REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL SUIT NO.14 OF 2015

MARTIN ODHIAMBO…..... 1ST PLAINTIFF/APPLICANT

PETER OTIENO BONYO ..... 2ND PLAINTIFF/APPLICANT

EXPRESS GENERAL

INSURANCE BROKERS LTD…..... 3RD PLAINTIFF/APPLICANT

EXP-RESS AUTOMOBILE

KENYA LTD …..... 4TH PLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE OF KENYA…..... DEFENDANT/RESPONDENT

RULING

1. This is the application by the Plaintiffs/Applicants dated 18th August 2015. It is supported by the Applicant's affidavit sworn on 18th August,2015. The said application is seeking several prayers which were not all argued by the Applicant. From the submissions the main prayer is:

> **"THAT pending hearing inter-partes a mandatory injunction do issue restraining the Defendant/Respondent by itself, servants or agents be from selling, transferring, entering, illegally disposing, advertising for sale by private treaty or public auction or in any way dealing with KERICHO MUNICIPALITY BLOCK 2/3 (suit property) until hearing and determination of this application and suit."**

2. It is the Applicants' case that they have two loan accounts with the Defendant/Respondent i.e Accounts 600-0010604 and 600-0012031. That the first letters of offer MM03 and MM05 respectively gave interest rates as 14% and 18% respectively.

Further that the Defendant/Respondent vide its charged documents dated 19th November, 2012 unilaterally consolidated the two accounts with an interest rate of 23% contrary to the letter of offer dated 20th September 2012.

3. They referred to several letters MM08 – 11 and MM013 which they say give varied interest rates. They also referred to another letter dated 29thDecember 2014 which shows balances on the two accounts and the repayment rates of Ksh.94,000/- and ksh.42,000/- respectively which they vehemently refute.They claim that the statement shows several variations of payments, interest and penalties yet no

notice was given for the variation as per the requirement in the charged document MM015. They therefore claim that the statutory power of sale cannot arise due to the variation of interest, penalties and the charged document. The statutory notice was therefore invalid, they say.

4. In his submissions the 1st Applicant reiterated what he had stated in the supporting affidavit on the varied interest and penalties rates. He also complained that he had negotiated withChase Bank to take up the loan as they were charging lower interest rates, but the Defendant/Respondent had refused to release the charge documents.

5. He also claims that he had been overpaying the loans and so he had no outstanding payments, but this was not considered, by the Defendant/Respondent.

According to him the value placed on his house by the Defendant/Respondent's valuer is too low.

6. In the further affidavit he has denied being served with any notices for variation of interest rates as claimed by the Defendant/Respondent.

7. The Defendant/Respondent's legal manager Mr. Martin Machira in his replying affidavit sworn on19th September 2015 confirmed that the Plaintiffs/Applicants borrowed money from the Defendant and used the 1st Plaintiff/Applicant's property **KERICHO MUNICIPALITY BLOCK 2/3** as security (MM1 and 2).

8. A further loan facility was executed as well as a further charge on the said property. That interest rates were reviewed from time to time as provided for in the letter of offer dated 19th January 2011 Clause 6.1 and 6.3.

That the last repayments by the Plaintiffs/Applicants were made on 15thOctober 2014 (MM9). The outstanding arrears as at 3rd September 2015 was **ksh.3,336,707/05** (MM8, 9, 10a and b).

9. The Defendant issued a notice to the Plaintiffs who have taken no step to repay the loan. A reminder was sent but it illicited no response from the Plaintiffs.

10. He further states that, this having been a commercial contract, the court can not make an order of take over and transfer of the contracts as the Plaintiffs are requesting. He urges the court not to order for removal of the Plaintiffs' names from the Credit Reference Bureau as they have defaulted and not complied with their obligations.

11. He urged the court not to grant any of the orders sought as the Plaintiffs had not come to the court with clean hands. That no *prima facie* case had been established. Further that it had not been shown that the Plaintiffs would suffer irreparable loss if the orders were not granted.

