

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

Civil Case 476 of 2009

PHYLLIS MBAISI EMBEVA.....PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA LIMITED.....DEFENDANT

RULING

The plaintiff filed an originating motion pursuant to the provisions of Order XXXVI Rules 3 and 3A of the Civil Procedure Act seeking various orders of the court essentially questioning the validity of the instruments of charge registered in favour of the defendant on the title in respect of LR No. Ngong/Ngong/23007 (*hereinafter referred to as the suit property*). Contemporaneous with filing suit, the plaintiff filed an application pursuant to the provisions of Order XXXIX Rules 1(a), 2, 2A, and 3 of the Civil Procedure Rules seeking orders of interlocutory injunction to restrain the defendant, by itself or through its agents from threatening, harassing, evicting or attempting to evict or interfere with the plaintiff's quiet and peaceful enjoyment of possession of the suit property pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. The defendant filed notice of preliminary objection to the plaintiff's entire suit. The defendant's company secretary, Celestine Otieno, swore a replying affidavit in opposition to the application.

At the hearing of the application, I heard rival submissions made by Mr. Ochichi for the plaintiff and by Miss Kamunya for the defendant. I have carefully read the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the oral arguments made in court. There are two issues for determination by this court: The first issue is whether the plaintiff filed a competent suit by way of originating motion instead of by way of plaint. According to the defendant, the issues in dispute between the plaintiff and the defendant are such that the same should have been litigated in the court by way of plaint instead of an originating motion. The defendant cited several decisions in support of its argument. In response thereof, the plaintiff submitted that her suit was competent in view of the prayers she sought in the suit. In the originating motion, the plaintiff predicates her suit on the provisions of Order XXXVI Rules 3 & 3A of the Civil Procedure Rules which sets out the procedure under which a vendor or purchaser of immovable property may move the court for the purposes of having any question which may arise in respect of any requisitions or objections or any claim for compensation or any other question arising out of or connected with the contract of sale, not being a question affecting the existence or the validity of the contract, a mortgagee or mortgagor whether legal or equitable, having the right to foreclose or redeem any mortgage may take out originating summons for the purposes of determining any rights relating to the sale, foreclosure delivery of possession by mortgagor, redemption, re-conveyance, or delivery of possession by mortgagor. It is therefore evident that a party may file an originating motion only in circumstances where the validity of the sale agreement or the mortgage instrument is not being challenged.

In the present suit, it is clear that the thrust of the plaintiff's case is the challenge to the validity of the defendant's right to sell the suit property under its statutory power of sale. The plaintiff alleged that the terms of the charge were varied at the time of her resignation from the defendant's employ. This assertion is vehemently disputed by the defendant. In Wepukhulu v Secretary, Board of Governors Buruburu Secondary School [2005] 1KLR 743, the Court of Appeal held that the procedure of originating summons is designed for summary or *ad hoc* determination of points of law, construction of certain specific facts or obtaining specific directions of the court by such persons as trustees, administrators or the court's execution officers. It was further held that the procedure should not be used for determination

of matters that involve a serious question or determination of disputed questions of fact. In Otulo Oloo Siso v Andrian Spencer Dearing t/a Price Waterhouse Coopers & 5 others [2008] eKLR at page 4, Musinga J held that:

“Order XXXVI sets out the nature of cases that can be commenced by way of originating summons and looking at the plaintiff’s claim herein, it does not fall within the provisions of the said order. Secondly, the nature of the plaintiff’s claim is such that it cannot be adjudicated upon in a suit brought by way of originating summons. The claim seems to be complex and quite contentious. It ought to have been brought by way of a plaint.”

In the present case, it was evident that the issues that the plaintiff wishes the court to render determination are seriously disputed. The said issues cannot be determined by way of originating summons rather they ought to be determined by way of plaint. The defendant has a case when it states that the plaintiff invoked the wrong procedure when she filed the present suit by way of originating summons instead of by way of plaint. However, having considered the facts of this case, I hold that the defendant was not prejudiced by the plaintiff’s decision to mount the present suit by originating summons. The matter that is before the court now is the plaintiff’s interlocutory application. When either party shall apply for directions to be issued by this court in regard to the manner which the hearing of the suit shall be disposed off, the defendant shall be at liberty to request the court to issue directions in terms of Order XXXVI Rule 10(1) of Civil Procedure Rules that provides the appropriate procedure by which pleadings in originating summons may be considered as having been filed by way of plaint. The affidavits filed in response thereto shall be considered as the defendant’s defence. I therefore decline to uphold the defendant’s objection to the plaintiff’s entire suit.

