

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

HIGH COURT CIVIL APPEAL 07 & 9 OF 2018

HOUSING FINANCE CORPORATION LTD.....APPELLANT

VERSUS

PATRICK IKUNDA NANJAU.....1ST RESPONDENT

KALOKI JACQUELINE NJURE.....2ND RESPONDENT

JUDGMENT

The Appellant in Civil appeals No. 7 and 9 of 2018 are seeking that orders made in the ruling of Hon Lucy Ambasi Chief Magistrate in Meru CMC C.C No. 116 of 2017 allowing application dated 28th September 2017 and dismissing application dated 28th September 2017 by Kaloki Jacqueline Njure be set aside and/or be substituted with orders dismissing the application dated 28th June 2017 and allowing application dated 28th September 2017 with costs.

Interim orders of injunction were granted on 29th June 2017 and the interim orders were vacated on 31st October 2017 before being reinstated vide ruling delivered on 15th January 2018.

This court has considered the suit in Meru Chief Magistrates court C.C. No. 116 of 2017 together with the ruling delivered on 15th January 2017 and in consideration that principles spelt out in the authority of Giella vs Casman Brown and Co. Ltd [1973] EA 360 puts the burden on the applicant to prove that he/she will suffer irreparable loss in event that the order of injunction being sought for is not granted.

The trial magistrate set out all the conditions but proceeded to interpret the principle wrongly that in event that there are damages that will be suffered by the 2nd defendants, the same will be compensated by an award of costs? The 1st Respondent in the plaint seeks a refund of Kshs. 414,000/=, which is made up of Kshs 109, 000/= which he deposited in 1st defendant/2nd Respondents loan Account with the bank and Kshs. 195,000/= paid through 1st defendants lawyer and Kshs 110,000/= alleged to be for gear box expenses. It is mentioned in the sale Agreement that the 1st Respondent herein was to service the 2nd Respondents loan with the appellant in monthly installments of Kshs 30,000/= effective 10th November 2016 but looking at the 1st Respondents schedule of repayment, when he was supposed to have paid Kshs 150,000/= he had only paid Kshs 109,000/= which was paid inconsistently on dates that had not been agreed upon. The Trial Magistrate presumed that the bank was aware of the arrangement between the Respondents but there is no such evidence in the 1st Respondents pleadings in the trial court and it is the view of this court that that was a wrong presumptions. The 1st Respondent was aware that he was buying a car that had been registered in the name of the 2nd Respondent and Appellant Bank and proceeding to transact with the 2nd Respondent in respect of the motor vehicle herein without written authority of the Bank was with all due respect misadvised.

The 1st Respondent claims to have informed the bank and that the bank colluded with 2nd Respondent and allowed her to withdraw the money he had deposited in her loan account. The Account into which 1st Respondent claims the Appellant and 2nd Respondent colluded and allowed the 2nd Respondent withdraw monies he had deposited annexure "PIN 1" is Account No. 200011582 -0. Whereas the Asset Finance Account that the 2nd Respondent used to take out a loan for finance of the car in questions is A/C No. 0050000368-43.

These are 2 distinct accounts although in the names of the 2nd Respondent and the bank could not have interfered with it without authority of the 2nd Respondent as that would have been illegal and actionable. This court agrees with the appellant that there was no privity of contract between it and the 1st Respondent and therefore the order of temporary injunction issued by the trial court was erroneous and that the principle that an injunction will only be issued where there is proof of irreparable loss that cannot be compensated with damages was wrongly interpreted.

The 1st Respondent knows that his redress is in the 2nd Respondent with whom they entered into an agreement over an asset that had been charged without authority of the appellant. The appeal herein is found to be valid and the prayer to set aside the interlocutory orders of injunction made on 15.1.2017 is allowed with costs to appellant. There shall be no costs to 2nd Respondent.

HON. A.ONG'INJO

JUDGE

JUDGEMENT DELIVERED, DATED AND SIGNED IN COURT ON THE DAY OF 7TH MARCH 2019

HON. A.MABEYA

JUDGE