12. In his written submissions the 1st Plaintiff/Applicant contends that the Defendant/Respondent's statutory power of sale had not arisen as the applicant is not in default. He states that he had been paying money in advance as is shown in the statements between 1st November 2014 to 31st April 2015.

He also takes issue with the valuation that was done by the Defendant/Respondent which he says was an under valuation.

13. In the written submissions, the Defendant/Respondent's counsel substantiated on the replying affidavit. He submitted that the 4th Plaintiff is not privy to the contract between it and the first three (3) Plaintiffs.

The Defendant/Respondent cannot therefore transfer the contract to it.

14. The 1st Plaintiff/Applicant and Mr. Kisila appeared before this court and highlighted the submissions.

I have considered the application, affidavits, annextures, submissions and all the authorities which are very useful.

15. The Plaintiffs/Applicants have vide this application dated 18th August 2015 sought several orders which are in the body of the application.

16. The first prayer is for a temporary injunction restraining the Defendant/Respondent by itself, servants or agents from selling, transferring, entering, illegally disposing, advertising for sale by private treaty or public auction or in anyway dealing with **KERICHO MUNICIPALITY BLOCK 2/3** Until hearing and determination of this application and suit.

17. Before issuance of such an order the court must be satisfied that the required conditions have been met.The said conditions were enunciated in the Case of **Giella V Cassman Brown Ltd [1973] E. A 358.**

The said conditions are as follows:

i. **The Applicant must show that he/she has a *prima facie* case with probability of success.**

ii. **The Applicant must demonstrate that he will suffer irreparable harm if the injunction is not granted. That the said irreparable harm can't be compensated in damages.**

iii. **Balance of convenience**

It is for the court to weigh as between the two parties who would suffer most if the injunction is not granted.

18. It is not disputed that the Applicants secured two loans from the Defendant/Respondent. It is also not disputed that the loan remains pending to date.

It is also true that the Defendant/Respondent has issued a Statutory Notice of Sale to the 1st Plaintiff/Applicant.

19. The Applicants' claim is that there is no outstanding unpaid instalment. According to them,they paid the Defendant/Respondent in advance,large amounts of money which brings him the 1st Plaintiff/Applicant within the instalment payment period. Thus he is not in arrears of any amounts, he says.

The Defendant/Respondent will not hear any of that and states that the Applicants have not paid any money to it since 15th October, 2014.

20. A perusal of the copies of statements annexed herein confirms that indeed the Applicants have not paid any instalment since October 2014.

The said statements also confirm that the payments have not been steadily made.

21. The Charge in respect of the first loan shows that the monthly instalment was **ksh.69,805/-** while the insurance premiums was **ksh.5,537/-** per month.The total comes to **ksh.75,342/-.** This is what the Applicants bound themselves to pay i.e **ksh.75,342/-** per month in respect of loan account number ML600-0010604.

22. In respect of the further loan on account ML 600-0012031, it's not clear what the Applicants were

paying. However, from the annexed statements of the account they were paying between ksh.30,000/- to ksh.40,000/- at any given time.

23. The 1st Applicant has submitted that the statutory notice was wrongfully issued as he had not defaulted in the repayments at all.

There is clear evidence that the applicants' repayments were not upto date.There are months they did not pay. The 1st Applicant's explanation is that he made huge payments which covered several months. Secondly, that the Defendant/Respondent increased interest rates at will and charged unlawful penalty rates.

24. The Defendant/Respondent has argued that the increment of the interest rates was within the terms and conditions of the contract.

The Plaintiffs/Applicants and Defendant/Respondent's relationship was governed by the terms and conditions of the Charge and further Charge in respect of the two loan facilities extended to the Plaintiff/Applicant by the Defendant/Respondent.

25. A perusal of the respective two Charges MM06 shows at clause No.2 (a) - (g) and clause 3.1 to 3.5 respectively that the two parties entered into a covenant of payment of interest. This clause clearly shows that the Defendant/Respondent had all the liberty to vary the rate of interest. All it needed to do was to serve a notice of such variation on the Plaintiffs/Applicants.

