



**IN THE REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC NO. 288 OF 2017**

**LUCY WANJIKU MUCHIRI.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**AUTOHOUSE IMPORTS LIMITED.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**=VERSUS=**

**SUMACMICROFINANCE LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. The applicant filed a notice of motion dated 28<sup>th</sup> March, 2017 in which they seek the following reliefs:

***i) Spent.***

***ii) Spent.***

***iii) That this Honourable Court be pleased to issue a temporary injunction restraining the defendant, its agents, servants, employees and/or surrogates however, whosoever from dealing in any manner whatsoever with the suit Property Title number Nairobi/Block 82/522 pending the hearing and determination of this suit.***

***iv) Any other relief that the Court may deem fit.***

***v) Costs.***

2. The respondent extended a facility to the second applicant which was to be repaid in accordance with the terms of the agreement. The facility was secured by a charge over the first applicant's title number Nairobi/Block 82/522. The second applicant defaulted in repayment of the loan prompting the respondent to put in place measures to realise the security. This is what prompted the applicants to move to Court seeking injunction orders.

3. The applicants contend that the entire principal loan has been repaid but that the respondent is demanding some interest whose basis the applicants do not understand. That the applicants have been requesting for accounts from the respondent which accounts are not forthcoming. That the respondent has now threatened to sell the charged property an action which will cause irreparable loss if an injunction is not issued restraining the respondents from going ahead to sell the charged property.

4. The respondent has opposed the applicant's application based on a replying affidavit sworn on 15<sup>th</sup>

May, 2017. The respondent contends that it advanced the second applicant a total of Kshs. 11,500,000/- which was to be repaid over a period of 36 months at an interest of 20% on a reducing balance. The second applicant serviced the loan by depositing various amounts into the loan account but these deposits were not enough to service the loan. The respondent was forced to issue a 3 months statutory notice as required.

5. Upon receipt of the statutory notice, the second applicant made proposals to discuss the redemption of the loan but the proposals never went through but instead the second applicant moved to Court for injunction orders. The respondent contends that it has always given the second applicants statements and that the applicants have not been candid. Whereas the applicants contend that they have cleared the principal sum, in the same affidavit, they contend that they have substantially repaid the loan which is contradicting.

6. I have gone through the applicant's application together with the supporting documents and the opposition to the same by the respondent. I have also considered the submissions by the applicants counsel and the submissions by the respondent's counsel. This being an application for injunction, the applicants are expected to demonstrate that they have a *prima facie* case with probability of success.

7. The principles for grant of temporary injunction were set out in the case of **Giella Vs Cassman Brown & Co. [1973] KLR 358**. First an applicant has to demonstrate a *prima facie* case with probability of success. Second, an injunction will not normally be issued unless otherwise the applicant might suffer loss which will not be compensated in damages. Third, if the Court is in doubt, it will decide the application on a balance of convenience.

8. A *prima facie* case in a civil application was described in the case of **Mrao – vs – First American Bank of Kenya Ltd. & 2 Others [2003] KLR 125** as follows:

***“a prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.***

9. In the instant case, the applicants are contending that they have cleared the principal sum and that it is only interest whose basis they do not understand which is remaining. I have looked at the replying affidavit by the respondent which has annexed copies of statements issued to the second applicant. Paragraph 3 of the supporting affidavit is in direct contradiction with paragraph 11 of the same affidavit. Whereas paragraph 3 states that the principal sum was cleared, paragraph 11 states that the principal sum has been substantially paid. The applicants seem to be claiming that there is an aspect of interest which they seem not to agree with. It has been held in a number of decisions from the Court of Appeal that the fact that there is a dispute on interest or accounts is not a ground for granting an injunction.

10. The applicants have not demonstrated that they are not in arrears on repayment of the loan as they allege. To this extent, I do not see any *prima facie* case which they have. The first applicant offered her property as security and she was aware of the consequences of failure by the second applicant to repay the loan. In the case of **Alternative Media Ltd. –vs- Safaricom Ltd. [2004] eKLR** the Court stated as follows:

***“The second principle established by the Giella case for the grant of interlocutory injunction is that the plaintiff would suffer irreparable harm which would not be compensated in damages. Considering this very point in the case of Mureithi –vs- City Council of Nairobi [1979] 12 (C.A.K) Madam J A (as he then was) cited with approval the speech of Lord Diplock in the case of American Cynamid Co. –vs- Ethicon [1975]. ALL ER 504 at 506 where he said;-***

***“The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages, recoverable in the action if the uncertainty were resolved, in his favour at the trial.....if damages is the***

***measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted however strong the plaintiff's claim appeared to be at that stage."***

11. I have found herein above that the applicants have not demonstrated a *prima facie* case. Even if the second principle in the Giella case (Supra) is to be considered, damages are an adequate remedy should it turn out that the respondent was at fault if it went ahead to realise the security. When the first applicant offered the property as security, she was aware that if the second defendant defaulted, the same would be sold. The applicants offered to negotiate the loan when the 3 months statutory notice was served upon them. They did not negotiate as proposed prompting the respondent to indicate that they will go ahead to realise the security if the outstanding loan was not paid. The applicants cannot therefore turn round and claim that they had repaid the principal amount in full without any evidence to that effect. I find that the applicant's application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this *7<sup>th</sup>* day of *November, 2017*.

**E. O. OBAGA**

**JUDGE**

In the presence of;-

Mr Adoli for applicant

M/s Migiro for Mr Ng'ani for respondent

Court Assistant: Hilda

**E. O. OBAGA**

**JUDGE**