REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMECIAL & TAX DIVISION

CIVIL APPEAL NO 09 OF 2020

MARGARET WAITHIRA WANGURE.....APPELLANT

VERSUS

KENYA WOMEN MICRFIANCE BANK LIMITED.....1ST RESPONDENT

CRATER VIEW AUCTIONEERS…….....……2ND RESPONDENT

RULING

1. **MARGARET WAITHIRA WANGURE**, the appellant, has filed a Notice of Motion application dated 18th August 2020. By that application she seeks two of what I would term as *'double barrel'* prayers. Those prayers are two. They are:

> **a. That there be a stay of execution of the Ruling delivered on 10th August 2020 in Chief Magistrate's Court civil case (CMCC) NO. 1939 of 2020 at Nairobi and an order do issue preventing advertisement or sale of the appellant's properties namely L. R. NO. NGONG/NGONG 29415 and NGONG/NGONG 29413 (the suit properties) by the respondent (KENYA WOMEN MICRO FINANCE BANK LIMITED) or their servants/agents pending the hearing and determination of the appeal herein.**
>
> **b. That there be a stay of execution of the Ruling delivered on 10th August 2020 in Chief Magistrate's Court civil case (CMCC) NO. 1939 of 2020 at Nairobi and an order do issue preventing advertisement or sale of the appellant's properties namely L. R. NO. NGONG/NGONG 29415 and NGONG/NGONG 29413 (the suit properties) by the respondent (KENYA WOMEN MICRO FINANCE BANK LIMITED) or their servants/agents pending the hearing and determination of CMCC 1939 of 2020 between the appellant and the respondent.**

2. The appellant filed this appeal against the Ruling of the Chief Magistrate's court which was delivered on 10th August 2020. By that Ruling A. M. Obura (Mrs) Senior Principal Magistrate (SPM) dismissed the appellant's application for injunction whereby the appellant had sought to restrain the respondent from selling by auction the suit properties in exercise of its statutory power of sale. The appellant has by the application before me sought similar prayer for injunction to restrain the respondent from selling by auction the suit properties. The auction sale of those suit properties is scheduled for 4th September 2020.

3. The appellant submitted that the amount outstanding towards the loan advanced by the respondent is in dispute. That it was because of that dispute that the appellant filed the case before the Chief Magistrate's court. That because her application before the Chief Magistrate, for injunction, was dismissed the appellant had filed this appeal and now seeks by the present application that there be stay of the Ruling of the Chief Magistrate and a restrain against the auction.

4. The appellant's application is premised on the ground that she is not in arrear with her loan repayments. She deponed in her affidavit in support of the application that she obtained her loan in the year 2013, from the respondent, of Ksh. 10 million when she was the respondent's employee. She resigned from her employment by her letter dated 22nd January 2018. That the respondent had served her with a redemption notice dated 2nd March 2020 for the outstanding amount of Ksh. 8,473,809. That she was shocked by that notice because she knew that her loan had be pre-paid up to the year 2028. This was because recoveries made in liquidation of her shares, recovery of her terminal dues and payments she had made into her account amounting to Ksh. 4,857,436.72. The appellant therefore surmised that she had paid the respondent Ksh, 12,332,459.50

5. The appellant further deponed that her loan of Ksh. 10 million was for a period of 20years at an interest rate of 6% and accordingly that

the monthly repayments would be Ksh. 71,643. This would lead to a total repayment of Ksh. 17,194,345.40. According to the appellant this year being the seventh year of her loan she should have repaid Ksh. 6,018.021.24 which is less than the amount she had actually paid.

6. That the respondent however arbitrarily changed the rate of interest from 6% to 23% without giving her notice of such change. Further that the interest rate of 23% was illegal because the law then had capped the interest rate to 14%.

7. The learned counsel for the appellant, Mr. Gichohi, submitted that the appellant had shown a prima facie case with probability of success and that accordingly an injunction should be granted.

8. The application is opposed by the respondent. The respondent relied on the affidavit of its head of legal services, namely Marion Wasike. According to the respondent there is no positive order in the Chief Magistrate's Ruling, of 10th August 2020, which is capable of being stayed, as sought by the appellant. Further that the appeal does not raise triable issues. That the appellant had concealed before the Chief Magistrate's court that she had authorized the respondent to deduct repayment of her loan from her terminal dues, she concealed that she had been served with the statutory notices and she also concealed that she had persistently defaulted in the repayment of her loan. Marion Wasike also deponed that the appellant had executed a letter of offer in which the respondent reserved its right to revise the interest rate and it was provided therein that the respondent would not suffer prejudice if notice of such revision was not given to the appellant. That on the appellant leaving the respondent's employment the letter of offer provided that the applicable interest rate would change from 6% to the prevailing market rate. That accordingly the rate of interest, on the appellant leaving respondent's employment changed from 6% to 23%. That the appellant had defaulted in the repayment of her loan and accordingly she was served with the requisite notices as required by law. That in view of that default the respondent is entitled to proceed with realization of the sale of the suit properties.

