

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 371 of 2008

MARY WANJIRU CHEGE.....PLAINTIFF

VERSUS

K-REP BANK LIMITED.....DEFENDANT

RULING

The plaintiff/applicant filed this suit simultaneously with an application under certificate of urgency seeking for a temporary order of injunction restraining the respondent from foreclosing property title No. NAKURU MUNICIPALITY BLOCK 23/48 or interfering in any way with the plaintiff's quiet enjoyment of the said parcel of land pending the determination of the suit. This application is supported by the grounds stipulated on the body of the application and the supporting affidavit sworn on 4th December 2008.

Briefly stated the gist of the matters stated therein can be summarised as follows: The applicant contends that a statutory notice to foreclose the residential title No. Nakuru Municipality/Block 23/48 is defective and does not comply with the provisions of **section 74(1) of the Registered Lands Act**. It is contended that the notice merely warned the applicant to pay the arrears to the respondent within 90 days. Secondly the interest on the mortgage account is accruing at the rate of 24% whereas in the agreement for loan the interest rate agreed is 19% which is contrary to the provisions of the banking Act, That interest cannot be increased without the permission of the Minister. Moreover the applicant fell in arrears for good reasons. She was given a contract by the government but could not complete due to the post-election violence. Her workers were ejected from the construction site. The applicant requested the respondent to transform the overdraft into a normal loan which would have given her time to pay but the respondent declined for no good reasons. Counsel urged the court to allow the application which established a prima facie case with a probability of success on account defective notice and illegal charge of interest. Formidable opposition to this applicant was put forward by counsel for the respondent. He relied on the replying affidavit by the respondent's sworn on 5th December 2008. The respondent contended that this application seeks for equitable remedies has failed the test for failure to disclose material facts. The applicant has not exhibited the statutory notice which is alleged to offend the provisions of **section 24 of the Registered Lands Act**. Similarly the charge is not annexed. Failure to make material disclosure is fatal and the application should be dismissed for failure to establish a prima facie case with a probability of success. The applicant admits liability but pleads that due to her financial inability to pay she should be allowed time. The fact that the applicant is disputing the calculation of the interest is not a ground for granting an injunction. The matters alluded of post-election violence clearly show that the applicant application has not met the threshold of the principles stated in the case of **Geilla vs. Cassman Brown**.

Following the above submissions the issues that fall for determination in this application is whether the applicant has established a prima facie case with a probability of success to warrant the granting of the interim orders of injunction. The applicant alleged that he executed a charge to guarantee an overdraft facility. She was issued with a statutory notice of the foreclosure of the charged property. This notice is faulted for contravening the provisions of section 74 of the Registered Lands Act. However the charge document and the notice were not availed to this court. There is no way the court can determine those allegations made by the applicant. It is applicant alleging contravention of the charge and failure on the part of the respondent. She had a duty to provide material information. Due to this material non-disclosure and admission of liability by the applicant it cannot be said that the applicant has established a prima facie case with a probability of success. The conditions of granting an injunction are sequential. See the case of **Kenya Commercial Finance Co. Ltd. Vs. African Education Society & Others C. A. No. 142 of 1999 (unreported)**. The court of appeal stated that the conditions of granting an injunction were that if a party failed to prove the first condition, the second condition need not be addressed;

“These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third one is addressed.”

The upshot of the above analysis is that this application lacks merit. It is hereby dismissed with costs to the respondent. The ex-parte orders of injunction issued on 5th December 2008 are hereby discharged.

Ruling read and signed on 14th day of May 2009.

M. KOOME

JUDGE