



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISC. CIVIL APPLICATION NO. 416 OF 2018

THE EVANGELICAL LUTHERAN CHURCH

IN KENYA REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

FIRST CAPITAL KENYA LIMITED.....DEFENDANT

RULING

1. **REGISTERED TRUSTEES OF EVANGELICAL LUTHERAN CHURCH IN KENYA**, the plaintiffs, are the Trustees of the church Evangelical Lutheran Church in Kenya. **FIRST CAPITAL KENYA LIMITED**, the defendant, is in the business of micro-finance.

2. It is not denied that the defendant advanced to the plaintiff Ksh 5 million. The great controversy between the parties is if interest on that amount was applicable and if so how much.

3. There are three distinct documents representing the facility.

4. Firstly is the 'letter of offer'. That letter of offer, which was undated, provided that the loan amount was Ksh 5 million. The loan was repayable within three months. The lending rate (whatever that is) was stated to be 18% p.m. The interest rate payable at default was '4% per month on the amount due'.

5. The second document is entitled '**Loan Agreement**'. It provided the loan to be Ksh 5 million against a security 'Title deed L.R. 2116 (Apartment one)'. Interest rate was indicated as 18%.

6. The third document is the charge instrument. Clause 3.2 of that document provides:

"3.2 To pay Interest

Save as may otherwise be provided herein, if charger does not pay any sum payable hereunder on its due date for payment, Chargor shall (without prejudice to the exercise by the Chargee of any other right or remedy in favour of the Chargee) pay to the Chargee (as well after as before any demand, judgment, liquidation or insolvency of the Chargor) interest at the rate of Fifteen per centum (15%) per annum over and above the applicable Chargee Base Rate (hereinafter referred to as the "Default Rate") or as may be determined by the charge from time in its sole discretion on all monies due from the Chargor with effect from the date of the same becoming due until actual repayment of such monies in full (together with all accrued interest) and the Chargor hereby acknowledges and agrees that the Default Rate represents a reasonable pre-estimate of the loss to be suffered by the Chargee in funding the default of the Chargor."

7. It is admitted that the plaintiff has repaid the debt by the amount of Ksh 5,108,000, albeit irregularly, and not on the due dates of the agreed instalments. The defendant presented the plaintiff's statement of account dated 3rd September 2019 showing the amount due and payable by the plaintiff to be Ksh 24,960,289.52.

8. When this case was first filed, in December 2018, the plaintiff appeared before Justice J. Makau, for the hearing of an interlocutory application of injunction when the learned judge made the following order:

IN COURT ON 20TH DECEMBER, 2018 BEFORE

THE HONOURABLE JUSTICE J. MAKAU

ORDER

THIS MATTER coming up for directions on application dated 13/12/2018 before Hon. Justice J. Makau and UPON HEARING Miss Orenge holding brief for Mr. Wandati for the defendant.

IT IS HEREBY ORDERED:

1. THAT I am satisfied that the respondents were properly served.
2. THAT status quo be maintained subject to the applicant paying the admitted principal sum of Ksh 5,000,000/= within 30 days from today thus by or on 21st January 2019, in default the matter be mentioned for further orders.
3. THAT the sum of the contested interests shall be determined by way of oral evidence.
4. THAT matter be mentioned on 24/1/2019.

GIVEN under my hand and seal of the court the 20th day of December 2018.

ISSUED at NAIROBI this 22nd day of January 2019

DEPUTY REGISTRAR

HIGH COURT OF KENYA, NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

9. The learned judge did on 25th February 2019 order, in this matter, make the following order.

“1. That the judgment debtor be and is hereby granted last opportunity to pay the remaining sum of Ksh 2.4 million together with interest within the next 21 days from today, in default execution do issue or the attached property be auctioned.”

10. That order is somehow an anomaly because there is no judgment in this case nor is there an attached property. What there is, is the plaintiff's action where the plaintiff is faulting the defendant's calculation of interest rate. The order of the learned judge of 20th December 2018 seems to have squarely addressed the issue between the parties.

11. What is before me is a Notice of Motion dated 4th September 2019. That application was provoked by the defendant's attempt to auction the plaintiff's charged property, L.R. No. 330/576 in exercise of its statutory power of sale.

12. I have considered the parties affidavits and written submission. I also do appreciate the jurisprudence cited by defence relating to dispute of amount due, not being a basis of injunction. This was stated in the case **Priscillah Krobrought Grant v Kenya Commercial Finance Co. Ltd and 2 others Civil Application No. Nai 227 of 1995**. I am also aware of the principle that courts should not interfere with contract properly entered into by parties. I am however concerned, and I believe this may have exercised the mind of the learned judge on 20th December 2018, that there is disparity in the applicable rate of interest stated in the different documents stated above. I hold the view that it is necessary for evidence to be adduced to ascertain the real intention of the parties. In other words, did the parties intend to charge 18% interest or 15% or even 4% default interest. This controversy can only be resolved by the court receiving oral evidence of the parties. It is for that reason I form the view that the plaintiffs have shown a prima facie case with probability of success. If indeed the plaintiff has, as it is argued, paid the amount due would it suffer if the sale of the charged property was sold. My response is in the positive.

13. Accordingly, I grant the following orders:

a) An injunction is hereby issued, pending the hearing and determination of this suit, restraining the defendants, their servants or agents from selling or transferring property known as Flat No. A1 erected on L.R. No. 330/576.

b) This case will be mentioned on 29th July, 2020 for orders on Case Management Conference and on mediation to be made.

c) The costs of the Notice of Motion dated 4th September 2019 shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **29th** day of **April, 2020**.

MARY KASANGO

JUDGE