On the merits of the application, the principles to be considered by this court in determining whether or not to grant the interlocutory injunctions sought are well settled. The plaintiff is required to establish a prima facie case with a probability of success. She is further expected to prove that she would suffer irreparable damage that will unlikely to be compensated by an award of damages in the event that the order is not granted. If the court shall be in doubt, it shall determine the application on a balance of convenience (see Giella vs Cassman Brown [1973] EA 358). In the present application, certain facts are not in dispute. It is not disputed that the plaintiff was an employee of the defendant before she tendered her resignation on 15th April 2008. During the period of her employment, the plaintiff took advantage of concessionary loans advanced by the defendant to its employees. The plaintiff was advanced two staff personal loans and a loan facility to finance the purchase and the development of L.R. No. Ngong/Ngong/23007 (*the suit property*) in Kajiado District. The second loan for the sum of Kshs.1.7 million was secured by the title of the suit property. The suit property was secured by a charge dated 28th March 2007 and a further charge dated 11th July 2007. Both charges were registered. Under clause 2(b) of both charges, it was provided that the plaintiff would be charged concessionary interest rate of 6% per annum which would be pegged to the fringe benefit tax rate and would be applicable in so far as the plaintiff would remain in the employment of the defendant. The two charges did not specify the interest that the plaintiff would be charged in the event that the plaintiff left employment with the defendant bank.

Upon tendering her resignation letter, the same was accepted by the defendant on the same day. In the said letter, the defendant notified the plaintiff that it would calculate all the amounts due to the plaintiff, take into account the outstanding loans, before notifying the plaintiff of the outstanding amount. From correspondence exchanged between the plaintiff and the defendant, it was evident that the plaintiff laboured under impression that the defendant, in accepting her resignation from employment, had somehow agreed to waive repayment of part of the outstanding loan. It is this misapprehension that forms the basis of the plaintiff’s suit. It is the plaintiff’s case that the terms of the charge and the further charge were varied when the defendant accepted the plaintiff’s resignation from employment. The defendant is of a contrary view. This court’s evaluation of the facts of this application leads it to make an inference that the plaintiff was forced into resigning from her position. It was from these circumstances of her leaving employment that may be the plaintiff got the impression that the defendant would waive part of the outstanding loan.

The plaintiff was paid her terminal dues by the defendant. The amount that she had saved under the pension scheme maintained on behalf of the defendant bank was paid to the plaintiff. The plaintiff did not however repay the loans which, according to the defendant, had accrued to the sum of Kshs.2,347,815.66 by 11th August 2008. According to the defendant, it sought to exercise its statutory power of sale in respect of the charged property when the plaintiff persisted in her failure to repay the outstanding loans. Although the defendant stated that it had issued the requisite statutory notice to the plaintiff dated 15th September 2008, such notice was not exhibited by the defendant in the documents filed in reply to the plaintiff's application. In the absence of evidence of such notice, it is apparent that the complaint by the plaintiff that the defendant was unprocedurally seeking to sell the suit property cannot be dismissed off hand. It is further apparent that the defendant has not yet negotiated with the plaintiff the rate of interest that is to be charged on the said loan now that the plaintiff is no longer an employee of the defendant.

In the premises therefore, I hold that the plaintiff established to the required standard of proof that the purported sale which was scheduled to take place on 7th July 2009 was unprocedural since there was no evidence exhibited that the defendant had issued the requisite statutory notice as required under Section 74 of the Registered Land Act. It is further evident that the plaintiff and defendant have not reached an agreement in regard to the rate of interest that is to be charged in respect to the said loan account now that the plaintiff is no longer an employee of the defendant. I therefore grant the plaintiff's application for injunction. The defendant is hereby restrained from proceeding with the sale of the suit property on the basis of the impeached notice allegedly issued on 15th September 2008. The defendant shall however be at liberty to exercise its statutory power of sale upon agreeing with the plaintiff on the rate of interest that is to be applied on the loan amounts. The defendant will also be required to issue a valid statutory notice before it can invoke its powers of sale under the said instruments of charge and further charge. Costs of this application shall be in the cause.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2009

L. KIMARU

JUDGE