

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 483 of 2004

GRACE WANGUI NJORU.....PLAINTIFF

VERSUS

EQUITY BUILDING SOCIETY.....DEFENDANT

R U L I N G

This Ruling relates to an application by the Plaintiff for an interlocutory injunction against the Defendant. The application is expressed to be brought under the provisions of Order XXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act, and because it was filed during the Court Vacation, it was also brought under Part I of the High Court Vacation (Practice and Procedure) Rules.

The background to the application is this. The Plaintiff guaranteed the repayment of a loan to one Lawrence Gitonga Njogu, by the Defendant (Equity Building Society), and in the process, charged her land Tile No. NGONG/NGONG/21469, UPPER MATASIA to secure the repayment of the said loan, and her own guarantee. The said Lawrence Gitonga Njogu failed to pay, so the Defendant turned to her, and advertised the suit property for sale by public auction. The plaintiff pleads that no notice was given to her before the property was advertised for sale, and as such the Defendant's statutory power of sale had not arisen. Mr. Chege learned Counsel for the Plaintiff told the Court that the notification of sale is invalid because it refers to a different property from that of the Plaintiff or the Charged property. Counsel submitted that on this ground alone, the Plaintiff had established a prima facie case under the principles of *Giella vs. Cassman Brown & Co. Ltd* [1973] EA 358) with a high probability of success, and that unless the proposed sale was stopped, the Plaintiff would suffer irreparable loss, and that on the balance, the convenience lay with the Plaintiff.

Mrs Njuguna, learned Counsel for the Defendant submitted that the Plaintiff admits to have received the statutory notice of sale, conceded that Lawrence Gitonga Njogu, the borrower, had defaulted. The Plaintiff had made a proposal to repay or redeem the loan but before the Defendant could respond the property was advertised for sale, and hence the application herein.

Counsel informed the Court that the parties had been negotiating a settlement, and the Defendant had accepted the first payment of Shs. 60,000/= but the Plaintiff had not made any further payment. The Plaintiff had come to a Court of Equity but has not done equity. There had indeed been a misdescription Counsel conceded, in the Notice of Sale by the Auctioneers, but having admitted the liability, the Plaintiff cannot be said to have established a probability of success on account of the misdescription. The Plaintiff had had enough time since August 2004. The Plaintiff had also not made any payment despite promises to do so.

Counsel cited the case of **CAESAR NJAGI KUNGURU vs. KENYA COMMERCIAL BANK LTD (Milimani Commercial Courts, H.C.C.C. No. 1543 of 2000), and GODFREY NGUMO NYAGA vs. HOUSING FINANCE COMPANY OF KENYA LTD** (Civil Appeal No. 134 of 1987) for the propositions, that the Plaintiff having admitted the debt, and having even made proposals to pay, and defaulted in such payments, had not established a prima facie case with a high probability of success and that the Court of Appeal, will not, where a party has a statutory right of action, prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively.

In the case at hand it is common ground between the parties, that the principal borrower,

Lawrence Gitonga Njogu defaulted the Plaintiff, the guarantor was informed of such default, the Plaintiff made promises to pay, made one payment, and then came back to stop the Defendant from realising the security. There is no evidence of oppression, the Plaintiff is a guarantor indebted to the Defendant. There is really no basis for this case and the application herein. The Defendant's interest is repayment of its loan. The Defendant's Counsel declared in Court that the Defendant is not interested in selling the Plaintiff's charged property – but will do so if the Plaintiff does not produce reasonable proposals for such payment.

So from the legal point of view, the Plaintiff has not discharged the onus placed upon an Applicant for the grant of the equitable remedy of injunction as laid down in the *Giella vs. Cassman Brown & Co. Ltd* (supra). In the circumstances, the Plaintiff's application dated 1.09.2004 fails, and the same is dismissed with costs. There shall be orders accordingly.

Dated and delivered at Nairobi this 26th day of May 2005.

ANYARA EMUKULE

JUDGE