



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 83 of 2002

WANGARI NDEGWAPLAINTIFF

VERSUS

HOUSING FINANCE CO. LTD.DEFENDANT

R U L I N G

In a plaint dated 4th March 2002, Wangare Ndegwa, the Plaintiff herein, sued Housing Finance Company of Kenya

The defendant herein, in which she prayed for the following orders:- herein, in which she prayed for the following orders:-

(a) A declaration that the interest particularized in paragraph 6 of the plaint i.e.

- Penalty interest
- Interest on arrears
- Default charges
- Other charges

Charged by the defendant are illegal and unconscionable.

(b) A declaration that the plaintiff has fully discharged her obligations under the charge document of 7.9.93.

(c) A permanent injunction to restrain the defendant or the servants and or agenda from advertising for sale or selling L.R. No. 3160/I/MN-Nyali.

(d) Costs of the suit plus interest

The plaintiff has now filed a summons dated 16th June 2006 the subject matter of this ruling in which she seeks for an order of temporary injunction to restrain the defendant from advertising, auctioning transferring, selling or taking possession of L.R. No. 3160/I/MN or taking any further step to realize the

sale of the same. Wangare Ndegwa has sworn an affidavit of the application. She also swore a supplementary affidavit upon obtaining leave to further support the summons. On its part the defendant opposed the application by filing the replying affidavit of Joseph Kania sworn on 18th July 2006.

Mr. Oruko, learned advocate for the plaintiff, urged this court to grant the orders prayed for because the plaintiff was tricked by the defendant's advocate, M/s Bowyer Mahihu & Co. Advocates to sign the charge document dated 7/9/93 without enabling her to get explanation on its effect as required by law. It is the submission of the aforesaid advocate that the plaintiff was misled into believing that the terms set out in the letter of offer dated 18.1.93 were similar in content to the term and conditions contained in the charge she signed. The defendant through its learned advocate Mr. Lakicha argued against this ground. The learned advocate submitted that the plaintiff appended her signature on the charge document after getting an explanation from Sally Muchoki Mahihu advocate who then signed a certificate confirming that on the same date.

I have taken into account these submissions. I have also perused the material placed before me. What is clear in my mind is that the allegations raised by the plaintiff in her affidavit in support of the summons are so grave that they should not be taken lightly. She has alleged that the defendant's advocate, Ms Sally Muchoki Mahihu committed acts of fraudulent misrepresentation which enticed her to sign the charge documents without the need of undergoing a thorough explanation. She has even given the particulars of the fraudulent representation. She says that she was misled into believing that the terms in the letter of offer were similar those in the charge document. After anxiously considering this argument I am unable to agree with the plaintiff's assertions that she was misled. I have already said that the allegations are serious so that it is expected that the plaintiff must disclose such allegations in the plaint. I have perused the entire plaint and I am unable to trace any allegations touching on fraudulent misrepresentation. There is no evidence that the plaintiff was coerced into signing the charge documents. The terms of the letter of offer were incorporated in the charge of 7/9/1993 which the plaintiff willingly signed to bind herself with the terms therein.

The second limb of the plaintiff's argument is that the defendant has fraudulently and illegally imposed penalties on the loan advanced to her. It goes without saying that the charges claimed as penalties and interest are contained in the charge document which I have said that at the moment that this court is not convinced that the same was procured by fraudulent representation.

Of course my findings at this stage are basically preliminary because the main suit is yet to be heard. What the plaintiff seeks is to stop the defendant from exercising its statutory power of sale. The principles of granting or refusing orders of temporary injunctions are well settled. One only needs to cite the celebrated case of **Giella =vs= Cassman Brown & Co. [1973] E.A. 358**. In my humble view I am not satisfied that the plaintiff's application has met these principles. Let me repeat it by saying that the allegations of fraudulent misrepresentations have not been stated in the main action hence it cannot be said that the applicant has shown she has a prima facie case. May be she has intentions of amending her pleadings later but that is neither here nor there. She has however opted to place the cart before the horse. Even if it was said that the plaintiff had a prima facie case still I am not convinced that she cannot be compensated by way of damages. What I am aware is that the jurisdiction of a court of equity to restrain by injunction the execution of a power of sale in a mortgage/charge should be exercised only when on account of frauds, want of consideration or other sufficient reason, the enforcement of the mortgage debt is against good conscience and would work irreparable injury. The complaint of the plaintiff is that she was not given notice of the kind of interest charged. It has not been said that the rate interest has been altered. Had such an allegation been made, I would have arrived at a different conclusion.

For aforegoing reasons, I see no merit in the summons. It is dismissed in its entirety with costs to the defendant.

Dated and delivered at Mombasa this 12th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Hassan h/b for Hassan for the defendant, Oruko for plaintiff/applicant