



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**COMMERCIAL SUIT NO. 71 OF 2018**

**KENNEDY ONYANGO OBIERO.....PLAINTIFF/APPLICANT**

**VERSUS**

**AFRICAN BANKING CORPORATION LTD. ....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiff's application is for an order of an interim injunction to restrain the Defendant from claiming its authority/power/instructions from advertising the suit property for sale by public auction.

1. The Plaintiff had also sought an order directing both the Plaintiff and the Defendant to appoint a single auditor, to take accounts/computation/calculation of the interest charged to the borrower's loan account.
2. In the event that the parties failed to appoint a single auditor, the Plaintiff asked the court to direct the Chairman of the Institute of Certified Public Accountants of Kenya to appoint an auditor.
3. The remuneration of the said auditor was to be shared equally between the Plaintiff and the Defendant, if the court accepted the Plaintiff's plea in that regard.
4. The issue of taking accounts, as well as the computation or calculation of the interest charged to the loan account was to have taken place pending the hearing and determination of the application for an interlocutory injunction.
5. It is common ground that the Plaintiff, **KENNEDY ONYANGO OBIERO**, is the registered proprietor of the suit property, **L.R. NO. KISUMU/OJOLA/4330**.
6. It is further common ground that the Plaintiff charged the suit property, by way of a Charge dated 9<sup>th</sup> September 2011. The Charge constituted the suit property as a security for the financial accommodation/loan which the Defendant, **AFRICAN BANKING CORPORATION LIMITED**, advanced to **MATHEW OMADO ETYANG** Trading As **AMADU INTERNATIONAL**.
7. At paragraph 8 of the Plaint, the Plaintiff acknowledges that Clause 2 of the Charge expressly stipulated that the bank had the right to charge interest;

*“..... at such rate or rates not exceeding any maximum permitted by law as the Bank shall in its absolute and sole discretion from time to time decide.*

*AND PROVIDED ALWAYS that the Bank shall not be required to advise the chargor prior to any change in the rates of interest so payable AND PROVIDED ALWAYS that the Bank retains the right to demand payment of such interest when due and PROVIDED ALWAYS that no failure by the Bank to so advise the Chargor shall preclude in any way the Bank's right to recover interest charged subsequent to any change .....*”

8. Whilst acknowledging that the Charge has a provision that contractually enables the bank to vary the rate of interest, the Plaintiff asserts that that contractual agreement was subject to the provisions of **Section 84(1)** of the **Land Act**.
9. It was the Plaintiff's case that the rate of interest could only be varied by a **WRITTEN NOTICE** of at least 30 days. According to the Plaintiff, the said Notice had to be served by the bank, upon the chargor.

10. Nonetheless, the bank had purported to increase the applicable rates of interest, without serving notices upon the chargor.
11. The Plaintiff described the bank's omissions, to serve the said notices, as fraudulent, illegal, un-procedural, irregular, non-contractual and a travesty of the Plaintiff's rights including the rules of Natural Justice.
12. As far as the Plaintiff was concerned, the bank's right to realize the security had not accrued because the bank had not complied with the requirements of the law.
13. The Plaintiff cited the case of **MRAO Vs FIRST NATIONAL BANK OF KENYA LIMITED & 2 OTHERS [2003] KLR 125** as authority for the proposition that a failure to serve a statutory notice pursuant to **Section 90(2)** of the **Land Act** is no doubt an infringement of the Applicant's right over the suit property.
14. In this case, the Plaintiff did not base his case on an alleged failure by the bank, to serve a Statutory Notice pursuant to **Section 90(2)** of the **Land Act**.
15. In any event, I find, on a prima facie basis, that the bank did serve a Statutory Notice dated 16<sup>th</sup> October 2012.
16. Indeed, at paragraph 14 of the Plaintiff, it is conceded by the Plaintiff that he was duly served with a Statutory Notice. Therefore, I find that the alleged non-service of a Statutory Notice is not an issue for determination in this application.
17. Pursuant to Clause 9 (i) of the Charge, the Charge Debt and Interest shall immediately become payable and the statutory power of sale or the appointment of a Receiver of the Bank shall become exercisable if default is made in payment of any monies secured by the Charge.
18. On his part, the Plaintiff says that he had been remitting monthly instalments as and when they fell due.
19. However, the Plaintiff did not provide the court with proof that he had not defaulted in the remittance of the regular instalments.
20. On the other hand, the bank made available the statements of account of the borrower.
21. A perusal of the said statements of account reveal that the borrower was not remitting payments regularly, to the tune that would ensure that there was no default.
22. In other words, it does appear that the borrower ran into arrears and failed to clear the said arrears.
23. On a prima facie basis, therefore, the default by the borrower triggered the bank's right to either realize the security or to appoint a receiver.
24. As the borrower was in default, he cannot expect that he will benefit from his own failings by getting an injunction to restrain the defendant from realizing the security.
25. By so holding, I have deliberately refrained from making a finding on the issue as to whether or not the interest rates charged were or were not illegal.
26. In my considered view, such a finding can only be properly arrived at after the court will have had the opportunity of hearing the substantive suit.
27. The Plaintiff appears to have been alive to this fact, when it is considered that he actually asked the court to order for the taking of accounts, or the computation/calculation of the interest charged to the borrower's loan account.
28. If the Plaintiff had a report by an appropriate professional, who had demonstrated that he had taken into account all the terms of the contract between the parties, together with legal authorities which had made determinations of the contentious statutory provisions, there could have been a possibility that an injunction could issue.
29. In this case, the Plaintiff said that he had engaged the Interest Rates Advisory Centre (**IRAC**), who had computed/calculated the interest rates charged to the borrower's loan account.
30. Regrettably, the court has not been given the opportunity of perusing the Report, if any, prepared by **IRAC**.
31. Similarly, the defendant has not had an opportunity to interrogate the alleged Report prepared by **IRAC**.
32. Therefore, it would be most unfair to the defendant if the court were to place reliance on a computation which neither the defendant nor the Court has had a chance to evaluate.
33. On a prima facie basis I make the following findings;

