

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2 of 2007

VIRGINIA WAMBUI OTIENO-MBUGUAPLAINTIFF

VERSUS

NATIONAL BANK OF KENYADEFENDANT

RULING

The application for my determination is under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules, Rules 11 and 16 of the auctioneers Rules 1997, Section 71, 74, 77 and 79 of the Registered Land Act. The applicant seeks an order of injunction restraining the defendant from selling, advertising for sale, transferring and in any other manner whatsoever dealing with parcels No. **L.R. NGONG/NGONG/4338 and 5646 – Kajiado District** pending the hearing and determination of this suit.

The case of the plaintiff is that she was served with an invalid statutory notice, hence the power of sale has not arisen. In any case no monies are outstanding under the mortgage. It is also the contention of the plaintiff she would suffer substantial financial harm and loss if the suit property is sold. The plaintiff further contends that she obtained financial accommodation from the bank to the tune of Kshs.550,000/= but could not service the loan, due to her ill health. Through various correspondences exchanged with the bank, the plaintiff sought for a waiver of the repayment terms of the mortgage date.

The plaintiff also avers that the defendant loaded various unsubstantiated and unlawful amounts into her account, which made difficult for her to redeem the charged property. And the sums allegedly due and owing are strange to her, as the defendant refused to honour her request to reverse the said figures. It is contended by the Plaintiff that the defendant's wrongful and erroneous computation of interest is contrary to the law and strict terms of the charge document.

The defendant filed a replying affidavit disputing the events narrated by the plaintiff. It is the case of the defendant that the plaintiff charged the two parcels of land to secure payment of advances or other financial accommodation from the defendant, which was granted to her. And after taking an amount of Kshs.550,000/= on 30th October, 1997, the plaintiff in breach of the charge instrument defaulted in repayment schedule. As at 31st August, 2000 the debt rose to a sum of Kshs.1,071,641/55 and the plaintiff requested a waiver of interest, which the bank declined. The plaintiff was then issued with a statutory notice dated 18th September, 2000. Again on 17th April, 2001 Auctioneers served the plaintiff with a proper and valid notification of sale indicating that the suit properties would be sold on 11th July, 2001.

The Plaintiff then made several pleas to be pardoned and requested for waiver of the interest loaded to her accounts. The defendant granted the plaintiff an accommodation and the sale was cancelled. Despite the gesture, the plaintiff continued in her default in repayment of the advances made to her, culminating in the defendant to down grade the plaintiff's account, that no liabilities could be levied. And thereafter the plaintiff was given 90 days notice to redeem her securities in a letter dated 17th November, 2003.

I have taken into consideration the submission made by both Advocates and the pleadings of the parties. The law is that the court has no powers to grant an injunction to restrain mortgagees/chargees from exercising their statutory power of sale solely on the basis that there is a dispute as to the amount

due under the mortgage. There is no dispute that the plaintiff did acknowledge at least some indebtedness through several letters exhibited by the defendant. This clear admission means that the plaintiff has approached the court with unclean hands.

There is also ample and uncontroverted evidence to show that the plaintiff was served with several statutory notices. And the sale was cancelled after the plaintiff made consistent pleas to the defendant. The defendant severally accommodated the plaintiff by adjusting the amount payable and the time for repayment. Such gesture was not genuinely and reasonably used by the plaintiff. This court is a court of equity and a party seeking the grant of an equitable relief must first do equity to the opposite party. The plaintiff has severally admitted being indebted to the defendant and in my view a mortgagee will only be restrained if the mortgagor pays the amount claimed into court, that is the amount which the mortgagee claims to be due to it, unless on terms of the mortgage, the claim is excessive.

I have no evidence before me whether documentary or otherwise to show that the defendant had acted oppressively in exercising its statutory powers of sale. In the same breadth, I am satisfied that a proper and valid statutory notice had been served upon the plaintiff. It was not once but at least twice or even more. There is a default in the servicing of the mortgage which has continued for a long period of time. The bank in my view exercised restraint and passion towards the plaintiff but the plaintiff thinks this court can aid her persistent and illegal default. It is my considered view that equity will not permit the plaintiff to gain an advantage from her unlawful act nor will this court aid the plaintiff to derive undue advantage from her wrongful act. That would be a blatant abuse of the powers of equity and definitely be unconscionable.

It is my decision that the plaintiff has failed to conform to the principles set out in **Giella v Cassman Brown 1973 E.A. 358**. The plaintiff has failed to show a prima facie case with a probability of success, there is no evidence that damages will not be adequate. The defendant is a reputable bank which can comfortably compensate the plaintiff for any eventual loss. I am satisfied the balance of convenience tilts against the plaintiff who defaulted after giving several and limitless promises to repay the debt.

After giving the matter my careful consideration, I am disinclined to award the plaintiff for her own transgressions. I refuse to exercise my discretion in favour of the plaintiff, due to her conduct towards the defendant who graciously accommodated her several times. The debt remains in the books of the bank without any efforts on the part of the plaintiff to repay the same. The properties were given as a security for the loan or financial accommodation extended. The purpose of that security was to give the bank the opportunity to recover its monies. The bank has no cabins to keep titles which have no use to the bank. In this case the two titles were kept in a cabin, where the money extended to the plaintiff was removed from. That cabin remains empty because the plaintiff took the money of the bank for her own use. And of course there is a default, hence the two titles have to be retrieved for sale in order to recover the debt owed to the plaintiff.

In the premises the application is dismissed with costs.

Dated and delivered at Nairobi this 26th day of April, 2007.

M. A. WARSAME

JUDGE

Ruling delivered in open court in the presence of Mr. Kuloba for the plaintiff and Mrs. Waigwa for the defendant.

M. A. WARSAME

JUDGE

26.4.2007