REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HCC NO. 123 OF 2014

BENJAMIN KABURI KAMURUCI.....PLAINTIFF

VS

STANBIC BANK LIMITED.....DEFENDANT

RULING

Injunction

[1] I have before me the application dated 28th March 2014 seeking injunctive orders to restrain the Defendant from selling by Public Auction or by any mode the Plaintiff's Property being house No.G6-6 situated on LR NO.12422/23 Karura, Muthaiga North Estate. The application is based on the Plaintiff's Supporting Affidavit. The suit property was given as security for a total mortgage amount of Kshs. 7,400,000/=. The Plaintiff continued to make payments the bank unilaterally revised the interest rates from the contracted percentage of 11.25% to a high of 26% which increased the monthly repayments from Ksh.90,000/= to a high of about Ksh.200,000/=.

[2] During the same time, the Plaintiff had lost his employment and he informed the bank about it. He, therefore, requested that bank to allow him time to resume the repayments. He has been paying the monthly repayment above Kshs. 90,000/= in order to reduce the arrears. He has paid in excess of Kshs. 1,000,000/= over the last one year save for the disputed claims in interest and penalties. He argues he is able to repay and so the bank cannot therefore claim that the only remedy available to them is the sale of the house. Despite requests, the bank has refused to revise or stop the unwarranted interest rate and penalties. And that has made it difficult for the Plaintiff to redeem the property. In the charge document, the rate at which default interest would be compounded was not made known to the Plaintiff and was left at the sole discretion of the defendant. For one to charge interest and penalty it not only ought to be certain but must be clearly advised to the customer given that the rates are not given with any measure of certainty since the same was not contained in the Charge instrument. Levying of such unknown interest violates the provisions of Article 46(1)(b) of the Constitution which guarantees consumer's right to information necessary for them to gain full benefit from the goods and services they consume. In **Givan Okallolngari & Another Vs. Housing Finance Co. (K) Ltd Nairobi HCCC NO.79 oft 2007[2007]2KLR 232,** Honourable Justice Warsame (as he then was) stated:

> ***"It would be difficult to redeem a loan which is loaded with figures at the discretion of one party. The other party interested in the redemption exercise would definitely find impossible to measure to the discretionary powers or decisions of the party interested in the beneficial result.***

It is in the benefit of the Plaintiffs for the defendant to load figures only provided by the contractual document…Equally it is not in the interest of the Defendant to milk the Plaintiffs dry and drain all blood from them. The court exists for the sole purpose of determining as who is entitled to what. In my view the defendant cannot be allowed to engage in acts or omissions, which are in contravention of the law".

[3] The Plaintiff argued his loan has been clogged with excess interest default penalties at unknown rates which have affected his right of redemption. Such information is useful to enable consumers of loans to make the best possible decisions in the circumstances of their case.

[4] The Plaintiff was not properly served with the notices and has the Bank's right of sale has not accrued. In paragraph 9 of the Defendant's Replying Affidavit, the Defendant admits that the registered mails were returned unclaimed meaning that the mode of service had failed. Through a letter dated 5th August 2013, the Plaintiff had informed the bank to be calling him directly to pick up his letters due to the problem that he was having in not receiving his letters. The defendants allege that service of the statutory notice was on 28th February 2014 for a sale scheduled for the 3rd of April, 2014 and that is not a proper notice. Service of notice is disputed and the Defendant should provide documentary evidence to prove it. There is no evidence that the Plaintiff was called to collect the notice of sale as he instructed the bank. The affidavit of service dated 8th July 2013 sworn by Julius Kilei Mbunge doess not comply with Order 5 Rule 15 of the Civil Procedure Rules, as it does not state the name and address of the identifying person. In **Abdul Rahim Dawood Vs. Martha Kithiru & 2 others [2013]e KLR**, Justice Makau held thus on the description of the identifying person:-

"The affidavit of service is required to be in Form No.4 of the Appendix A with such variations as circumstances may require. It is mandatory for process server in affidavit of service to indicate dated of service, or place of service, time of service and indicate whether the person being served, was known to him/her or if not so who identified the person being served giving his address and indicate whether the person being served admitted that he or she was the Defendant. The affidavit of service must also be signed before Commissioner for Oaths or Magistrate".

The Process server did not indicate how he confirmed whether the person served was the Chargor or not. The affidavit of service in this case is defective and falls short of mandatory legal requirements. It only confirms the Plaintiffs/Applicants position that he was not served.

[5] The Plaintiff/Applicant avers that he was not properly served with statutory notice of 90 days, he would have taken drastic measures to redeem his property by even borrowing funds to pay part of the outstanding arrears or he would have sold the property by private treaty at the market value of the property to clear the loan and retain enough money to find an alternative property as it is his matrimonial home. All these facts establish a prima facie case for court to issue an order for injunction pending hearing. And if the injunctive orders are not granted, he will suffer irreparable damage given that the charged property is his matrimonial home and he has no alternative means of providing shelter for his spouse and children. He has paid in excess of Four Million on the loan. Accordingly, the balance of convenience tilts in favour of the Plaintiff.

