



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 381 OF 2010

AGNES NDINDA MALUNDU PLAINTIFF

VERSUS

FAMILY FINANCE

BUILDING SOCIETY LTD. DEFENDANT

RULING

1. There are two applications which were argued before me. The first application is Chamber Summons dated 31st March, 2010 in which Agnes Ndinda Malundu who is the Plaintiff in this suit, seeks *inter alia*, orders as follows:-

(i) That upon inter partes hearing of this application, this Honourable Court be pleased to issue an interim order for injunction to restrain the Defendant whether by itself, its servants, agents and/or employees from selling, alienating, transferring, disposing of, and/or in any manner whatsoever dealing in property known as Land Reference Number Nairobi/Block III/601 – Komarock.

(ii) That upon inter partes hearing of this application and in the alternative to prayer number 3 above, this Honourable Court be pleased to issue a mandatory order for injunction to compel the Defendant to cause to be issued and registered a discharge of charge against the title to the property known as Land Reference Number Nairobi/Block III/601 – Komarock and to forthwith release to the Plaintiff the discharged title document to the said property known as Land Reference Number Nairobi/Block III/601 – Komarock.

(iii) That costs of this application be borne by the defendant in any event.

2. The second application is a chamber summons dated 25th November, 2011. It is an application filed by Family Finance Building Society Ltd, who is the defendant in the suit. The defendant seeks to have the plaint filed herein struck off, the plaintiff's suit dismissed, and the defendant condemned to pay costs of the application and the entire suit. The two applications are inter-dependent. That is to say that should the application for striking off the plaint succeed, then, the application for injunction would die with the plaintiff's suit. Thus it is appropriate to consider the application for striking off the plaint first.

3. The application for striking out the plaint is anchored on the grounds that the plaintiff's suit is *res judicata*, as it seeks to litigate on matters already concluded in **Civil Appeal No. 596 of 2009**. Both parties filed written submissions which they relied upon. Counsel for the plaintiff also highlighted their submissions.

4. It is not disputed that there were previous proceedings between the Plaintiff and the defendant in **MILIMANI CMCC No.7962 of 2006** (hereinafter referred to as the Milimani suit). It is also common ground that the defendant was the plaintiff's employer, and that the genesis of the Milimani suit was the dismissal of the plaintiff from her employment. The plaintiff filed the Milimani suit to stave off the threat by the defendant to repossess motor vehicle KAQ 494H which was used as security for a loan advanced to the plaintiff by the defendant during the course of her employment.

5. Property known as L.R. No.111/601 owned by plaintiff which was used as security for a school fees loan advanced by the defendant to the plaintiff, was not initially subject of the Milimani suit. Nonetheless, during the trial the issue of what the plaintiff owed the defendant, and what the defendant owed the plaintiff came up. This brought in issue all the loans advanced to the plaintiff and whether the same had been repaid. In the consent signed by the parties on 11th March, 2010, settling the appeal filed by the plaintiff against the judgment in the Milimani suit, reference was made to L.R. No. III/601. This was in Clause 2 of the consent letter signed by the parties in **Civil Appeal No. 596 of 2009**.

6. Clause 2 stated as follows:-

“The Respondent upon receipt of the full outstanding loan amount and cost do release the Title Deed of the property known as L.R. No.111/601 and motor vehicle Reg. No. KAQ 494H, Toyota Station Wagon to the Appellant.”

7. The appeal was purported to have been withdrawn by the Plaintiff on 24th May, 2010 through a letter addressed to the court. Nonetheless the withdrawal being unilateral, it was subject to the consent order recorded earlier.

8. The issue now being posed is whether the subject matter and issues raised in the Milimani suit is the same or substantially the same as that raised in the present suit. In the present suit the plaintiff's concern is release by the defendant of the original Title documents in respect of L.R. Nairobi Block III/601 – Komarock and an order directing the defendant to discharge the charge registered in their favour against that title.

9. It is obvious that the Milimani suit concerned the issue of termination of the plaintiff's employment, and whatever was due to her, taking into account the amount outstanding on the loans advanced to the plaintiff by the defendant and the release of the securities given for the loans. In paragraph 9 of the plaint which was filed in the Milimani suit the plaintiff stated that other than the car loan, she had two other outstanding loans which were the school fees and the check off loan.

10. In the defence and counter claim filed by the defendant, the defendant has also made reference to the car loan and other loans advanced to the plaintiff. Therefore, although the property L.R. Block III/601 was not specifically referred to in the pleadings, the issue of the loans and the security in respect thereof were issues which were substantially in issue in the Milimani suit. That explains why there was reference to Nairobi Block III/601 – Komarock in the consent recorded by the parties in **Civil Appeal No.596 of 2009**.

