REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 199 OF 2014

MARTIN K. MANYARA.....PLAINTIFF/APPLICANT

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Through the application dated 1st April 2019, the plaintiff /applicant seeks the following orders:

> **a. An order of temporary injunction restraining the defendant herein either by itself, its servants or anyone of them whatsoever from advertising for sale, selling, whether by public auction, private treaty or otherwise or in any other way disposing of or alienating or interfering with the suit property pending the hearing and determination of the application and the main suit.**
>
> **b. An order that the defendant produces adequate, honest and up to date accounts and records of all monies received from the plaintiff towards payment of the loan granted to it and which is the subject of the charged property suit property.**
>
> **c. An order that the parties jointly appoint an auditor to prepare statement of accounts to confirm the correct outstanding amount.**

2. The application is supported by the applicant's affidavit sworn on 1st April 2019 and further affidavit dated 9th May 2019. The application is also premised on the following grounds:-

> **1. That the defendant has served upon the plaintiff statutory notices threatening to sell the property Land Reference Number 209/10481/24 on account of loan facilities advanced to the plaintiff and which loan facilities were secured by the property Land Reference Number 209/10481/24.**
>
> **2. That there is a dispute between the plaintiff and defendant on the interest applicable by the defendant due to the application of illegal interest rates in clear violation of the letter of offer herein and the employment exist terms.**
>
> **3. That the defendant has inflated the outstanding loan amount from the plaintiff by more than Kenya Shillings Four Million Six Hundred Thousand (Kshs 4,600,000/=).**
>
> **4. That the plaintiff continues to repay the loan and have even overpaid on his monthly installments due.**
>
> **5. That the plaintiff stands to suffer irreparable loss and damage unless the defendant is restrained by orders of this Honourable court from disposing of the plaintiff's property Land Reference Number 209/10481/24.**

3. A summary of the applicants case is that he is the registered owner of the Land Reference Number 209/10481/24(hereinafter "**the suit property"**) and the respondent's former employee where he served for a period of 24 years during which period he secured a mortgage facility with the respondent at the preferential staff rate of 6% to enable him purchase the suit property. He states that he diligently serviced the said loan through salary deductions while still in employment and that upon the termination of his employment, he entered into an agreement with the respondent that he would continue enjoying the staff preferential interest rate of 6% until payment of the outstanding loan balance in full.

4. The applicant's case is that on or about March 2014, the respondent unilaterally and without any notice to him illegally increased the interest rate from the agreed 6% per annum to 29.5% per annum. The applicant states that he then engaged the interest Rate Advisory Centre (IRAC) to calculate the outstanding loan amount which team found that the outstanding loan amount was Kshs 3,447,373.39 as at 16th October 2018 but that the respondent illegally inflated the amount by more than 4.6 million thereby logging his ability to settle the outstanding loan despite his spirited efforts to diligently service the debt.

5. The applicant further states that on or about October 2016, the respondent stopped him from making direct deposits to his loan account and required him to instead make repayments through a current account where the respondent imposed unexplained and unconscionable charges that had the effect of further inflating the debt.

6. The gist of the applicants case is that the respondent is now threatening to exercise its statutory power of sale over suit property which action, unless stopped by the court, will deprive the applicant of the suit property despite the fact that he has continued to repay the loan at the agreed interest rate of 6% per annum.

7. At the hearing of the application, counsel for the applicant submitted that the applicant has made out a case to warrant the granting of the orders sought in the application. It was submitted that the unlawful and arbitrary variation of the interest rate, by the respondent, was an issue which the court needed to determine at the hearing of the case. For this argument, counsel cited the decision in the case of ***Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya*** [2014] eKLR where it was held:

> **"Can it therefore be said that a practice in which the banks unilaterally decide to load the customer's account with penalties at their own discretion whose rates are only known to the bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word "certain" too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in my contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1) (b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs Housing Finance Company of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this court".**

8. It was argued that the rate of interest to be charged on a loan must be provided for by the contractual document and must be in accordance with the parties' agreement.

9. The applicant further argued that he had established that he would suffer irreparable loss of the orders sought are not granted as he had invested all his life's savings in the suit property. He further argued that the balance of convenience tilted in his favour as loss he would suffer if the injunction is not granted and the suit is ultimately determined in his favour will be greater than that which would be caused to the respondent an injunction is granted and the suit is ultimately dismissed.

