



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 42 OF 2013

SAMWEL KIPRONO SANG T/A KERICHO TECHNICAL INSTITUTE.....PLAINTIFF

- V E R S U S -

INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATIONDEFENDANT

JUDGMENT

1. The Plaintiff in this case, SAMWEL KIPRONO SANG T/A KERICHO TECHNICAL INSTITUTE (hereafter referred to as the plaintiff) filed the plaint dated 1/7/2013 against the Defendant INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION (hereafter referred to as the Defendant) seeking the following prayers;

i. A permanent injunction against the Defendant by itself, its servants, agents, employees and otherwise from selling advertising and/or in any manner dealing with the plaintiff's parcel of land Ref. KERICHO MUNICIPALITY BLOCK NO.5/586 and Block No.589.

ii. An order that re-adjustment and fresh calculations of interest accruing as at the initial interest rates agreed by the charge.

iii. General damages

iv. Costs of the suit

v. Any other relief the court may deem fit to grant.

2. The Defendant entered appearance and filed a defence denying the plaintiff's claim.

3. The plaintiff called one witness (PW1) who said he took a loan facility of 10 million shillings under a loan agreement duly executed by the plaintiff and defendant dated 31/3/2010 which he faithfully repaid by monthly installments of Kshs 243,181.00.

4. The plaintiff said on 9/5/2021, he released a letter dated 1/3/2012 stating he had been served with a notice purporting to increase interest from 16% to 19%.

5. The Plaintiff said in June 2012 he was served with a notice to clear the outstanding amount.

6. In 2013, the plaintiff said he wrote to the defendant seeking modalities of liquidating the alleged outstanding amount but the defendant rejected the proposal and the plaintiff filed this suit.

7. The Defendant called one witness; DW1 (ZEPHANIAH RONO) who said that the plaintiff used to service the facility regularly for about 8 months after which the plaintiff started defaulting. The witness asked the court allow the Defendant to exercise its powers of sale.

8. The parties filed written submissions which are as outlined below.

9. The plaintiff submitted that the unilateral increment of interest rates from 16% to 19% was in violation of statutory provisions particularly section 84 of the Land Act and section 44 of the Banking Act.

10. The plaintiff also submitted he was fully aware of the import of clause 1 of the charge document which gave unfettered discretion to the defendant to vary interest rates without notifying the chargor, however, that discretion was not absolute. The discretion ought to be exercised

fairly as between the parties to the contract and not arbitrarily, capriciously or unreasonably.

11. The plaintiff relied on the following cases ***John Gatuu Nderitu vs. Kenya Commercial Bank Ltd (2011) eKLR; Givan Okallo Ingari vs. Housing Finance Co. (K) Ltd. Nairobi HCCC No. 79 of 2007 [2007] 2 KLR; Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya [2014] eKLR*** in support of his position that the purported increase was unlawful and/or illegal.

12. The plaintiff submitted that he had satisfied the requirements for issuance of an order of injunction namely that he had a *prima facie* case, would suffer irreparable injury if the injunction was not granted and on a balance of convenience he stood to suffer greatly if not more than the defendant if the injunction was not granted and his properties were auctioned. He relied on the cases of ***Geilla vs. Cassman Brown (1973) EA 358; Mrao Ltd vs. First American Bank of Kenya Ltd (2003) eKLR; Pius Kipchirchir Kogo vs. Frank Kimeli Tenai (2018) eKLR;***

13. The plaintiff further submitted that the defendants had not valued the properties before exercising the statutory power of sale, failure to value the suit properties and the variation of interest contrary to the provisions of law would clog and fetter on the equity of redemption. The plaintiff sought that the court should order readjustment and fresh calculation of interest.

14. The defendant on their part submitted the loan amount was secured by a charge registered on 31/3/2010 against the plaintiff's properties title no 5/585 and 5/589 and further that the plaintiff freely and voluntarily charged the suit properties in favour of the defendant and knew that they would be sold to recover the loan amount in the event of default.

15. The defendant submitted that the plaintiff defaulted in repaying the loan on several occasions, the defendant upon receiving a statutory notice of sale, moved to court claiming that his default had been occasioned by the increase in interest rates.

16. The defendant also submitted that they had issued the statutory notice of sale as required by the law, the plaintiff had not made any loan repayments since he came to court and was enjoying the protection by court orders stopping sale of the suit properties.

17. The defendant cited the following cases ***John P.O Mutere & Another vs. Kenya Commercial Bank [1995] HCCC No. 3125; Ambient Construction vs. National Bank of Kenya Limited [2019] eKLR; Andrew Muriuki Wanjohi vs. Equity Building Society Ltd. [2006] eKLR;***

18. The defendant further submitted the terms of the charge instrument and loan agreement were clear and both parties were bound by the terms therein. Further that the role of the court was to enforce what was agreed between the parties not what it thinks ought to have been fairly agreed upon by the parties.

