REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 84 OF 2013

SAMMY JAPHETH KAVUKU.....PLAINTIFF

-VERSUS-

EQUITY BANK LIMITED.....1ST DEFENDANT

ROBERT WAWERU MAINA

T/A ANTIQUE AUCTIONA AGENCIES.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Application before court is the Notice of Motion dated 3/7/2013 in which the Plaintiff/Applicant is seeking temporary injunction to restrain the Defendants/Respondents from interfering with or selling the property known as L.R NO. KILIFI/MBARAKA CHEMBE/570 (hereinafter "**the suit property**") pending hearing of the suit.

2. The relationship between the parties herein emanates from loan facilities which the Plaintiff obtained from the 1st Defendant of Kshs. 1,200,000/=, Kshs. 2,320,000/= and Kshs. 6,480,000/= which facilities were secured by a charge, further charge and a second further charge respectively over the suit property.

3. The Defendants claim that the Plaintiff defaulted in repayment of the loan facility prompting the 1st Defendant to issue a Statutory Notice dated 3rd January, 2013, seeking to exercise its statutory power of sale over the suit property. Alongside the said Statutory Notice, the 1st Defendant avers that it sent a letter of even date giving the Plaintiff an opportunity to exercise his right of redemption over the security. Earlier, the 1st Defendant had sent out a demand letter dated 28th September 2012 demanding payment from the Plaintiff of the outstanding loan.

4. Subsequently, the Plaintiff received a letter dated 23rd April 2013 from the 2nd Defendant demanding payment from him (the Plaintiff) of the outstanding loan within 45 days in default of which the 2nd Defendant would sell the suit property. A Notice of Public Auction of the suit property was put in the *Daily Nation* on 17th June 2013.

5. The Plaintiff then filed this suit on 4th July 2013 alongside the Notice of Motion seeking to restrain the Defendants from disposing of the suit property.

THE ARGUMENTS

The Applicant's Case

6. The Applicant submits that he is entitled to the interlocutory injunction on the following grounds:

a. **That the statutory notice issued by the 1st Defendant on various dates is invalid for the reason that the same is defective, bad in law and fails to meet the mandatory standards.**

b. **That notwithstanding the contractual stipulations of the charge, the 1st Defendant has levied varied interest and penalty charges contrary to section 44 of the Banking Act, Cap. 488 of the Laws of Kenya.**

c. **That the amount demanded by the 1st Defendant is excessive as payments have been made but the same have been swallowed by the penalty charges and interest and unutilized insurance premiums in contravention of section 39 of the Central Bank Act.**

d. **That the suit property has been grossly undervalued by the Defendants.**

e. **The Plaintiff submits that he has met the standard for the granting of the interlocutory order of injunction.**

The Response by the Defendants

7. The Defendants opposed the Application through a Replying Affidavit sworn by GEOFFREY K. NGETICH and filed on 6th August 2013. In a nutshell, the Defendants submit that the Plaintiff is not entitled to the interlocutory injunction because of the following reasons:

a. **That the Plaintiff has defaulted in repayment of the loan and the outstanding balance now stands at Kshs. 12,140,966.75**

b. **That the 1st Defendant never subjected the loan to varying interest rates without notice to the Plaintiff. That the interest applicable was 18% per annum as per the letter of offer dated 21st October 2011 until variation was done to 25% per annum with due notice to the Plaintiff vide a letter dated 15th March 2012.**

c. **That both the letter of offer and the charge provided for insurance cover over the security property at the Plaintiff's expense.**

d. **That all payments made by the Plaintiff were factored in although a disputed account cannot entitle the Plaintiff to an injunction.**

e. **The Defendants denied that the suit property has been undervalued.**

The Issues

8. I have carefully studied the Application, the Affidavit in support thereof, the Replying Affidavit and the annextures. In my view, the main issue for the court's determination is whether the Plaintiff has met the requisite conditions to warrant the granting of the temporary injunction.

Analysis

9. The principles of interlocutory injunction are now well settled. The same were laid down in the case of **GIELLA v. CASSMAN BROWN & CO. LTD[1973] EA 358 at page 360** where Spry J. held that:-

"**The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. 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."**

***Prima facie* Case**

10. Has the Plaintiff established a *prima facie* case with a probability of success? In other words, has he demonstrated that he has a genuine and arguable case? To answer that, I will address the grounds upon which the Plaintiff is relying as discussed above, and the response thereto from the Defendants.

i. Validity or Otherwise of the Statutory Notice

11. It is the Plaintiff's case that he was served with two statutory notices by the 1st Defendant – dated 28th September 2012 and 3rd January 2013 – both of which were defective, bad in law and invalid. The Plaintiff gives the following reasons for the alleged invalidity:

i. The Statutory Notices give varied amounts allegedly outstanding.
ii. They were received by the Plaintiff one month after they were sent meaning that the 90 days statutory period was not given to the Plaintiff.
iii. Notice given was not sufficient and does not comply with Section 74 Registered Land Act as it then applied.