The respondent's case

10. The respondent opposed the application through the replying affidavit of its legal officer one **Samuel Njuguna** who avers that the applicant's supporting affidavit contains lies, contradictions, fabrications and material non-disclosure calculated to mislead the court. He further states that the applicant has come to court with unclean hands as he is a habitual defaulter who is not worthy of the orders sought in the application.

11. He further avers that the minimal rate of interest on the loan advanced to the applicant ceased the moment the applicant defaulted in his repayments after which the interest rate automatically converted to default rate of 29.5%. He further states that the applicant has approached the court for orders of injunction prematurely as all the respondent has done is to give the applicant a second notice to regularize his loan account and that the suit property is therefore not in any imminent danger of being sold.

12. At the hearing of the application, the respondent's counsel submitted that the plaintiff has not shown that he has a prima facie case regarding the contested issue of the applicable interest rate as the parties had agreed that the respondent will have a right to vary the interest. Counsel argued that it is trite law that an injunction should not be granted to restrain a mortgagee from exercising his statutory power of sale solely on the ground that there is dispute as to the amount due under a mortgage. For this argument counsel relied on the decision in the case of ***Bhamal Kanji Shah & Another v Shah Depar Devji*** [1965] EA 91.

13. Reliance was also placed on the case of ***Fina Bank Ltd Vs Ronak Ltd*** [2001] IEA 54 wherein it was held:

> **"As the charge documents which were in evidence before the High Court expressly reserve, in favour of the appellant, the right to charge interest at variable rate its absolute and sold discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis."**

14. According to the respondent, it was as a result of the applicant's default in loan repayments that prompted the respondent to recall the loan on 12th February 2014. It was submitted that the applicant is therefore not entitled to the equitable remedy of injunction as he had not come to court with clean hands. It was the respondents case that the applicant had not met any of the conditions set for the granting of orders of injunction.

Determination

15. I have carefully considered the instant application, the respondents response and the parties' respective submissions together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for the granting of orders of injunction.

16. The principles governing the issuance of orders of injunction were set out in the celebrated case of ***Giella v Cassman Brown Co. Ltd*** (1971) EA 358 where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows:-

> **"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."**

17. The above principles, together with their mode of application, were restated in ***Nguruman Limited v Jan Bonde Nielsen & 2 Others,*** CA No. 77 OF 2012, 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) ally 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. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. <u>If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage</u>. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between." (Emphasis added).**

18. In the instant case, it is not disputed that the applicant secured a loan facility from the respondent to enable him purchase the suit property. The respondent's case is that the applicant has defaulted in the loan payments thereby precipitating its move to set the debt recovery process in motion. The applicant's position, on the other hand, is that the respondent reneged on the terms of their loan agreement by unlawfully imposing a higher interest rate of 29.5% per annum instead of the agreed 6% per annum minimal staff rates thereby inflating the balance due to an astronomical sum that had the effect of completely clogging his ability to redeem the suit property.

19. On its part, the respondent argued that it was an express term of the loan agreement that the interest rate would be automatically converted to the default rate of 29.5% once the applicant defaulted on his repayments.

20. I have perused the respondent's replying affidavit sworn on 29th April 2019 and I note that apart from the claim, at paragraph 10 thereof, that the interest rate on the loan advanced to the plaintiff ceased the moment the plaintiff defaulted, in his repayments, no material was placed before the court to establish that such a provision existed in their agreement.

21. I have also perused the respondent's letter of offer dated 24th March 2010 addressed to the applicant wherein under interest, it is stated as follows:-

> **"6% per annum will be charged on the loan. This rate will be variable and in the event where the Barclays Base Rate increases or decreases then, the Housing Loan interest rate will fluctuate accordingly to always reflect the existing percentage below Base Rate.**
>
> **Interest will be calculated on a daily basis on the amount outstanding on the loan including interest charges debited to the loan , will charged monthly to the loan outstanding and will be reviewed in accordance with the Base Rate. Base Rate is presently at 15.75 %, but this rate may be varied from time to time in line with prevailing market rates. The interest will be charged on the loan before as well as after any court judgment.**
>
> **The bank reserve the right to revise the interest margin below Base Rate applied. <u>Notification of any interest change in the margin shall be advised to you, and any change in the Base Rate will be published by way of an appropriate internal staff communication or by notice displayed in the Banking halls of the branches of the bank.</u> Please note that any change in the interest rate will automatically affect the repayment period, which will be recalculated once a year and advised to you."** *[Emphasis mine]*.

