



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 528 of 2005

KAIRU ENTERPRISES LTD.....1<sup>ST</sup>  
PLAINTIFF/APPLICANT

MRS. LUCY W. KAIRU .....2<sup>ND</sup>  
PLAINTIFF/APPLICANT

LUCY W. KAIRU (Suing as the administratrix Of the  
estate of the late Hon. Munene Kair.....3<sup>RD</sup>  
PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA  
LTD.....DEFENDANT/RESPONDENT

RULING

By their Chamber Summons of the 23.9.2005 the applicant seeks the following orders:-

2. **THAT pending the hearing and determination of this suit, the Defendant by themselves, their servants, agents or whosoever be restrained by way of an injunction from selling, disposing, transferring, alienating or in any other way adversely dealing with that property known as L.R. No.9509/41 Mirema Road, Ruaraka.**
3. **THAT costs of this application be provided for.**

The Applicant wishes to restrain the Respondent from exercising its statutory right of sale to sell the suit premises, which are charged to it.

The first Applicant applied for a loan from the Respondent, which was granted subject to certain special conditions.

The first Applicant is a limited liability company and the 2<sup>nd</sup> Applicant is a director of the 1<sup>st</sup> Applicant Company. She is also the administrator of her late husband's estate, he also having been a director of the 1<sup>st</sup> Applicant company.

One of the special conditions referred to above was that the offer of the loan was subject to a Life Insurance quotation from ICEA.

The 1<sup>st</sup> Applicant accepted the conditions for loan but asked that two of the special conditions be changed including the reference to ICEA to read Madison Insurance Company.

The loan was duly disbursed and a charge registered over the suit premises in favour of the Respondent.

On the 1<sup>st</sup> April, 1998 the deceased died. At that time the loan account was in arrears to the sum of Kshs.5,997,450.70.

On the death of the deceased, it appears that no life insurance had been effected on his life. The Applicant says that this was due to either the negligence or fraud of the Respondent. The Applicant put to the fact that the loan was disbursed and that premium for life Insurance were debited on the loan account.

On the 12.6.2003 the Respondent wrote to the 1<sup>st</sup> Applicant stating their insurers had agreed to implement a premium refund of Kshs.123,948.00 and that the balance outstanding at that time was Kshs.7,153,542.85.

The Respondent's case is that the insurance was not effected as Madison Insurance Company which the applicant preferred had not undertaken the risk and annexed to the Replying affidavit of Joseph Karia for the Respondent a letter from Madison Insurance of the 13.10.2004 stating they had not received a proposal form from the Respondent but that a quotation for a mortgage protection quotation was submitted to them in mid 1995 by the deceased but that he had passed away before fulfilling "*all our medical requirements.*"

Mr. Ngunjiri for the applicant relied on the case of *Kamithi v Kenindia Assurance company (2001) EA page 394* a case in which an insurer lost the right to avoid a policy when it continued to accept premiums after it discovered the non disclosure of material facts by the insured.

Also *Simiyu v Housing Finance Company of Kenya (2001) EA page 540* where an injunction was granted to restrain a sale by a mortgagee as the statutory notice had not been validly served.

Mr. Ngunjiri relied on dicta of Ringera J (as then was) at page 549 where he said;

**"In exercising such a discretion it is entitled to take into account the conduct of the Respondent and the gravity of the breaches of law or contract alleged. If, for example, it is shown that the Respondent has behaved in a high-handed or overbearing manner or that he has flagrantly disregarded clear and mandatory provisions of law, equity may yet come to the assistance of the applicant. To hold otherwise would be to confer a *carte blanche* on those who are rich enough to pay all quantum of damages to ride roughshod over the rights of other persons."**

The Applicants' contention is that it is due to the fault of the Respondent that the deceased was not covered, which would have led to the insurance monies being used to reduce the 1<sup>st</sup> Applicant's indebtedness.

The Respondent contended, however, that it was the fault of the deceased that cover was not in place when he died.

It must be borne in mind that the debtor is the 1<sup>st</sup> Applicant and not the deceased. It was the 1<sup>st</sup> Applicant which still exists which borrowed the money and agreed to repay it on the charge. I do not see that the death of the deceased obviated the 1<sup>st</sup> Applicant's obligation to pay.

The relief claimed in the Plaintiff is as follows:-

**(a) An order for injunction do issue against the Defendant restraining the Defendant from alienating or selling or in any way dealing adversely or otherwise with all the property known as L.R. No.NRB/9509/41 Mirema Road, Ruaraka;**

**(b) A mandatory injunction compelling the Defendant to discharge the 1<sup>st</sup> Plaintiff's mortgaged property L.R. No.NRB/9509/41 Mirema Road, Ruaraka as mortgaged to the Defendant;**

If there was negligent or fraud on the part of the Respondent then the Applicants' remedy is in damages. I do not see that it removes the Applicants' obligation to pay back what it borrowed nor do I see that it estops the Respondent from exercising its statutory power of sale.

In order to succeed, the Applicant must show that it has a prima facie case with a probability of success and that damages would not be an adequate remedy.

In my view, the applicants have not shown they have a prima facie case. Their remedy in my view depends upon the Applicants proving that the Respondent was either negligent or fraudulent and lies on damages. This is a collateral matter and does not affect the 1<sup>st</sup> Applicant's obligation to pay.

In the result I dismiss this application with costs to the Respondent.

Dated and delivered at Nairobi this 23<sup>rd</sup> day of November, 2005.

**P. J. RANSLEY**

**JUDGE**