12. I must state from the word go that I do not understand the third reason given by the Plaintiff for the alleged invalidity of the statutory notice.

13. I will therefore only address the first two reasons. The Defendants have explained that there were no two statutory notices. That the only statutory notice is dated 3rd January 2013 and the letter dated 28th September 2012 was a mere demand letter. I agree with that explanation because the reference of the said letter dated 28th September 2012 is self explanatory as it reads:

"RE: FORMAL DEMAND FOR PAYMENT OF KSHS. 10,269,343.69"

14. The reason why the figures in the statutory notice dated 3rd January 2013 and in the letter dated 28th September 2012 are varied has been satisfactorily explained by the Defendants. The same is attributable to accrued interest. That, to me is understandable because the outstanding loan kept attracting interest as time went by. I see no reason why the same would make the notice defective.

15. The Plaintiff submits that he received the statutory notice one month after it was sent and claims that the 90 days statutory period was not given to him. I must point out that I have carefully read the Plaintiff's application and the Supporting Affidavit and he does not mention the fact that he received the notice one month after it was sent. In his Further Affidavit filed on 30th August 2013, at paragraph 11, he avers that he received the statutory notice in the month of March 2013, which is about two months from the date of the notice. So, did the Plaintiff receive the notice one month from the date of the notice or two months after? It is hard to believe him on his allegations as to belated receipt of the notice. It is clear to me that either the Plaintiff is not sure as to when he received the notice or he is not truthful of when he received the letter. That leaves me with no option but to work with date of the statutory notice.

16. I must therefore conclude, from the discussion above, that none of the reasons given by the Plaintiff to attack the validity of the statutory notice has basis.

ii. Interest and Charges

17. The Plaintiff claims that notwithstanding the contractual stipulations of the charge, the 1st Defendant has levied varied interest and penalty charges contrary to section 44 of the Banking Act, Cap. 488 of the Laws of Kenya. Section 44 of the Banking Act provides that "**no institution shall increase its rate of banking or other charges except with the prior approval of the Minister"**.

18. The Defendants, in response, state that they never subjected the loan to varying interest rates without notice to the Plaintiff. That the interest applicable was 18% per annum as per the letter of offer dated 21st October 2011 until variation was done to 25% per annum with due notice to the Plaintiff through a letter dated 15th March 2012. The Plaintiff claims that he did not receive the said notification letter dated 15th March 2012. The questions to be determined are whether the 1st Defendant should have sought approval from the Minister before varying the interest rate, and whether the interest rate as varied contravened the contractual stipulations between the parties.

19. In the case of **ST ELIZABETH ACADEMY- KAREN LIMITED v**

HOUSING FINANCE CO OF KENYA LIMITED [2013] eKLR Honourable J. Kamau, J. held as follows:

"I would agree with the holding of Hon Emukule J in HCCC No 261 of 2006 Daniel Kamau Mugambi vs Housing Finance at page 13 when he said-

" **… the question as to whether or not the provisions of Section 44 of the Banking Act limit the interest rates chargeable by banks and other institutions, appears to be uncertain."**

The key words in this Section are '**rate of banking or other charges**' with no specific mention of '**interest'.** As has rightly been pointed out by the Defendant's counsel, Section 52 of the said Act is clear that no contravention of the provisions of the Act shall affect or invalidate in any way any contractual obligation between an institution and any other person. In this regard, I find that there was no contravention of the Banking Act when the Defendant varied the interest rates without approval from the Minister. The Minister could not interfere with the contractual obligations between the Plaintiff and the Defendant when Clause 2 (b) of the Mortgage Instrument had clearly spelt out the effects of variation of interest by providing that:-

'….the decision of the Mortgagee in this regard shall not be questioned on any account whatsoever.'". (emphasis added)

20. I must point out that there is a near similar provision to Clause 2(b)

quoted above by Honourable J. Kamau in the subject charge at Clause 3 (iv) which provides that:

"The statement of the Bank as to the rate mode or amount of interest payable shall in the absence of manifest error be conclusive."