22. According to the already existing jurisprudence, courts have adopted the position that a dispute touching on the amount payable or interest chargeable, without more, is not a ground for restraining a chargee from exercising its statutory power of sale. In the case

of ***Priscillah Krobought Grant v. Kenya Commercial Finance Co. Ltd. and 2 Others,*** the Court of Appeal in Civil Application No. Nai 227 of 1995 (108/95 V.R) (unreported), the stated as follows: -

> **"Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury's Laws of England (4th Edition) paragraph 725and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A."**

23. Similarly in ***Mrao Ltd v First American Bank of Kenya Ltd*** [2003] K.L.R. 125, it was held:

> **"I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters. I agree entirely with the Commissioner of Assize Shah that the appellant was not entitled to an injunction upon any one of the grounds urged on its behalf."**

24. The circumstances in which a mortgagee or charge may be restrained from exercising his statutory power of sale are set out in ***Halsbury's Laws of England Vol. 32 (4th Edition) paragraph 725*** as follows: -

> "725**. When mortgagees may be restrained from exercising power of sales—**
>
> > **"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is arranged. He will be restrained however if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."**

25. In the instant case what can be discerned from the clause on interest that I have already highlighted in this ruling is that it was specifically agreed that the interest rate would be 6% per annum and that any changes in the interest rates would be communicated to the applicant. In the present case, while the respondent claims that the interest rates shot to 29.5% per annum following the applicant's default no material was placed before me to show that the applicant was notified of the alleged changes in the said interest rates. The applicant not only alleges breach of contract but also claims that he was not made aware of any changes in the agreed interest rates.

26. This court notes that he relationship between the applicant and the respondent at the time the loan agreement was signed was not the ordinary bank/client relationship but rather, that of an employer and an employee. This relationship explains the preferential interest rates of 6% per annum that was accorded to the applicant as opposed to the existing market rates. The fact that the applicant's loan was granted on preferential interest rates was not disputed by the respondent. My take is that in the instant case, interest rates formed such an integral part of a loan agreement that they could not be the subject of arbitrary adjustment/alteration by one party without notice to the other party. I am therefore satisfied that the applicant has made a prima facie case to warrant the granting of the injunctive orders sought.

27. Turning to the issue of the substantial/irreparable loss to be suffered by the applicant if the orders sought are not granted, I note that the applicant's case is that the suit property is his family residence wherein he has invested all his life's savings. To my mind, the sale of such property will subject the applicant to loss that he cannot recover should the case be eventually be determined in his favour. In the case of ***Manasseh Denga v Ecobank Kenya Limited*** [2015] eKLR it was held that a person's property is not a matter that can be taken casually because it deprives a party of his or her right to own property, a right enshrined in Article 40 of the Constitution.

28. I am further of the view that the balance of convenience tilts in favour of granting the orders sought in this application.

29. The respondent argued that the suit and application has been prematurely filed as no notice had been issued for the intended sale. I however note that it was not in dispute that the respondent has already set in motion the process of exercising its statutory power of sale by instructing its counsel to issue notice of the same to the applicant. To my mind, the applicant is, in the circumstances of this case, within his rights to seek redress from the court at the earliest possible opportunity rather than wait until the eleventh hour before he can file suit.

30. In a nutshell, I find that the application dated 1st April 2019 is merited and I therefore allow it in the following terms:-

> **a. An order of temporary injunction restraining the defendant herein either by itself, its servants or anyone of them whatsoever from advertising for sale, selling, whether by public auction, private treaty or otherwise or in any other way disposing of or alienating or interfering with the suit property pending the hearing and determination of the application and the main suit.**
>
> **b. An order that the defendant produces adequate, honest and up to date accounts and records of all monies received from the plaintiff towards payment of the loan granted to it and which is the subject of the charged property suit property.**
>
> **c. An order that the parties jointly appoint an auditor to prepare statement of accounts to confirm the correct outstanding amount.**

d. Costs of the application shall abide the outcome of the main suit.

e. Mention on 7th November 2019 for further directions.

It is so ordered.

Dated, **signed and delivered in open court at Nairobi this 26th day of September 2019.**

W. A. OKWANY

JUDGE

In the presence of:

Mr. Maloba for the applicant

Mr. Mbaji for defendant/respondent

Court Clerk- Otieno