*a) The chargee's right to commence the process of realizing the security has arisen, owing to the fact that the borrower was in*

*arrears of the loan repayment.*

***b) The chargor has not demonstrated any specific breach by the chargee, of the contractual terms embodied in the Letter of Offer and in the Charge.***

***c) The parties expressly and unequivocally agreed that the chargor would not need to serve notices upon the borrower, before varying the rate of interest.***

***d) The parties expressly agreed that the non-issuance of notices for variation of interest rates would not preclude the bank from recovering the interest charged subsequent to any change.***

***e) The Plaintiff has failed to demonstrate that he had Continued to pay the agreed monthly instalments.***

***f) The Plaintiff has not shown that as at February 2017, his loan account had overpayments.***

34. In the result, I hold that the Plaintiff has failed to prove that he has a prima facie case with a probability of success.

35. This court appreciates the fact that each piece of land is probably unique in one way or the other. However, the Plaintiff has not shown how the suit property is so unique that the court ought to safeguard it at all costs.

36. It is the chargor who offered the suit property as a security for the financial facility which the borrower was obtaining from the Defendant.

37. Surely, at the time of providing the suit property as a security, the chargor must have known that his matrimonial home was built on that piece of land. The fact that there was sentimental value to the suit land cannot be a basis for depriving the chargee from realizing the security, as it was the same person who is now invoking sentimentality, who made a conscious decision to offer the property as a security.

38. In this instance, there also appears to have been an express concurrence between the chargor and his spouse, that the suit property be offered as security. I so find because of the spousal consent executed by the chargor's spouse.

39. The Plaintiff has failed to demonstrate that he would suffer irreparable damage if the suit property was sold by the chargee before the suit was heard and determined.

40. The suit property had been valued prior to it being accepted as security.

41. The law enjoins the chargee to have the property valued prior to it being put up for sale, in the exercise of the chargee's powers of sale.

42. If the Plaintiff were to ultimately win the case, he could be compensated by an award of damages, as the loss, if any, would be quantifiable.

43. Having come to the conclusion that no prima facie case with a probability of success, had been established by the Plaintiff, the court need not have delved into the question as to whether or not the Plaintiff would suffer irreparable damage.

44. But I have also found that the Plaintiff would not suffer irreparable damage if the interlocutory injunction was not granted.

45. The issue concerning the Balance of Convenience is only given consideration if the court were in doubt on the first two applicable tests.

46. I have no doubts in that respect.

47. But even if I were to give consideration to the balance of convenience, I find that the mere fact that the Plaintiff and his family were resident within the suit property does not tilt the balance in his favour.

48. It is better that a chargor should not be given a false sense of security, by being allowed to remain in the suit property until the case was determined.

49. Having come to the conclusion that the Plaintiff has not proved, on a prima facie basis, that he has a probability of success in the substantive suit, I hold the considered view that by giving him an order to enable him remain on the suit property, is to give him a false sense of security.

50. If the Plaintiff is unable to bring his loan repayments upto speed, the arrears and the overall indebtedness would continue to increase: And if that were allowed to continue, both parties would end up as losers. I say so because the bank may end up recovering (from the sale), a sum that may not cover the whole debt. And if that were to happen, and the bank then pursued the guarantors in respect to balance that was still outstanding, the Plaintiff and the other guarantors would feel worse pain than the chargor could feel if he counted his losses now.

51. In the final analysis, I find no merit in the application dated 23<sup>rd</sup> June 2017. It is therefore dismissed with costs to the Defendant.

**DATED,SIGNED and DELIVERED at KISUMU this 29<sup>th</sup> day of January 2019**

**FRED A. OCHIENG**

**JUDGE**