



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 80 of 2010

**NANCY NJOKI KINYANJUIPLAINTIFF
VERSUS**

EQUITY BANK LIMITED.....DEFENDANT

RULING

1. The Chamber Summons dated 11th February 2010 is taken out by the plaintiff under the provisions of **Order 39 of the Civil Procedure Rules**. She is seeking for an order of injunction to restrain the defendant, its agents or servants from selling or dealing with the property known as **NGONG/NGONG/6090** pending the hearing and determination of the suit. This application is premised on the grounds that the defendant purported to issue a statutory notice dated 13th November 2009 threatening to sell the plaintiff's matrimonial home. The statutory notice is faulted as it is seeking for monies that were not secured by the charge.
2. A charge was created on 16th April 2008 but that charge is unenforceable for failure to comply with Section 65(1) as read with **Section 74 of the Registered Land Act**. Since there is no valid charge, the power of sale does not arise. Moreover, the defendant is also faulted for lumping an overdraft loan advanced to the plaintiff's co-proprietor and one **Joseph Gitau Kimani** on to the charge without creating further legal instrument and thereby clogging the plaintiff's equity of redemption. There was a guarantee that was cancelled amounting to 2.3 million which should have reduced the

loan to only 1.6 million. For those reasons the plaintiff seeks for an order of injunction.

3. This application was opposed by the respondent, Counsel for the respondent relied on the replying affidavit sworn by **Stanley Kiima** sworn on 4th March 2010. It is admitted that the plaintiff and two others were granted banking facilities for Ksh.3.6 million and the borrowing was secured by the charge dated 16th April 2008. The defendant denied that there was any banking guarantee which was cancelled as alleged by the plaintiff. It is also denied that there was a variation of the charge. The borrowing was jointly between the plaintiff and her co-proprietor **Benson Muiruri Kinyanjui**. It is further stated that on 6th October 2008, there was a request to convert an overdraft facility into a loan which continued to be secured by the charge.

4. The defendant issued a letter of offer dated 24th November 2008, which was duly signed by the borrowers. According to the defendant, the security was adequate to cover the existing loan and the overdraft facility. Therefore there was no need to create a further charge and none was created. The defendant contends that the plaintiff and co-borrower are indebted in the sum of **Ksh.3.968,133.01** as at 13th November 2009 when the statutory notice was issued and there is no defect in the charge. The plaintiff acknowledged on page 12 of the charge as the chargor that she had read and duly signed after reading the document. Thus the application does not disclose a prima facie case with a probability of success.

5. The principle element to determine in this application is whether the applicant has demonstrated a prima facie case with a probability of success to warrant the granting of an order of injunction. The court of appeal in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** explained what constitutes a prima facie case as follows:

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case”. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

In the same case the Court appeal cited with approval the circumstances in which a mortgagee may be restrained from exercising its statutory power of sale as set out in Halsbury’s Laws of England, Vol 32 (4th edition) paragraph 725 as follows:-

“725 When mortgagee may be restrained from exercising power of sale.”

“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claims excessive.” (Emphasis added)

6. The plaintiff’s case is built around the contention that the charge is defective for failure to indicate that the contents were explained to the plaintiff and the fact that the loan under the charge is disputed as it was lumped with an

overdraft facility. The first ground falls by the way side because under Clause 12 of the charge, the plaintiff was supposed to read and sign. The plaintiff could not have signed if she had not understood what she was signing. Moreover, the charge clearly indicated that the plaintiff's were borrowing a sum of Ksh.3.6 million. There is no indication whatsoever that the plaintiff has paid the loan. The charge was between the defendant, the plaintiff, her co-proprietor and one Joseph Gitau Kimani.

7. There is no evidence by the plaintiff that she settled the loan. If there is an issue of accounting that is not a ground for granting an order of injunction. The plaintiff having failed to satisfy the 1st condition that is establishing a prima facie case there is no point in interrogating whether the 2nd element has been fulfilled because the conditions are sequential. For those reasons I find the plaintiff's application for injunction does not meet the threshold of granting an interim order the application is disallowed with costs to the defendant.

RULING READ AND SIGNED ON 16TH JULY 2010 AT NAIROBI.

M. K. KOOME
JUDGE