11. The plaintiff contends in paragraph 8 of the plaint filed in the present suit that she settled the entire school fees loan with the defendant on **11th April, 2006**. However she was unable to establish this in the Milimani suit. Moreover if indeed plaintiff had repaid the loan for which L.R. III/601 was given as security, why did the consent signed by the parties on the **11th March, 2010** and filed in court on 15th March, 2010 not mention that fact? It is telling that the consent only provided for the release of the Title Deed of the property L.R. Nairobi Block III/601 and motor vehicle Registration No. KAQ 494H to the applicant, **“upon receipt of the full outstanding loan amount”**. Indeed the outstanding loan amount is

indicated in the consent as Kshs.569,953/=. Thus, the issue of the outstanding loan was clearly addressed by the parties and a specific figure arrived at.

12. It is further noteworthy that the plaintiff did file an amended Notice of Motion in **Civil Appeal No.596 of 2009** on 25th November, 2009 in which she sought orders of injunction restraining the defendant from selling motor vehicle KAQ 494H and property known as L.R. No. III/601, whose title was being held by the defendant. That order of interlocutory injunction which was sought by the plaintiff, in regard to property known as L.R. No. III/601 is almost identical to that sought in the present suit.

13. In the affidavit sworn by the Plaintiff on 23rd November, 2009, in support of the application for the injunction filed in **Civil Appeal No. 596 of 2009** the plaintiff indicated that the defendant was holding documents to the property known as L.R. Nairobi Block III/601 illegally. That was not consistent with the consent recorded which provided for release of the Title Deeds of the property upon receipt of the payment in respect of the full outstanding loans.

14. Although the plaintiff has now come to this court, taking issue with the defendant's failure to release the title deeds to the suit property, that issue is not a new issue. It is an issue which ought to have been canvassed in the Milimani suit and the subsequent Civil Appeal where a specific consent order was made with regard to the release of the Title documents.

15. In my considered view, the issues raised in this suit relating to property known as L.R. Nairobi Block III/601 – Komarock, and the release of the title documents, are issues which were substantially in issue in the previous suits. The issue having been determined by a court of competent jurisdiction through the consent order, **Section 7** of the **Civil Procedure Act** is applicable and I would uphold the submission that plaintiff's suit and application is *res judicata*.

16. The above findings ought to dispose off the entire suit including the application dated 31st May, 2010. However, notwithstanding the above findings, I now proceed to consider the application dated 31st May, 2010 on merit. The application being one for interlocutory injunction, it is trite law that the plaintiff must satisfy the conditions set out in the notorious case of **GIELLA v. CASSMAN BROWN & CO. LTD. (1973) EA 358** which was cited by the plaintiff's Advocate.

17. The Plaintiff's case is that she obtained a loan facility from the defendant which she secured through a simple deposit with the defendant of Title Deeds to her property L.R. Nairobi Block III/601 – Komarock; that the plaintiff has now repaid the loan with interest but the defendants have refused to release her Title documents; that the defendant have irregularly registered a charge against the plaintiff's aforementioned title.

18. On its part, the defendant concurs that the plaintiff obtained a loan facility from it, but deny that the same was secured by a simple deposit of Title Deeds. The defendant also denies that the loan advanced to the plaintiff was repaid in full. From the affidavits filed in support and in reply to the application, it is evident that the issue of the repayment of the loans by the plaintiff was canvassed in the Milimani suit, and a determination made against the plaintiff.

19. It is also evident that there is a charge registered in the defendant's favour against the Title in respect of L.R. III/601, and that the charge is indicated as duly signed by the plaintiff in the presence of an Advocate. The plaintiff has not alleged any fraud nor has she given any particulars of fraud in her plaint. Further there is the consent recorded in **HCA NO. 596 OF 2009** which essentially concedes to the fact that there is an amount due and owing from the plaintiff to the defendant. In the light of the above, it cannot be said that the plaintiff has established a *prima facie* case with a probability of success.

20. It was further argued that the plaintiff lives on the property L.R. Nairobi Block III/601 Komarock with her family, and that she would suffer irreparable loss if the property is sold. Nonetheless, this argument cannot hold. The plaintiff voluntarily offered the property L.R. Block III/601 as security for the loan advanced to her. It is common knowledge that a charge whether simple or registered has risks and consequences. The plaintiff having voluntarily undertaken the risk, she cannot now turn round and seek

the court's sympathy. The court has an obligation to protect the interests of both parties. The plaintiff must therefore bear the consequences of her actions.

21. As regards the prayer for an order of mandatory injunction to compel the defendants to cause to be issued and registered a discharge of Charge against the title to LR No. Nairobi Block III/601, firstly, the plaintiff has not demonstrated any clear case or special circumstances such as would justify the granting of an order of mandatory injunction at this interlocutory stage. Secondly, the Charge can only be discharged if the loan subject of the Charge has been fully repaid. This has not been demonstrated by the plaintiff.

22. The upshot of the above is that I find no merit in the Plaintiff's application dated 31st May, 2010. I find that the Plaintiff's suit is *res judicata* and do therefore strike out the entire suit together with the application dated 31st May, 2010. I award costs of the suit and application to the Defendant.

Orders accordingly.

Dated and delivered this 11th day of March, 2011

H.M. OKWENGU
JUDGE

In the presence of:
Juma for the Plaintiff
Anzalla for the Defendant
Jason – Court clerk