The defendant opposed the application

[6] The Defendant relied on its Replying Affidavit sworn by Boniface Machuki on 16th April 2014 and filed on the same day. The loan facility granted was for a sum of Kshs. 7,400,000/= which was secured by a Charge on the suit property. The Plaintiff agreed to *"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 or 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 account'* and it was further agreed that *"the Bank shall not be required to advise the Charger prior to any change in the rate of interests so payable"*. Further the Plaintiff agreed that should he default in making any payments or exceed the authorized limits for banking facilities, the bank would charge default interest, from the date of such default until overall payment, at such rate or rates over and above the rates

specified in clause 2(1) of the Charge as may be determined by the bank from time to time and that the default interest may at the sole discretion of the bank be at any time capitalized and added to the principal amounts. These interests are lawful as per Honourable A. Mabeya, J in the case of Christopher Ndolo Mutuku & another vs. CFC Stanbic Bank Ltd (2013)eKLR, 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…"***

The Plaintiff defaulted in making payment making the entire debt of Kshs. 8,637,059.33 as at 14th October 2013 due and payable together with interest accruing at the contractual rate until payment in full. The same is shown in the bundle of Bank Statements of the Plaintiff's Home Loan (Exhibit "BM – 2").

[7] The Plaintiff was duly served with the 90 day notice by registered post which was returned unclaimed and on or about 8th July 2013 he was served again in person as shown by the affidavit of service sworn by Julius Kilei Mbunge on 8th July 2013, Exhibit "BM-3". Three months later, on 22nd October 2013, the Plaintiff was served with the forty day notice via registered post and using the Postal Address indicated by the Plaintiff when he was applying for the home facility, 50183-00200, Nairobi, Exhibit "BM-4 and in person on 28th February, 2014, Exhibit "BM-5". The forty day notice was also affixed at the Nairobi Land's Registry's Notice Board and the charged property. Upon expiry of the 40 days, the Defendant's advocate, in exercise of the Defendant's statutory power of sale instructed Valley Auctioneers to sell the charged property.

[8] The Plaintiff has not satisfied the conditions set out in the case of **Giela vs. Cassman Brown & Co. Ltd (1973) EA 358**. He has not shown a prima facie case with probability of success. Secondly, he has not shown he will suffer irreparable injury, which would not adequately be compensated by an award for damages. Thirdly, the balance of convenience does not favour him. The money was advanced and the Plaintiff has admitted that he defaulted when he lost his job. The plaintiff has not provided evidence that he was paying monthly rate of Kshs. 90,000/= in order to cut back on the arrears". In the face of the default, the Defendant is entitled to exercise their statutory power of sale. In **Kyangaro vs. Kenya Commercial Bank Ltd & another (2004) 1 KLR 126** at page 145 the learned Judge Njagi had this to say:

> ***"…the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the Plaintiff in this case betrays him. It does not endear him to equitable remedies ….. He admits that he is in default, and yet he is also in possession. He can't have it both ways. Either he pays the loan or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The Plaintiff has not done that. Consequently he has not done equity. In the hands of the Plaintiff, a permanent injunction would wreak havoc to the first Defendant, and that would be inequitable. While charges are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted int0 a haven of refuge by defaulters. Even lenders and charges have their own rights"***

[9] The Defendant also cited the case of **Christopher Ndolo Mutuku (Supra)**, where 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 documents that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the Defendant could change the rate or interest as 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".***

And the case of **Morris and Company Ltd vs. Kenya Commercial Bank Ltd & others [2003] 2 Ea 605: Ringera J:**

Fina Bank Ltd vs. Spares and Industries ltd [2000] 1EA 52, Shah JA: and the Court of Appeal in **Francis J.K Ichatha vs. Housing Finance Company of Kenya, Civil Application NO.108 of 2005.**

[10] They submitted that the Plaintiff has defaulted, thus, has come to this Court with unclean hands and wants to derive advantage from his own breach of contract. There is sufficient evidence and numerous affidavits of service that show that the Plaintiff was served in person with the 90 day notice. Registered post to his Postal Address and also in person. The Defendant's Advocates then instructed Valley Auctioneers who served a 45 day Notification of sale via registered post, Exhibit "BM-6". The required notices were served. But the debt remains unpaid. The plaintiff will also not suffer any irreparable loss as such properties are commodity for sale once given as security. See the case of **Maithya V. Housing Finance co. of Kenya & Another [2003] 1 EA 133; Sammy Japheth Kavuku vs. Equity Bank Limited & Another [2014] eKLR.** Therefore, the balance of convenience tilts in favor of the Defendant. His application must therefore fail.