26. This clause No.2 (a) – (g) is so detailed and indicates exactly how the issue of interest should be handled.

Clause 2 (b) of the charge provides:

> *"The chargee reserves the right to vary the rate of interest and may from time to time serve on the chargor notice forthwith requiring payment of interest at such increased or reduced rate as shall in the decision of the chargee fairly represent the rate of interest commonly chargeable in Kenya having regard to such circumstances as the chargee considers to be relevant and the decision of the chargee in this behalf shall not be questioned on any account whatsoever."* (Underlining mine).

27. Clause 3.1.3 of the further charge provides:

> *"The chargee shall in its sole discretion determine the rate or rates and methods of calculating the interest applicable from time to time with full power and authority to the chargee to charge different rates for different accounts and/or transactions."* (Underlining mine).

28. The above quoted are clauses forming part of the covenants entered into by the 1st to 3rd Plaintiffs and the Defendant.

It is assumed that they were taken through the Charge and further Charge before they appended their signatures to it.

29. Having so bound themselves, they must comply with the terms of the Charge and make the required payments.

30. In the Case of **Christopher Ndolo Mutuku & Anor V CFC Stanbic Bank Ltd [2013] eKLR,** Mabeya J in a similar situation state thus:

> *"I have endeavored to analyse the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the charge document*

that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the Defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be affected. Clause 2 and 11 of the charge must be given effect. ***I cannot re-write the agreement or the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it.*** *This is what the Court of Appeal seems to have said in the Case of* ***Shah V Guilders International Bank Ltd [2003] KLR 8***. (Underlining mine).

31. Further in the Case of **Morris & Co. Ltd V KCB Ltd & Others [2003] 2 EA 605** Ringera J (as he then was) had this to say on the subject of interest rates:

> *"As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced if the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so shall it be."*

32. It is therefore clear that the issue of interest being raised by the Plaintiffs/Applicants is governed by the terms of the Charge, which they are expected to have read before signing. It is contractual and binding on the parties. It is only the same parties who have the power and authority to vary the terms and conditions and not the Court.

33. From the statements exhibited herein the Plaintiffs/Applicants last serviced the loan on 1st October 2014 for account ML 600-0012031 and 24th October 2014 for account number ML 600-0010604.They have not availed any evidence to show that they have serviced the loan, or are upto date with the repayments. They unilaterally stopped making payments in the belief that the interest charged was unlawful and illegal.

34. In the Case of **Daniel Kamau Mugambi V. Housing Finance Co. of Kenya Ltd [2006] e Klr,** Ochieng J had this to say on such conduct of self stopping by a borrower:

> *"From the foregoing, it is abundantly clear that the Plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the Plaintiff to make presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case, and it is only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition."*

35. The 1st Plaintiff/Applicant argued that the Defendant/Respondent should not have issued the statutory notice since they had not defaulted in making repayments.

36. It has been shown above that the Plaintiffs/Applicants were in arrears and have to-date not remedied the situation. A statutory notice dated 20th March 2015 was therefore issued and sent to the 1st Plaintiff/Applicant by registered mail. A further notice dated 22nd June 2015 was sent by registered post. (MM 10a-11b).

37. The Plaintiffs/Applicants have denied receiving these notices which I find to have been properly issued.

38. The Plaintiffs/Applicants have raised issue with the valuation of the charged property by the Defendant's Valuer. The 1st Applicant alleges that the same Valuer (Crystal Valuers Ltd) had on 3rd September 2013 valued the same property at ksh.7 million. He wondered how on 20th August 2015 the

same property could be valued at ksh.6 million. The said two reports are marked MM01 (B) & MMO 2 (A). He submitted that the value of his house was more than what has been indicated by the valuer.

39. Both MM0 1 (B) and MM0 2 (A) were annextures by the Plaintiffs/Applicants. MM01 (B) is a complete document and shows the forced sale value as ksh.5,300,000/- and the market value as ksh.7,000,000/-.

On the other hand, MM02 (A) is not a complete report. It does not show the market value nor the forced sale value.