21. In the case of **DANIEL KAMAU MUGAMBI v. HOUSING FINACE**

COMPANY OF KENYA LTD [2006] eKLR, Honourable Fred A. Ochieng, J. held as follows:

"Furthermore, in the case of Desai & Others v Fina Bank Ltd [2004] 2 EA 46 at 51, the Hon. Emukule J. came to the conclusion that Section 44 of the Banking Act did not appear to touch on interest rates."

22. I agree with the holding in the case of **St. Elizabeth Academy-Karen Limited** (supra) and the case of **Daniel Kamau Mugambi** (supra). In my view, the 1st Defendant did not contravene the provisions of the Banking Act when it varied the interest rate without approval of the Minister.

23. The second question is whether the interest rate as varied contravened the contractual stipulations between the parties. To answer that question, I will be guided by the decision of the Honourable A. Mabeya, J. in the case of **CHRISTOPHER NDOLO MUTUKU & ANOTHER v CFC STANBIC BANK LIMITED [2013] eKLR**, where he stated at paragraph 10 that:

"There is no dispute that there was change of the rate of interest. The issue is whether such change was lawful and in accordance with the terms of the contract between the parties. In order to discern whether the changes were in terms of the contract, it is imperative to revert to the said contract for its terms and conditions..." (underlining mine)

24. I will therefore revert to the contract between the parties herein which is contained in two documents: the Letter of Offer dated 21st October 2011 and the Second Further Charge made on 22nd December 2011.

25. Clause 5 of the said Letter of Offer provides as follows:

"All advances made... shall attract interest... at a rate of 18% per annum... or such other rate as may be determined by the Lender from time to time. The Lender reserves the right to amend interest charges without prior notice to the Borrower...

If the Borrower fails to pay any sum payable... on its due date, the Borrower shall pay interest on such sums from the date of such failure to the date of actual payment... at the rate of 6% per annum above the rate specified in clause 4 of this letter." (underlining mine)

26. Clause 3 (i) of the said Second Further Charge stipulates as follows:

"The Chargor shall pay commission interest fees and charges to date of payment... at such rate or rates and upon the terms from time to time agreed with the Bank of (sic) if not so agreed at such rate or rates (not exceeding any maximum permitted by law) as the Bank shall in its sole discretion from time to time decide with full power to the Bank to charge different rates for different accounts AND it is agreed that the Bank shall not be required to advise the Chargor prior to any change in the rate of interest so payable nor shall any failure by the Bank to advise the Chargor as aforesaid prejudice in any way howsoever the recovery by the Bank of interest charged subsequent to any such change." (underlining mine)

27. Clearly from the contract entered into by the parties herein, the 1st

Defendant had the authority to vary the interest rate at any time and in fact the 1st Defendant was under no obligation to notify the Plaintiff of such variation. The claim by the Plaintiff that he did not receive the 1st Defendant's letter dated 15th March 2012 notifying him of the variation in the interest rate does not therefore add substance to his case as such notification was not a requirement under the contract.

28. The question as to variation of interest charged on loans has been

dealt with by the courts before. In the case of **Christopher Ndolo Mutuku** (supra), Honourable A. Mabeya, J. stated at paragraph 18 that:

"I have endeavored to analyze 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 effected. Clauses 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)

29. In the case of **DESAI & OTHERS v FINA BANK LTD [2004] 2 EA 46** at 51, Honourable Emukule, J. stated as follows:

"In FINA BANK LTD V SPARES AND INDUSTRIES LTD [2000] 1 EA 52, Tunoi, Shah and O'Kubasu JJA after considering the allegations of high and onerous rates of interest by the bank and criticizing the trial judge for falling into the serious error of being a sympathizer although it is human to so feel Shah said in his judgment:

'...the function of the Court is to enforce what is agreed between the parties and not what the court think ought to have been fairly agreed between the parties...'"

