REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL SUIT NO. 126 OF 2011

RONALD NG'ANG'A NJERI………......................................……PLAINTIFF /APPLICANT

VERSUS

EQUITY BANK LIMITED…....…..............................……..DEFENDANT/RESPONDENT

R U L I N G

By this application, the plaintiff prays for an order of injunction restraining the respondents from selling, realizing or otherwise disposing off his property registered as LR No. Ndumberi/Riabai/1657 pending the hearing and determination of this suit. He also applies that the cost of the application be awarded to him.

The application is brought by a notice of motion dated 5th April, 2011 and taken out under Order 40 Rules 2 (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A and B and 3A of the Civil Procedure Act. It is supported by the plaintiff's own affidavit sworn on 5th April, 2011, and brought on the grounds that the applicant was not privy to the loan of Kshs 3 million advanced to the borrower, and that the loan of Kshs 1 million in respect of which the applicant offered his own property by way of security had been repaid in full.

By a replying affidavit sworn by Purity Kinyanjui on 9th May, 2011, the defendant's case is that the plaintiff was fully aware of the loan advanced to the borrower on 25th May, 2009 for which the principal borrower had defaulted. The same was in arrears amounting to Kshs 4,169,695.62 as at 18th April, 2011, which continues to attract interest at the rate of 24% p.a.

During the hearing of the application, Mr Matwere held brief for Ms Wahito for the applicant and submitted that the loan in question was advanced to a third party without the knowledge or consent of the applicant. He contended that the earlier loan to which the applicant was a guarantor had been fully repaid. Consequently, the threatened sale was illegal as the applicant had not given his consent. He therefore urged the court to allow the application as prayed.

Appearing for the respondent, Ms Kithinji relied on Purity Kinaynjui's affidavit sworn on 9th May 2011. She submitted that the applicant was fully aware of the 2nd loan of Kshs 3 million. The title had never been discharged in respect of the 1st charge because the plaintiff was fully aware that it was used to guarantee the 2nd loan. She further submitted that the applicant being fully aware of the second loan only

came running to court for an injunction after the property was advertised. She asked the court to dismiss the application with costs.

After considering the pleadings and respective submissions of counsel, I note that this being an application for an interlocutory injunction the conditions laid down in **GIELLA** v **CASSMAN BROWN & CO. LTD** [1973] EA 358 must be satisfied. These are that first, 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 awarded of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

The facts of this case are that sometime in 2007, one Janet Wairimu Muiruri borrowed a sum of Kshs 1 million from the respondent. The same was secured by a charge over the applicant's property known as LR Ndumberi/Riabai/1657, which charge was registered on 2nd November, 2007. It is not disputed that the said loan was repaid in full. However, the title was not discharged. Subsequently, Janet was advanced a further sum of Kshs 3 million, ostensibly secured by the said charge. There is no evidence that the applicant was aware of the second loan. Indeed, in their "**Notice of Exercise of Statutory Power of Sale**" dated 9th March, 2010, the respondents wrote to the applicant as follows –

"**We refer to the charge registered on 2nd November, 2007 created over your property known as TITLE NUMBER: NDUMBERI/RIABAI/1657 in favour of ourselves to secure an aggregate sum of Kshs 1,000,000 (one million only) together with interest thereon and other costs, charges and expenses.**

Following the default in repayment of the monies advanced to Janet Wairimu Muiruri and secured by the said charge, you are indebted to us in the sum of Kshs 3,806,088.97 as at 13th/03/2010. The said amount continues to attract normal and default interest at the rates of 18% and 6% per annum respectively compounded with monthly rests."

It is noteworthy that this letter carefully avoids any reference to the second loan which was advanced in May, 2009. Instead, it alludes only to the charge registered on 2nd November, 2007, which was the security in respect of the loan for Kshs 1 million advanced in 2007. It steers clear of the second loan and thereby gives the distinct impression that it is the first loan for Kshs 1 million which remains unpaid and in respect of which the applicant stands indebted to the respondents to the tune of Kshs 3,806,088.97 as at 13th March, 2010. Yet, there is no dispute that the first loan was repaid, and that the applicant was never notified of the second loan for Kshs 3 million.

In paragraph 6 of the replying affidavit, however, Purity Kinyanjui, The Head of the Debt Recovery Unit with the respondent lets the cat out of bag when she deposes that –

"… in response to paragraphs 7, 8 and 9 of the said affidavit, I state that the applicant was fully aware of the loan granted on 25th may, 2009 for which the Principal borrower has defaulted and is currently in arrears amounting to Kshs 4,169,695.62 as at 18th April 2011 and the said amount continues to attract interest at the rate of 24% per annum calculated on daily balances. .."

It is clear from this deposition that the loan in respect of which the applicant's property is being disposed of is not the first one for Kshs 1 million, in respect of which the applicant offered his property by way of security, but the second loan for Kshs 3 million in respect of which the applicant was kept in darkness. For that reason alone, reference to Kshs. 1 million instead of Kshs. 3 million in the Statutory Notice issued in this matter renders that notice invalid and of no legal consequence. Consequently, the threatened sale is itself equally invalid.

The conduct of the respondent in this matter is inequitable and cannot be tolerated by a court of equity. By seeking to sell the applicant's property in respect of advances which they did not bring to the attention and for which they did not seek his consent, they are clearly stealing a match on the

applicant. Any act or agreement between a principal debtor and the creditor without the consent or consultation with the guarantor which has the effect of varying or altering the contract of guarantee itself is forbidden. The respondent in this case should not have advanced more monies to the principal debtor against the security offered by the applicant without the latter's consent.

On account of the foregoing, I find that the applicant has established a *prima facie* case with a probability of success for which he is entitled to protection. Prayer (ii) of the application by Notice of Motion dated 5th April, 2011, is accordingly granted pending the hearing and determination of this suit as prayed.

Costs in the cause.

DATED and **DELIVERED** at **NAIROBI** this 22nd day of September, 2011.

L NJAGI
JUDGE