40. It is not therefore possible for the court to confirm the allegations raised against Crystal Valuers and in particular Mr. Baresa Mukundi by the Plaintiffs/Applicants, without documentary proof.

41. The duty of a chargee exercising the power of sale is clearly set out under section 97 of the Land Act. This must be adhered to. The breach of any of these requirements, which must be proved is catered for under section 99 (4) of the Land Act No.6 of 2012 which provides:

> *"A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power."*

42. It was at this stage crucial for the Plaintiffs/Applicants to lay before this court all the full reports of what they have indicated in their affidavit about the valuation. The requirement for a valuation report is mandatory under section 97 (2) of the Land Act, No.6 of 2012.

43. The Plaintiffs/Applicants want an order of transfer of charge to M/S Express Automobile (K) Ltd (4th Plaintiff) to take over the payment of the legal outstanding charge transfer. The 4th Plaintiff did not enter into any agreement or covenant with the Defendant. For the court to make such an order would mean re-writing the charge for the parties concerned. The most prudent thing for the Plaintiffs/Applicants to do would be to approach the Defendant and negotiate on this.

44. The Plaintiffs/Applicants have asked this court to compel the Defendant/Respondent to remove the adverse listing of the 3rd Plaintiff/applicant with the CRB (Credit Reference Bureau). This is a legal requirement by the banks of any defaulting customer.

45. Nothing has been laid before this court at this interlocutory stage to show that the listing complained of is unjustified.

In the Case of **Rupa Cotton Mills (EPZ) Ltd & 2 Others V Bank of Baroda (Kenya) Ltd [2012] e KLR,** Musinga J (as he then was) at para. 20 and 21 stated:

*"If a borrower has defaulted on a loan, it is mandatory that the bank shares his information with all other banks. The Plaintiff's assertion they have been portrayed as bad, impecunious and doubtful debtors does not lie. The information that the defendant has provided falls within the ambit of the provisions of the **Banking (Credit Ref Bureau) Regulations, 2008** and more particularly as provided for in **section 14 of the Regulations** much as there may be a dispute as to the amount owed, the Plaintiffs have not settled the loan advanced to them, neither have any efforts been made towards the same."* I entirely agree with the Judge.

46. The Plaintiffs/Applicants herein were served with a statutory notice in March 2015 and were given 90 days within which to respond. They did not. Another notice was issued in June 2015 and they were given 40 days. The Plaintiffs/Applicants have had ample time to date to wriggle out of this challenge, including getting a buyer or money to repay the loan.

47. It is not clear if they have done so. The Plaintiffs/Applicants have not demonstrated that in the event they are successful in the trial, their loss would not be compensated by the Defendant/Respondent.

48. The Defendant/Respondent is a financial institution whose financial standing has not been challenged by the Plaintiffs/Applicants.

49. In view of all I have stated above, I do not find any merit in any of the prayers sought by the Plaintiffs/Applicants, in their application.

They have failed to establish a *prima facie* case for issuance of any of the said orders.

50. I dismiss the application dated 18th August, 2015 with costs. The interim orders in place are hereby discharged. Orders accordingly.

Delivered, Signed and Dated at Kericho this 29th day of February, 2016.

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H. I. ONGUDI

JUDGE

In the presence of:

Plaintiff/Applicant in person

Mr. Koech for Kisila for defendants/respondents

Hillary: Court Assistant

Interpretation: English

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H. I. ONGUDI

JUDGE

MR. ODHIAMBO:

I pray for a temporary stay to enable me make an application since I now have full documents which I want to present to the court.

MR. KOECH:

No objection but let it be for a limited period.

COURT:

Counsel for the Defendants/Respondents is asked to talk to the bank to see how this matter can be amicably settled out of Court.

ORDER:

Status quo to be maintained for the next 21 days.

H. I. ONG'UDI

JUDGE

29/2/2016

APPLICANT:

I pray for a copy of proceedings.

COURT:

As prayed.

H. I. ONGUDI

JUDGE

29/2/2016