30. Honourable Emukule, J. then went on at page 52 in the **Desai & Others** case cited above to quote with approval the decision of Ringera, J. (as he then was) in the case of **Morris and Co Ltd v Kenya Commercial Bank Ltd & Others [2003] 2 EA 605** as follows:

> **"And this is what Ringera J. had to say on the subject of interest rates in the case of MORRIS AND CO LTD V KENYA COMMERCIAL BANK LTD & OTHERS [2003] 2 EA 605:**
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> **'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 it shall be.'"**

31. In the case of **Elizabeth Academy- Karen Limited** (supra), Honourable J. Kamau, J. stated as follows at paragraph 11: **"It is clear from the documentation before me that the rate of interest both the Plaintiff and the Defendant had contracted to had a variation of interest. The decision to vary the interest herein would not be questioned whatsoever. It is therefore not true that the Defendant made unilateral decisions to vary interest as had been alleged by the Plaintiff."**

32. The thread running through these cases is that interest rate is a contractual issue and courts should be reluctant to interfere with the interest rate agreed by the parties unless the same is shown to be illegal, unconscionable or fraudulent as doing so would amount to re-writing the contract. The parties herein agreed on the rate of interest to be applied and the 1st Defendant had authority to vary the same without reference to the Plaintiff. On prima facie basis it is my opinion that the interest rate applied by the 1st Defendant was in accordance with the contract between the parties herein and the court should not interfere with the same.

iii. Dispute as to the Amount Demanded

33. The Plaintiff claims that the amount demanded by the 1st Defendant is excess as payments have been made but the same have been swallowed by the penalty charges and interest and unutilized insurance premiums. I wish to observe that although the Plaintiff alleges to have made payments to offset the loan, he did not give particulars of such payments. It was incumbent upon the Plaintiff to demonstrate how much he has paid and produce evidence such as cheques, deposit slips or direct transfer. The Plaintiff did not discharge that burden.

34. The question of interest is already settled that the 1st Defendant was

within the law and the contract to have levied interest as it did. It is also apparent from Clause 6 and 11 of the Letter of Offer dated 21st October 2012 and Clause 4 of the Second Further Charge that the parties agreed that the Plaintiff would take insurance cover over the security property and

to pay fees and expenses. This, again, is a contractual term that the court cannot vary unless for good reason is shown such as illegality or unreasonableness.

35. The law as established by judicial precedent is that even if a borrower has a dispute with the interest and charges levied by the lender, he should not stop repayments until a court of law makes pronouncement as to the illegality or otherwise of the interest and the charges. Honourable Justice Ochieng was of that view in the case of **Daniel Kamau Mugambi** (supra) when he stated as follows: **"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."**

36. Clearly, the Plaintiff did not have any colour of right to stop

repayments simply because he believed that his account had been overburdened by high interest and charges.

37. The position adopted by courts is that a dispute as to the amount outstanding is not a basis for injunction to restrain a mortgagee from exercising the statutory power of sale. In the case of **Desai & Others** (supra), the court stated as follows at page 54:

"In any event it is now settled judicial precedent, that a dispute as to amount is not a basis for injunction to restrain a mortgagee from the exercise of the statutory power of sale..."

38. In the case of **Elizabeth Academy- Karen Limited** (supra), Honourable J. Kamau, J. stated as follows at paragraph 37: **"A legal position has been taken that a Mortgagee will not be restrained from exercising its power of sale because the amount was in dispute. I wish to reiterate the position espoused in the Halsbury's Laws of England 4th Edition Vol 32 at page 725 cited in HCCC No 10 of 2010 Scholastica Nyaguthii Muturi vs Housing Finance Co of Kenya Limited on page 8 that- 'The mortgagee will not be restrained from exercising his power of sale because the amount 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 being arranged. He will be restrained, however, if the mortgagor pays the amount into court, that is, the amount the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive.'"**

39. The legal position therefore is that even if it was established that the outstanding amount had been inflated due to interest and charges levied by the 1st Defendant, that would not form a basis for restraining the 1st Defendant from exercising its statutory power of sale.

40. The Plaintiff has not approached the court with clean hands. I say so because the Plaintiff claims that the Statutory Notice cannot take effect because he was not given 90 days to comply. As already discussed though, the Plaintiff cannot be believed on that claim because he himself gives different periods as the dates in which he had received the notice.

41. Secondly, at paragraph 12 of his Further Affidavit filed on 30th August 2013, the Plaintiff denies that he was given a chance to redeem the property and further denies that he received the 1st Defendant's letter marked "GN6" and dated 3rd January 2013. However, in his List of Documents filed alongside the Plaint on 4th July 2013, Document Number 5 is a copy of undated letter from the Plaintiff to the 1st Defendant in which he writes as follows:

"RE:STATUTORY NOTICE/POWER OF SALE KILIFI/MBARAKACHEMBE/570

This is in reference to your letter dated 3rd January 2013... Kindly note that I am waiting funds in order to pay up/offset the repayment installments in arrears and the accrued interest thereof. These efforts were hampered by among other reasons – the recent elections, and effects on tourism/economy; but hope to normalize this issue soon.