THE DETERMINATION

The Charge

[11] The Charge made on 17th March 2010, at Clause 2 provide as follows:

> ***"the Chargor shall pay commission interest fees and charges…..at such rate or rates… as the bank shall in its sole discretion form 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 charger as aforesaid prejudice in any way whatsoever the recovery by the bank or interest charged subsequent to any such charge. If the charger defaults in making any payments hereunder or exceeds the authorized limit for the banking facilities then … the amount so in arrear or in excess shall henceforth itself bear interest (default interest) form the due date of such payment until actual payment thereof at such rates over and above the rates specified in clause 2(i)….at such rates as may at the sole discretion of the Bank be at any time capitalized and added for all purposes to the principal amount".***
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> [12] There is ample case law that, when parties enter in a contract, they are bound by its terms. And courts should only enforce such contracts rather than try and re-write them for the parties. Such terms on interest had been even discussed before. See what courts have said in this subject. In the case of Christopher Ndolo Mutuku (Supra), Honourable A. Mabeya, J. stated at paragraph 18 that:
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> ***"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 documents that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the Defendant could change the rate or interest as 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".***

[13] In Morris and Company Ltd vs. Kenya Commercial Bank Ltd & others [2003] 2 Ea 605: Ringera J. (as he then was) stated,

> ***"As regards interest, I can only say that it behooves 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."

[14] Also in the case of **Fina Bank Ltd Vs. Spares and Industries ltd [2000] 1EA 52,** Shah JA, said in his judgement:

> ***"..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…"***

[15] The Plaintiff willingly signed the Charge with the above terms on interest. The Charge was properly executed and is not tainted with glaring illegality which the court can pick. Therefore, according to the Charge interest and other default charges were governed by clause 2 above. The intention of the parties was that they will be bound by the Charge. And as parties are bound by their contract, I do not see anything illegal with the Charge which will justify the intervention of the Court. As a general rule, disputes on interest rate or amount payable cannot be a basis for a grant of injunction unless they are tinctured with illegality or the amount claimed is preposterous, excessive or unconscionable on the face of the Charge. Or it is a bargain so ridiculous on the face of the Charge that no person would offer another. The terms above do not fall in that category. If the Plaintiff considered the interest to be illegal or un-contractual, he should have taken appropriate legal steps to have the interest declared as such immediately it was charged on his account.

[16] I have noted that the Plaintiff is in default of payment and he has admitted this. Even if he is disputing the varied interest rate, he has not paid in court the sum he admits. He confessed that he has paid only about or slightly over Kshs. 4,000,000. Even if we go by the principle sum of Kshs. 7,400,000/=, without any interest, a balance of Kshs. 3,400,000/= would still be outstanding. Although I sympathize with what happened to the plaintiff when he lost his job, but he is clearly in default and may not excite the tenderness of equity. The Court of Appeal in **Francis J.K Ichatha vs. Housing Finance Company of Kenya, Civil Application NO.108 of 2005** held:

> ***"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 form his own wrong, for the Plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity".***

[17] But there is one comfort; that the plaintiff has undertaken to pay the sum due within reasonable time or by even selling his property by private treaty so that he can fetch good price for it; pay up the loan and be left with substantial sum. I will consider that pledge when I will be making my final orders. For now, let me consider the issue of notices herein.

Notices

[18] I have perused the file and documents filed. The Defendant made a demand for payment of the entire sum after the plaintiff defaulted. The plaintiff admits he defaulted. Then a statutory notice for 90 days was served on in person on 8th July 2013. Thereafter, on expiry of the 90 days, the defendant served a 40 days' notice through registered post on 22nd October, 2014. Out of abundance of caution, the defendant served the 40 days' notice on 28th February 2014 upon the person of the plaintiff. The said notice was also affixed at the registry notice board at Ardhi House and at the suit property. The defendant averred again at paragraph 16 of the Replying Affidavit that the auctioneer served a 45 days' notice through registered post on 3rd February 2014 for an auction scheduled for 3rd April 2014. It is clear the defendant made efforts to serve the notices on the plaintiff. This is despite earlier attempts to serve by registered post. Affidavits of services filed have not been controverted except the plaintiff attempted to discredit the service because the person identifying him had not been named. The affidavit clearly states that the process server identified him through his phone No [particulars witheld]. There was really no serious challenge posed to the service and no request for cross-examination of the process server that was made which perhaps would have provided more information on the service. For now, the evidence shows he was served with all the requisite notices. His challenge to the notices as a ground for an injunction fails.

[19] Now therefore, shouldn't the court consider the entire case and its peculiar circumstances so as to chart a path with least risk of injustice? The court has found that the Applicant defaulted to repay the debt as agreed; it has also noted that losing employment was a great loss for the Applicant who has made effort, albeit not enough, to make some payments. Those payments are also scattered and without any uniform trend. I note also that the Plaintiff has confessed that he is ready and willing to repay the loan amount found to be due. I will, therefore, grant a temporary injunction on the condition that the plaintiff pays the entire debt herein within 60 days. That does not prejudice his suit as he can always get reimbursement of any extra sum he may have paid, if any. Indeed I should emphasize that these orders are purely made in the interest of justice. I make no orders as to costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 28th day of November, 2014

F. GIKONYO

JUDGE