ANALYSIS AND DETERMINATION

9. The Ruling of the Chief Magistrate's court was, as rightly submitted by the respondent, negative and is therefore incapable of being stayed as the appellant seeks by the 'first barrel' of her prayer. There are several authorities which support that jurisprudence. A case in point is **CATHERINE NJERI MARANGA V SERAH CHEGE & ANOTHER [2017] eKLR** where the court stated:

> 15. Further, in the more recent case of **Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others [2016] eKLR**, the Court of Appeal expounded on stay of execution stating:
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> ***"16. In Kanwal Sarjit Singh Dhiman v. Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:***
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> ***"The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of Arts & Applied Sciences vs. Oranga & Others [1976] KLR 63 at page 66 paragraph C)."***
>
> ***17. The same reasoning was applied in the case of Raymond M. Omboga v. Austine Pyan Maranga (supra), that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:***
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> ***"The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order … The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise…"***

10. It follows from the above discussion that the first part of the appellant's prayer, for stay of the Chief Magistrate's order, fails because the only thing Learned Magistrate did was to dismiss the appellant's application for injunction which is a negative order.

11. For the second part of the appellant's prayer she will be required to satisfy the principles of granting an injunction as enunciated in the case **GIELLA V CASSMAN BRWON & COMPANY LIMITED (1973) E. A.358.** Those principles, which have held true from 1973 to this day, are that:

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."***

12. The appellant argued that she has shown a prima facie case with probability of success because she proved she had made payment for her loan up to the year 2028, and that the respondent had illegally changed the rate of interest and had charged it to an unlawful rate.

13. The appellant in alleging that she had made prepayment of her loan did not deny as was alleged by the respondent that she had defaulted in the payment of her loan. If indeed she has defaulted her calculation leading a surplus repayment is indeed in doubt. This because on defaulting there would be penalties and interest on those penalties. The appellant obviously in her recalculation of her repayments did not bear that in mind and hence the doubt on her allegation that she has paid her loan up to the year 2028.

14. There is further doubt in that calculation because the appellant by her letter date 26th June 2018, to the respondent, she requested the respondent to use her final dues of Ksh. 2 million to reduce the principal of her loan. Having made that request the appellant is not justified to use that amount of Ksh. 2 million in calculating her monthly repayment. That mount was applied, as per her request, to reduce the principal.

15. The appellant's recalculation of the repayments is also in doubt in view of what was stated in the Magistrate's Ruling of 10th August 2020, thus:

> **"The Applicant (the appellant) also stated that she is ready and willing to continue repaying her loan and shall be prejudiced if the residential house (the suit properties) is sold"**

16. The appellant could not have undertaken to continue repaying her loan if, as she has argued before me, she has repaid the debt up to the year 2028. The appellant also needs to be reminded that a dispute of the outstanding amount is not a basis of granting an injunction. This is what the Court of Appeal stated in the **case MRAO LIMITED V FIRST AMERICAN BANK OF KENYA LTD & OTHERS [2003] KLR**, thus:

> ***"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."***

17. The appellant argued, without saying which law, that the rate of interest charged by the respondent was illegal. Even if the rate interest applied by the respondent was illegal, in view of the appellant's own admission of indebtedness the appellant has failed to show a prima facie case with probability of success. It needs noting that the respondent under contract, the letter of offer, was entitled to change the rate of interest to market rate once the appellant left its employment and failure to give the appellant notice of such change would not prejudice the respondent.

18. When the appellant obtained her loan she offered the suit properties as security. In offering those properties she accepted that on her defaulting in her repayment of her loan the same would be sold in realization of that security. The appellant cannot therefore now argue that she will suffer irreparable loss if the properties are sold. See the case of **KITUR V STANDARD CHARTERED BANK & 2 OTHERS [2002] IKLR** where the court stated:

> ***"It must be noted that when a Chargor lets loose its property to a Chargee as security for a loan or any other commercial facility on the basis that in the event of default it be sold by a Chargee, the damages are foreseeable. The security is thenceforth a commodity for sale or possible sale, with the prior concurrence and consent of the Chargor. How then can he, having defaulted to repay loan arrears prompting a chargee to exercise its statutory power of sale, claim that he is likely to suffer loss or injury incapable of compensation by an award of damages? Such an argument is definitely misplaced and has no merits."***

19. The appellant has also failed to prove that she will suffer irreparable injury because the value of the property is quantifiable and if she does succeed in proving she had repaid the loan she can be awarded damages equivalent to the value of the suit properties.

20. Having considered the two principles of injunction and because I am not in doubt on in respect to those two principles I will not proceed to consider the third principle of injunction, that is where the balance of convenience lies.

21. The appellant's application dated 18th August 2020 is without merit and is dismissed. Having been dismissed the costs will follow the event.

CONCLUSION

22. The Notice of Motion dated 18th August 2020 is dismissed with costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **3rd** day of **SEPTEMBER** 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the Appellant:

For the Respondents:

ORDER

This decision is hereby virtually delivered this **3rd** day of **September, 2020.**

MARY KASANGO

JUDGE