I have also explored the option of selling the property under private treaty as you advised, so as to enable you recover the amount owed to the bank...

Please therefore I am pleading that I be allowed more time to pursue the issue as explained...

Yours faithfully,

Sammy Japheth Kavuku"

42. This letter was annexed to the Plaintiff's own bundle of documents. Its existence, source and contents cannot therefore be disputed. The letter is not only evidence that the Plaintiff received the Statutory Notice and the notice giving him an opportunity to redeem the property but also an admission on the part of the Plaintiff that he was in arrears. He also does not dispute the amount outstanding as per the notice or the interest accrued. All he asks for is more time to enable him pay. For the Plaintiff to turn round and deny everything including the outstanding amount, service of the statutory notice and being offered an opportunity to redeem the property, to me, is a clear demonstration of bad faith on his part. The Plaintiff failed to disclose in his application the existence of his said undated letter. He came to court with unclean hands.

43. In the case of **SAMSON ALITON OKELLO v BARCLAYS BANK OF KENYA LIMITED [2009] eKLR**, Lesiit, J. observed that "**an injunction is an equitable remedy and a party seeking such a remedy must conduct himself in relation to the suit and the matter at hand in a manner that will meet the approval of a court of equity**."

44. In the case of **Daniel Kamau Mugambi** (supra) the court quoted with approval the Court of Appeal decision in **Francis J.K Ichatha v Housing Finance Company of Kenya, Civil Application No. 108 of 2005** as follows:

" **A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the Plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity..."**

45. Since the Plaintiff has not approached the court with clean hands, he should not expect the court to grant him any equitable remedy.

46. I have analyzed the main grounds upon which the Plaintiff's application is premised. It is my opinion that the Plaintiff has not established a *prima facie* case with probability of success.

Irreparable Loss

47. Has the Plaintiff demonstrated that he will suffer irreparable loss unless the injunction is granted, **which loss would not adequately be compensated by an award of damages?** The Plaintiff submits that he will suffer irreparable loss that cannot be compensated by an award of damages because the suit property is his source of income and that he has attached great sentimental value to it.

48. To start with I am guided by the case of **MAITHYA v HOUSING FINANCE CO. OF KENYA**

& ANOTHER [2003] 1 EA 133 at 139 where Honourable Nyamu, J. stated as follows:

"Charged properties are intended to acquire or are supposed to have a commercial value otherwise lenders would not accept them as securities. The sentiment of ownership which has been greatly treasured in this country over the years has in many situations given way to commercial considerations. Before lending, many lenders, banks and mortgage houses are increasingly insisting on valuations being done so as to establish forced sale values and market values of the properties to constitute the securities for the borrowings or credit facilities... Loss of the properties by sale is clearly contemplated by the parties even before the security is formalised. For these reasons, I hold that damages would be adequate remedy and it has not been suggested that the Respondent cannot pay damages should it become necessary." (underlining mine)

49. I agree with the above observations. By agreeing to charge his property, the Plaintiff had accepted to give more weight to the commercial value of the same than the sentimental attachment. The Plaintiff must have contemplated that the property would be sold in case he defaulted in repayment of the loan before he entered into the contract. I therefore do not agree with the Plaintiff that the loss of the property cannot be compensated by damages because the value of the property is ascertainable and there is nothing to show that the Defendants cannot pay. On that ground too, the Plaintiff fails.

Balance of Convenience Test

50. The Plaintiff has not met the requirement as to *prima facie* case and

has failed the damages test. His application must therefore fail. But for the avoidance of doubt, I will briefly discuss the balance of convenience.

51. I take judicial notice that the 1st Defendant is a reasonably sound financial institution. It stands better chances to compensate the Plaintiff should the Plaintiff succeed in the trial. Should the injunction be granted to restrain the Defendants from exercising statutory power of sale, the amount of the debt may continue to rise exponentially and the security may prove to be insufficient to cover the ultimate balance. On the other end of the scale, the 1st Defendant is highly likely to satisfy any decree passed against it. The balance of convenience therefore tilts against the granting of interlocutory injunction.

Court Order

52. In the end, it is my view that the Application should be dismissed with

costs and interim orders in place be discharged. It is so ordered.

DATED and DELIVERED at MOMBASA this 20TH day of MARCH, 2014.

MARY KASANGO

JUDGE