



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 813 of 2003

VIOLET WANJA GATEI. PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD. DEFENDANT

RULING

On 18.12.03, the Plaintiff/Applicant, under Order 39 rules 1 (a), 2, 2A, 3 and 9 of the Civil Procedure Rules, moved to this court by way of a Chamber Summons, seeking five orders, two of which, Nos. 1 and 2, are already spent. The remaining three orders are:

1. A temporary injunction restraining the Defendant, its agents, employees and or servants from advertising and/or offering for sale, selling, transferring, alienating L.R. No. 170/36 Kiambu and registered in the name of Violet Wanja (the applicant) pending the hearing and determination of this application **inter parties**.
2. Same as 1 above except, pending the hearing and determination of this suit.
3. Costs of this application.

The application is on the grounds inter alia that:

- (a) No statutory power of sale arises and/or accrues in favour of the Defendant in respect of monies advanced, if any, to Airland Tours and Travel Ltd. – (the company) as any sums advanced to the Company are unsecured.
- (b) The mortgages registered against the suit premises were registered as securities for previous – past – and distinct advances to the company which have since been fully repaid and settled;
- (c) There was no agreement – express or implied – that the aforesaid mortgages would be provided as security for the current advances granted to the company (if any);
- (d) That the Defendant has irregularly and unlawfully consolidated the debts of the company (for which the Plaintiff is not personally liable) with those of the Plaintiff in her personal capacity;
- (e) That the Defendant has irregularly, illegally and fraudulently issued a statutory notice based on the alleged debts of the company despite the same not being secured on the suit premises;

- (f) That there was no consideration provided for the current advances to be secured against the suit premises any such consideration being past and/or lapsed after performance of the initial contracts to lend;
- (g) The statutory notice issued by the Defendant is improper illegal null and void ab initio in that it purports to demand payment of the company's debts as a precondition to redemption of the securities held;
- (h) The Defendant has charged and continues to charge exorbitant and extortionate interest rates on the Plaintiff's loan account beyond the rate or rates agreed on between the parties at the material time; which renders the loan account to fall into arrears and thereafter impose compound interest and default and/or penalty rates thereby rendering redemption of the loan account virtually impossible and onerous and such actions by the Defendant are a clog against the Plaintiff's right of redemption;
- (i) There is need for accounts to be taken as between the Plaintiff and the Defendant for a true and accurate determination as to, the extent of the Plaintiff's indebtedness;
- (j) The suit premises are the Plaintiff's residence and if sold it will occasion irreparable loss and damage and defeat the purpose of the suit and that damages are not an adequate remedy in the instant case;
- (k) No prejudice will be occasioned to the Defendant by grant of the orders sought

The application is supported by an affidavit by Violet Wanja Gatei of even date.

In opposition, the Defendants aver that the Plaintiff, together with Purity Mbuba, have at all times been indebted to the Defendant, a debt secured by several mortgages over the suit property; that the suit property was to secure the Plaintiff's borrowings together with Purity Mbuba; that at no time has the Plaintiff been able to redeem her indebtedness with the Defendant; that at no time has the applicant denied owing the sums demanded by the Defendants; that the applicant defaulted leading to the issuance of the statutory notice which is valid and proper and which should not be stopped.

I have perused the massive pleadings and authorities by both parties and considered the submissions and authorities cited by their respective learned counsels – Gachanja and Namachanja for the Plaintiff and the Defendants respectively, and I have arrived at the following findings and conclusions.

The offshoot of the dispute between the parties is the use of the suit property as security for both company borrowings and borrowings by the Plaintiff, in her individual capacity. I have no doubt that due to the mixed relationship of the Plaintiff, as a customer of the Defendant bank both as an individual and a Director of the company, the two accounts, by two legally separate legal entities could and, I believe did, get mixed up.

The correspondence and the mortgages bear witness to this fact.

Accordingly, and given that the Plaintiff admits that at one point the suit property secured the company borrowings as well as her own individual financial facilities with the Defendant bank, it is not possible, in the absence of full trial where oral evidence can be adduced with the necessary cross-examination process, to determine whether or not the company mortgages had been fully repaid. There is the issue of whether or not the two accounts got mixed up, whether intentionally or otherwise, and how much was the unpaid balance or balances in each account. These are, in my view, triable issues which cannot be disposed off through an interlocutory application like this.

I have no doubt in my mind that there is an absolute need to take full accounts before the exact indebtedness of the Plaintiff, as an individual, vis-à-vis the company, can be established. Without that redemption becomes illusory. I have also no doubt that the validity of the various mortgages, and there

are five of them on record, calls for a full trial given the Plaintiff's averments that such security was for past or lapsed advances to the company. This is not an issue that can be solved by affidavit evidence alone. It is, in my view, a triable issue.

Further, whether the company loans had been fully repaid, thus discharging the charged property in that respect, is a matter that calls for oral evidence, in a full trial.

The law on when a case needs a full trial is trite leaning. So long as the party has shown even one single triable issue, irrespective of the chances of success, the matter should go for a full trial to establish the correct position.

Having held that there are triable issues in this case, it is necessary to preserve the substance of the suit until or pending the final determination of the suit herein.

Accordingly, I grant prayer No. 4 in the application (No. 2 in this Ruling). I further order that costs shall be in the cause.

Dated and Delivered in Nairobi this 22nd day of July, 2005.

O. K. MUTUNGI

JUDGE