



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 122 OF 2018

SHELLMITH WAMBUI NJOGU.....PLAINTIFF/APPLICANT

VERSUS

**KENYA WOMEN MICROFINANCE BANK
LIMITED.....DEFENDANT/RESPONDENT**

RULING

1. The Plaintiffs plea for Injunction is premised on two broad issues:-

a. That because of default of some contractual terms by the Defendant, certain drawdown and disbursements are erroneous, unlawful and otherwise unexplained.

b. An infringement of Section 24 (2)(a) of The Microfinance Act.

2. It is common ground that the Statutory Notices required by the Land Act have been issued but the gist of the Plaintiff's case is that they are premature because had the Defendant honoured the terms of the Contract then there would be no default.

3. If arguendo, I accept that the Defendant was in breach then I must ask myself whether such breach has caused a situation where the Plaintiff appears to be in default when she is actually not in default.

4. It is common ground that the Plaintiff has benefitted from sum funds granted to it by the Defendant, and for this reason I would have expected the Plaintiff to place before this Court evidence (say by way of accounts) that would demonstrate that in the absence of breach on the part of the Defendant she would not be in default at all. The amount claimed by the Bank is in excess of Khs.70m. To debunk this demand, the Court would require some evidence that would support the assertion that had the Contract been adhered to (as she claims) then not a cent would be due and owing. This the Plaintiff has not done.

5. On the second aspect, Section 24 2(a) of the Microfinance Act provides that;-

a) An Institution shall keep accounts and records which show a true and fair state of affairs.

6. It is the position of the Defendant that it has provided the Plaintiff with Bank Statements on a monthly basis and has shown a copy thereof, BK7. The Plaintiff in her further supporting Affidavit of 9th May 2017 filed after the Defendant had displayed the Statement does not directly address the issue and I am unable to agree with her that she has made out a prima facie case that she did not receive the Statement/s.

7. If however it is the Plaintiff's case that the Statements are not a true and fair statement of affairs as required by Section 24(2)(a), then that would amount to a dispute of accounts, a matter that cannot ordinarily be a ground for this Court to injunct a Chargee from exercising its Statutory Power of Sale.

8. Being of the view that the Notice of Motion dated 26th March 2018 does not meet the 1st threshold in Giella ie. does not demonstrate a prima facie case with a probability of success then I have to, as I now do, dismiss that application with costs i.e. The Notice of Motion of 26th March, 2018 in prayer 2 and 3.

Dated, Signed and Delivered in Court at Nairobi this 4th day of October, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Arika for Applicant

Mahinda for Respondent

Nixon - Court Assistant