.

With leave of the court, the parties filed their respective skeleton submissions. After considering the pleadings and the submissions, I find that the only issue for determination is whether the Applicant has satisfied the conditions for the grant of an interlocutory injunction. These conditions were set out in the over cited case of **GIELLA v. CASMANN BROWN & CO. LTD [1973 E.A 358]**. In that case, which is the cornerstone of the law on interlocutory injunctions in East Africa, the then Court of Appeal for E.A held that these conditions were fairly settled and that they were firstly, 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 might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

Regarding the 1<sup>st</sup> condition, I note that it is common ground that the Applicant, who apparently was an employee of the Respondent, obtained a staff loan in 1996. According to an exhibit produced by the Respondent, she serviced the loan up to March, 2001 or thereabouts, after which no more remittances were forthcoming. Interest then took over and continued accumulating unabated. By 31<sup>st</sup> January, 2009 the amount due had accumulated to KShs. 310,103.40/=. The Applicant was subsequently served with a statutory notice dated 18<sup>th</sup> June, 2009, whose receipt she duly acknowledged by a letter dated 2<sup>nd</sup> October, 2009.

In the said letter, the Applicant stated, *inter alia* -

***"...I would wish to bring this matter for negotiation personally with the Bank Management because I would wish us to draw a well considered and conclusive agreement as two parties who have since successfully related..."***

***The purpose of this note is to acknowledge receipt of the statutory notice as well as seeking from the Bank Management a conducive environment to a far reaching agreement in order to settle this matter.***

***I have all along been hoping that things would turn around for the better pertaining to my financial***

***status and one day would settle this debt once and for all. I have always been aware of same but without much ability to take a positive move to settle.***

***In order to resolve this matter I am of the opinion to requesting (sic) Barclays Bank Management to consider my case on the basis of humanitarian grounds...***

The above letter constitutes not only a clear and affirmative acknowledgement of the debt, but also a concession that the same was still outstanding. It is therefore erroneous and misleading for the Applicant to allege at the same time that she made full payment to the Respondent in settlement of the loan facility. Consequently, I find that the Applicant has not made out a *prima facie* case with a probability of success, and the first condition for the grant of an interlocutory injunction has not been satisfied.

The second condition is that an interlocutory injunction will not normally be granted unless the Applicant ought to otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. In her application and submissions, the Applicant contends that she stands to suffer irreparable loss and damage should the illegal and unprocedural sale of her property be allowed to proceed since it is her matrimonial home and the only property she owns. It is further alleged in her submission that the charge instrument was void for want of compliance with the provisions of **Section 59** of the ITPA as to attestation.

In the first instance, the suit property herein is registered under the **Registered Land Act (Cap 300)** and not the **Registration of Titles Act**. Therefore, **Section 59** of the ITPA does not apply to this matter in any way. Secondly, when the property was advertised for sale by public auction on 29<sup>th</sup> March, 2010, the property was described as **“undeveloped”**. How it became suddenly developed and a matrimonial home by June, 2010, defers logic. Even if it was a matrimonial home, as long as it is offered by way of security for repayment of a debt, it thereby becomes a commodity for sale if the debt is not repaid, and it matters not that it is a matrimonial home. I do not, therefore, subscribe to the view that the intended sale is unlawful or unprocedural as alleged in the Applicant’s submissions. In the unlikely event that the exercise of that power is irregular, the Applicant would have her remedy in damages only as prescribed in **Section 77(3)** of the **Registered Land Act**. And the Respondent herein, being a bank of repute, would have no difficulty in paying any such damages. However, as earlier indicated, there is no irregularity in the exercise of that power in this case.

In those circumstances, if the property is not sold as soon, it will continue accumulating interest to a level where the Applicant may never be able to pay, thereby delaying the inevitable. I therefore find that the balance of convenience lies in favour of declining to grant the injunction.

For the above reasons, I find that the application for an interlocutory injunction has no merit and it is hereby dismissed with costs.

Orders accordingly.

**L. NJAGI**  
**JUDGE**

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of November, 2012**

**MUTAVA**  
**JUDGE**