



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITALE**

**CIVIL SUIT NO.10 OF 2020**

**ROSEMARY HANDA ODIMA.....PLAINTIFF/ APPLICANT**

**VERSES**

**ECO-BANK KENYA LTD.....DEFENDANT /RESPONDENT**

**RULING**

1. The applicants Notice of Motion dated **11<sup>th</sup> August 2020** pray for the following reliefs;

**(a) that there be a temporary orders of injunction to restrain the defendant /respondent, its servants and or agents from selling by way of public auction land parcel number KITALE MUNICIPALITY BLOCK 16 /282 pending the determination of this application and thereafter the main suit.**

**(b) an order for taking of accounts, directing the defendant to supply the plaintiff and this court the full statement of accounts detailing all dealings and interest charged on the plaintiff loan account.**

2. The application is supported by the affidavit of the applicant sworn on the same date. In summary the applicant was an employee of the respondent for close to 17 years and at the time of leaving the job due to redundancy she was the manager at its Kitale branch.

3. While at the said employment she took a loan facility of **Kshs 7,212,490** on 9<sup>th</sup> December 2015 and a further loan of **Kshs 4,136,309** on 3<sup>rd</sup> October 2016 thus totalling **Kshs, 11,348,799**. On both loans she offered her title number **KITALE MUNICIPALITY BLOCK 16 /282** as a security.

4. She went on to deposed that the said loan attracted interest of 4% per annum. That on 27<sup>th</sup> March 2017 the respondent's Kitale branch was closed and she was declared redundant and as at that time the loan amounted to **kshs.10.9 million**. The respondent then converted the interest from 4% to prevailing commercial rates which became difficult for her to service.

5. She unfortunately fell and injured her leg which costed her a lot of money on treatment. The doctor found that she was 40% incapacitated. She also faced another difficulty of not being able to lease the premises as the passage was closed and it led into along litigation vide Case no.8 of 2017.

6. The applicant as a result wrote to the respondent to restructure the loan but she did not receive any response. Subsequently the respondent issued notification of sale of the security which she denied receiving any statutory notice. She therefore prays that this court ought to intervene and stop the sale until the respondent explains the status of the accounts as well as provide the relevant history of the account.

7. By the replying affidavit of **ELIZABETH HINGA** dated **8<sup>th</sup> September 2020**, the respondent conceded that the applicant was its employee till the Kitale branch in which she was the manager was closed. That she took the aforementioned loan and offered her land as a security. She however defaulted in the payment and that is why the statutory notice was issued but she was unable to pay the loan and thus it necessitated that the auctioneers be involved.

8. The respondent denies that the respondent was not served with the notices as can be seen from the attached statutory notices signed by the applicant. The application is therefore an abuse of the court process. She said that the applicant has never asked for any accounts to be provided and in any case she attached the accounts to her said supporting affidavit.

9. The parties were directed to file written submissions which they have complied. The thread of the two submissions is whether the applicant has established a prima facie case and therefore should be granted the orders as per the famous case of **GIELLA VS. CASSMAN BROWN CO. LTD (1973) E. A. 358**.

10. The applicant submitted that should the sale proceed she stands to suffer irreparable loss incapable of being compensated. She said that the issues she advanced are weighty and she should be granted a chance to ventilate them in the main hearing. In essence she said that the balance of convenience tilts in her favour.

11. The respondent on the other hand submitted that the application was spurious as it was clear that the applicant has been unable to settle the loan. The only option was for the respondent to exercise its statutory power of sale as it was obvious that the applicant was unable to pay the loan and the interest had kept accruing.

12. The respondent went on to submit that it was in any case able to compensate the applicant should it be found that she had a good claim against her. She urged the court to dismiss her application.

13. Having gone through the pleadings herein, it is apparent that the applicant does not deny that she took the loan and offered her land as a security. Through loss of work because of redundancy, her injury, and some litigation in land case no.8 of 2017 and thus unable to lease the house, she has been unable to service the loan. The issue of accounts was well in the view of this court answered by the production of annexure 11(b) of the affidavit of Elizabeth Hinga.

14. Further there is no evidence that the applicant requested for the accounts which she would have been given. The amount of about Kshs 10 million is yet to be settled. There is no evidence by the applicant that despite the challenges she has gone through she has attempted to pay any sum even as at the time of filing this application and the suit. It appears from the respondent's annexure 11(b) that the last payment by the applicant was over two years ago.

15. This application is not meritorious. The applicant cannot seek the protection of this court as she has not demonstrated any sufficient evidence of settling the loan. The issue of accounts is not germane. The amount of Kshs 10million is still colossal and even if she is given any discount because of some miscalculation on interest the same cannot be sufficient to settle the loan.

16. The unfortunate situations faced by the applicant cannot be sufficient to stop the sale. The loan was done via a mutual contract by the parties and cannot be altered by this court as that would be an interference in a contract which the court is not a party. Perhaps the only option left to the applicant is to renegotiate with the respondent the latter taking into consideration what befell the applicant and the current prevailing circumstances economically.

17. The principles laid down in the Giella case above cannot benefit the applicant for now. The applicant no doubt can compensate the applicant in any event.

18. The application is hereby dismissed with costs to the respondent. The interim orders in forces are hereby vacated.

**Delivered, Signed and Dated t Kitale this 11<sup>th</sup> day of December 2020.**

**H K. CHEMITEI**

**JUDGE**



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