



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 479 OF 2015

LUCY WANJIRU MBUGUA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

SPEED CAPITAL LIMITED ::::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. By a **Notice of Motion** application dated 1st October 2015, the plaintiff seeks to secure the following surviving order, namely:

3. That this Honourable court be pleased to issue a Temporary injunction restraining the sale, transfer or in any other way dealing with Land No. Reference NGONG/NGONG/46227 pending hearing and determination of this suit.

4. That costs be provided for.

2. The application is supported by the grounds set out therein, and also by the affidavit of LUCY WANJIRU MBUGUA sworn on 1st October 2015. The plaintiff's case is that on or around 23rd February 2015, Plaintiff/Applicant obtained a loan facility from the Defendant/Respondent to the tune of Kenya Shillings Two Million Five Hundred Thousand (2,500,000/=). As security for the said loan facility, the Defendant/Respondent registered a charge over NGONG/NGONG/46227. On or around 4th June, 2015 the Plaintiff/Applicant realized that the interest rates by the said Defendant/Respondent were exorbitant and extremely high as the Defendant indicated that the outstanding loan balance was Kenya Shillings Five Million, Five Hundred and Sixty Seven Thousand, Six Hundred and Sixty (5,567,660/=) at 5.5% per month which translates to 65% per annum. Barely within four months, the interest had doubled the principal amount which goes against the spirit of the induplum rule. This caused the Applicant to seek another facility from a different institution who agreed to buy off the loan in its entirety from the Defendant/Respondent and communicated the same to the Respondent, who are nonetheless hell bent to ensuring that the plaintiff does not redeem the property which is her matrimonial home.

The Defendant/Respondent blatantly refused and / or ignored the said request and instead clandestinely decided to advertise for sale by public auction of the security by advertising the same in a newspaper that has limited circulation to the detriment of the Plaintiff/Applicant. Unless the application is allowed the Plaintiff/ Applicant stands to suffer irreparable loss and

damage, or so it is alleged.

3. The application is opposed by the defendant. Parties filed submissions which I have carefully considered. In my view the following two issues will be considered to determine the application
 - i. Whether the court can interfere with the agreement of the parties on issue of interest as contained in the charge.
 - ii. Whether the Defendant served Statutory Notice.
4. It is not in doubt that pursuant to a letter of offer dated 23rd February 2015, the Plaintiff/Applicant accepted a loan facility from the defendant of Shs.2,500,000 at a monthly interest rate of 5.5% p.m. and pursuant to which the parties entered in a binding charge agreement under which the Plaintiff offered the suit property as security.
5. Within a period of four months, the sum due on the loan had escalated to Shs.5,567,660/= as the plaintiff was only able to pay one instalment. The plaintiff now has come to court claiming that the interest rate of 5.5% per month is oppressive, and that the court should stop the defendant from realising the security.
6. In my view, the plaintiff cannot ask the court to rewrite a contract between her and the defendant. The Plaintiff accepted a loan facility in clear terms which were reduced into writing and which both parties accepted. At paragraph 5.0 of the letter of offer parties agreed at a fixed rate of interest at 5.5% per month, and the plaintiff agreed to pay Kshs.241,666.67 as monthly instalment. These conditions were not imposed on the plaintiff. A legal and binding change was entered into, and the suit property given as security. This court lacks the legitimacy to declare either the said letter of offer, or the subsequent charge oppressive. It is not the duty of the court to rewrite contracts for the parties. Further, a contract cannot be impeached merely because it has become difficult for one of the parties to perform his or her part of the contract. If that were to be the case then no contracts would be binding, and parties would walk into and court of contracts at will as soon as they felt that their obligations had become too onerous to honour. This court is not persuaded that the Plaintiff/Applicant has met the threshold established in **Giella v Cassman Brown** for the grant of injunction. The plaintiff has also disputed the existence of a charge, and has submitted that the said charge is illegal, and was not attached. However, the plaintiff has herself admitted receiving the 2,500,000/= at 5.5% per month interest and did herself offer the suit property to be changed. The Plaintiff also had the duty to attach that change to the proceedings.
7. On the second issue, there is no evidence on record that the Defendant issued the Statutory Notice before attempting to execute its right to sell the security. Again, while the defendant appears ready to sell the security, there is no indication whether or not a fresh valuation was carried out for that purpose. Therefore, it is the finding of this court that in the absence of a Statutory Notice served upon the Plaintiff, and in the absence of a valid valuation of the suit property the proposed sale by the defendant cannot take place.

I have carefully perused the court record, and I have not seen any evidence of either a copy of a fully served Statutory Notice or a valid Valuation Report.

8. Pursuant to the foregoing, the court makes the following orders;
 - a. The plaintiff's application for injunction herein fails.
 - b. The defendant shall be at liberty to exercise its Statutory power of sale, and to sell the suit property upon;
 - i. Service of a Statutory Notice required under S. 90 (1) of the Land Act.
 - ii. Valuation of the suit property.
 - c. Costs herein shall be in the cause.

READ, DELIVERED AND DATED, AT NAIROBI

THIS 5th DAY OF FEBRUARY 2016.

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Wachira hb Thuku for Plaintiff

M/s Omondi hb Kirimi for Defendant

Teresia – Court Clerk