



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 370 OF 2006**

**NANCY BOMET JERUTO.....APPELLANT**

**• VERSUS -**

**HOUSING FINANCE COMPANY LTD.....RESPONDENT**

**JUDGEMENT**

1. On 24<sup>th</sup> May 2006 the Chief Magistrate's Court at the Milimani Commercial Law Courts delivered a Ruling in which it rejected the plaintiff's application for an interlocutory injunction.
2. Being aggrieved with that Ruling, the plaintiff lodged an appeal to this court. The grounds of the appeal can be summarized as follows;
  1. *The court erred by finding that the appellant had not established a prima facie case.*
  2. *The court erred by holding that a dispute over interest rates and bank charges cannot found a cause of action.*
  3. *The court erred by finding that compensation could be an adequate remedy.*
  4. *The court erred by finding that the appellant had admitted her indebtedness to the respondent.*
  5. *The court erred by finding that the appellant was guilty of non-disclosure of material facts.*
  6. *The court erred by finding that the issue of the respondent is alleged failure to serve the 90 days Statutory Notice could not be raised through the submissions by her advocate.*
3. In the light of the foregoing, the appellant asked this court to find that the magistrate's court was wrong to have dismissed her application for an interim injunction.
4. It was the appellant's request to this court that the dismissal of the application should be set aside, and that this court should issue an injunction to restrain the respondent from alienating, selling, transferring, disposing of by either public auction or by private treaty, the suit property until the case was heard and determined.
5. When canvassing the appeal, the appellant submitted that sections 15, 44 and 52(3) of the Banking Act expressly prohibited the unilateral variation of Interest Rates and of Bank Charges.
6. In support of her submissions, the appellant cited the decision of Mwera J. (as he then was) in **HOUSING FINANCE COMPANY of KENYA LIMITED Vs GILBERT KIBE NJUGUNA Hccc No. 1601 of 1999**. The exact words which the appellant quoted from that case were as follows;

*“....this Court adds its voice to the stand that Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts.*

....

***If it appears to a court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract?.***

7. In my understanding of that decision, it is the unilateral variation of the terms of a contract which was frowned upon, if the contract did not permit such variation.
8. By necessary implication therefore, where a contract had a provision for variation, the parties to the said contract had expressly acknowledged that the contract may be varied.
9. That quotation did not make any reference to the statutory provisions which bar the variation of either the Interest Rates or of the Bank Charges.
10. A perusal of the Ruling in issue in this case shows the learned magistrate as expressing herself thus;

***“It is trite law that a dispute on the issue of interest cannot form the basis of an injunction?.***

11. In effect, the court did not hold that a cause of action could not arise when there was a dispute over either interest rates or on the charges levied by the bank.
12. It is one thing to have a cause of action; and quite a different matter altogether to say that a foundation had been established for the grant of an interlocutory injunction.
13. A plaint may well reveal a cause of action. However, that fact alone would not be the basis for the grant of an interlocutory injunction.
14. A cause of action is simply an actionable wrong. It is the legal basis for the bringing of a claim against a defendant. Therefore, if the courts were to issue injunctions simply because a cause of action had been disclosed, there would be hardly any case which would fail the test.
15. The other case which the appellant has relied upon is that of **PROF. DAVID MUSYIMI NDETEI Vs DAIMA BANK LIMITED, Hccc No. 2198 of 2000.**
16. In that case, Kasango J. held that;

***“The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Act and the Banking Act were squarely on the defendant. It is only the defendant who could prove that the interest rates complied with Section 39 of Cap 491, when the restrictions were there, and it is only the defendant who could have proved that the Central Bank approved the increased charges according to section 44, Cap. 488?.***

17. The foregoing pronouncements were made by the learned Judge in her Judgement, after a full trial.
18. In the case before me, I am currently handling an interlocutory appeal. The substantive suit is still pending hearing and determination before the magistrate’s court. Therefore, I have reminded myself of the importance of exercising maximum caution, to prevent a situation where this court makes any finding which may prejudice the independent and fair trial of the case.
19. In the case of **MRAO LIMITED Vs FIRST AMERICAN BANK OF KENYA, LIMITED & 2 OTHERS, CIVIL APPEAL No. 39 of 2002**, the Court of Appeal said that when an appellate court was handling an interlocutory appeal;

***“...care must be exercised to obviate the risk of trespassing on the jurisdiction of the Judge who will eventually hear the case?.***

20. In recognition of the need to act cautiously, I refrain from making any comment as to whether or not there was already evidence, even on a prima facie basis, concerning;

a. ***The contractual rates of interest;***

- b. *The presence of a provision in the contract which allowed the variation of the rate of interest or the variation of bank charges;*
- c. *The period during which, within the context of this case, the statutory provisions cited by the appellant were in force.*

21. A reading of the Judgement in the case of **PROF DAVID MUSYIMI NDETEI Vs DAIMA BANK LIMITED Hccc No. 2198 of 2000**, suggests that there may have been periods of time when the law imposing a limitation or controls on the chargeable rates of interest, were removed.
22. Even if that be the position, that would imply that there were periods of time when the rates of interest and the bank charges could only be varied after the bank had obtained the approval of the Minister.
23. In effect, the appellant may yet have a case which was arguable. However, that may not have been sufficient to warrant the grant of an interlocutory injunction.
24. In the case of **MRAO LIMITED Vs FIRST AMERICAN BANK of KENYA LTD & 2 OTHERS, CIVIL APPEAL No. 39 of 2002**, Bosire J A delved into the distinction between an arguable case and a probability of success. This is what the learned Judge said;

*“Mr. Wasuna appeared to me to imply that the test as to whether or not a prima facie case had been made out is satisfied if the applicant is able to show the existence of an arguable case.*

*But as I earlier endeavoured to show, and I cited ample authority for it, a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case?.*

25. In the light of that authority, I find that the learned magistrate was not plainly wrong.
26. I say so it cannot be said that when a respondent appears to have financial muscle, that compensation payable to somebody who had offered his property as security, could not be an adequate remedy.
27. That is finding which the learned magistrate was entitled to arrive at, in the exercise of her judicial discretion, after taking into account the factual information made available to the court.
28. Again, there appears to be a basis upon which the court concluded that there had been material non-disclosure, on the part of the appellant. I so find because the appellant had not initially volunteered the information concerning the negotiations between the parties, which culminated in a letter which appeared to indicate that the appellant had admitted her indebtedness for the negotiated sum.
29. It is only when the respondent had indicated that the appellant had admitted the debt that the appellant then sought to explain the apparent admission as being nothing more than the result of coercion exerted upon her by the respondent.
30. By choosing not to come out with such information from the outset, the appellant cannot, at this interlocutory stage, have reason to fault the learned magistrate for concluding that she failed to make disclosure of all material facts.
31. In conclusion, I find that the learned magistrate did not misdirect herself on the applicable law. I also find that the appellant has failed to demonstrate that the learned magistrate had misapprehended any facts.
32. If anything, the learned magistrate appears to have taken into consideration all the issues of both law and facts, which had been brought to the attention of the court.
33. Finally, the learned magistrate did not take into account any issues of fact or of law, which the court ought not to have taken into consideration.
34. Therefore, I find no merit in the appeal. The same is therefore dismissed, with costs to the respondent.

**DATED, SIGNED and DELIVERED at NAIROBI this 26<sup>th</sup> day of January 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Judgement read in open court in the presence of***

Jaoko for the Appellant

Omino for Karungo for the Respondent

Collins Odhiambo – Court clerk.