19. They cited the cases of ***Fina Bank Limited vs. Spares and Industries Limited (Civil Appeal No. 51 of 2001), Thugi River Estate Limited & Anor vs. Citi Bank N.A. Limited eKLR ; Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya (2014) eKLR ; Givan Okallo Ingari & Anor vs. Housing Finance Company of Kenya Limited [2007] eKLR ;***

20. The defendant submitted that it had properly executed the provisions of section 90 of the Land Act and the right of sale had crystallized and it was within their rights to exercise the statutory powers of sale.

21. The defendant submitted that the plaintiffs were not entitled to a permanent injunction and rather that the defendant was suffering irreparable harm in terms of losses as the interim injunction issued by Serگون J. on 4/4/2014 stopping them from exercising the statutory power of sale had been in force for over six (6) years.

22. They cited the following cases ***Giella vs. Cassman Brown and Company Limited (1973) E.A 385; Mrao Limited vs. First American Bank of Kenya & 2 Ors (2003) KLR 125, Orion E.A Ltd vs. Ecobank Ltd & Anor [2015] Eklr ; Ajay Indravadan Shah vs. Guilders International Bank Limited Civil Appeal No. 135/2001 [2001] 1 E.A 269; Mohammed 7 Anor vs. Haidara [1972] E.A. 166 ; Francis Munyoki Kilonzo & Anor vs. Vincent Mutua Mutiso [2013] eKLR; Kyangavovs Kenya Commercial Bank Ltd & Anor (2004) 1 KLR***

23. The defendant submitted that the increase in interest was not targeted to the plaintiff rather it was occasioned by the increased source of sourcing for funds for lending.

24. The issues for determination in this case are as follows;

i. Whether the plaintiff has established the conditions for grant of an injunction.

ii. Whether the Defendant was justified to increase the interest rate from 16% to 19%,

iii. Whether the court should order readjustment of the interest rate.

iv. Who pays to costs of this suit?

25. On the issue as to whether the plaintiff has established for grant of a permanent injunction, I wish to highlight the following;

26. The court defined a perpetual injunction in the case of ***Kenya Power & Lighting Co. Ltd -vs- Sheriff Molana Habib (2018) eKLR*** as follows; **"A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of**

the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

27. In the case of *Nguruman Limited vs. Jan Bonde Nielsen & 2 others*, CA No. 77 of 2012; [2014] eKLR, the Court of Appeal reiterated the conditions to be met by a litigant who seeks injunctive relief as follows; “***In an interlocutory injunction application, the applicant has to satisfy the triple requirements to; (a) establish his case only at a prima facie level, (b) demonstrate irreparable injury if a temporary injunction is not granted, and (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.***”

28. In the case of *Giella vs. Cassman Brown & Company Limited (1973) EA 358* the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction; “**First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.**”

29. I find that the plaintiff defaulted in servicing the facility. He is therefore **not entitled to the grant of an injunction.**

30. I find that the plaintiff has not made out a *prima facie* case with probability of success to warrant the grant of an order of injunction from this honourable court.

31. I find that the plaintiff has failed to demonstrate that he has clean hands, while coming to this court to seek equity. The Plaintiff is seeking the assistance of the Court to avoid his obligation to repay the loan

32. In the case of *Francis J. K. Ichatha vs. Holding Finance Co. Ltd. Kenya HCCC No. 414 of 2004* the court held that; “**A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the plaintiff seeks this court to protect him from the consequences of his own default. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make payments to the defendant/respondent a debt which he expressly undertook to pay**”

33. Similarly, in the case of *Showind Industries vs. Guardian Bank Limited & Another [2002] 1 EA 284* the learned judge stated as follows; “**An injunction is granted very sparingly and only in exceptional circumstances such as where the applicant’s case is very strong and straight forward. Moreover, as the remedy is an equitable one, it may be denied where the applicant’s conduct does not meet the approval of court of equity or his equity has been defeated by laches**”

34. I find that it was a term of the agreement between the parties that the interest rate may be increased or reduced by a written notice and therefore the plaintiff is bound by the terms of the contract.

35. It is not the duty of the court to re-write contracts between parties.

36. The position in law with regard to the binding nature of a contract executed willingly by the parties is clear. In the case of *National Bank of Kenya Ltd vs. Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR*, the court stated as follows; “**It is clear beyond para adventure, that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.**”

37. Similarly in the case of *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Ltd [2017] eKLR*, the court stated as follows; “**We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.**”

38. There is evidence that the plaintiff was served with Notice to increase the interest rate and this court finds that the Defendant was justified to increase the interest rate.

39. In the circumstances, this court cannot order re-adjustment of the said interest rate.

40. I find that the plaintiff has failed to prove his case to the required standard and the same is dismissed with costs to the defendants.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 25TH DAY OF MARCH, 2022

A. N. ONGERI

JUDGE