



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 455 OF 2012

JULIUS MAINYE ANYEGAAPPLICANT

Versus

ECOBANK KENYA LIMITED.....RESPONDENT

RULING

Injunction

[1] The Applicant filed a Motion dated 16th July, 2012; seeking the following substantive prayers, that:-

- a. ***A temporary order of injunction does issue restraining the Respondent by itself, its servants, agents, assigns or otherwise howsoever from offering for sale, selling, transferring, alienating or in any way disposing of all that property known as L.R. NO.209/11646 FLAT B3, HOUSE NO.7 PARKVIEW APARTMENTS – SOUTH C, NAIROBI, to a person other than the Applicant and from evicting or dispossessing the Applicant herein thereof pending hearing and determination of this suit.***
- b. **Costs.**

Brief facts

[2] The Applicant entered into an agreement dated 3rd November, 2004 with the Respondent to purchase all that property known as LR No. 209/11646 Flat B3, House No. 7 Parkview Apartments – South C, Nairobi “*the suit property*” from East African Building Society, the predecessor of Ecobank Kenya Limited “*the Bank*”, at a cost of Kshs. 3,240,000.00. Pursuant to the aforementioned agreement, the Applicant was on 15th April, 2005 advanced a mortgage finance facility of Kshs. 3,240,000.00 by the Bank and it was agreed that the Applicant was to make monthly repayment instalments of Kshs. 45,346.70 for a period of 15 years subject to variable interest rate from time to time upon notice being served for that purpose. The Applicant also executed a Mortgage in respect of the suit property in favour of the Respondent as security for the financial facility advanced to him.

[3] From the date the facility was disbursed on 15th April, 2005 to the end of the year 2010, the facility was attracting an annual interest rate of 15%. However, due to interest rates fluctuations in

the Kenyan economy, the mortgage rates rose to 18% in July, 2011, 19.25% in October, 2011, 21.25% in November, 2011 and 27.25% in June, 2012. According to the Respondent, the changes in the interest rate were communicated to the Bank's Clients, including the Applicant, by print media.

[4] The Applicant then fell into arrears in repayment and statutory notices were issued for the sale of his land. The Applicant was aggrieved by the notices and the general conduct of the Respondent in handling his accounts and applied for an injunction to restrain the mortgagee from exercising its statutory power of sale on the basis that the bank changed interest rate without notice, it charged illegal sums to the mortgage and failed to render a statement of accounts.

The Applicant's case

[5] According to the Applicant submitted that supposedly pursuant to the charge herein, as at 15th April, 2005 the Respondent indicated the Applicant's opening balance to be Kshs. 3,587,017.50. The Applicant claim that was the beginning of the repayment of the mortgage, and therefore, the above figures must have been erroneous and in excess of the loan advanced.

[6] On 3rd September, 2008, the amount of Kshs. 145,000.00 paid by the Applicant was credited into a strange account not held by him whatsoever. On 9th September, 2009, more than a year later, the Respondent recorded the above payment into the Applicant's mortgage account; having Mortgaged interests on it supposedly for default of payment thereof. On 1st November, 2010, the Applicant paid Kshs. 50,000.00 towards the loan which the Respondent failed to record. The said sums were later reflected in the Applicant's mortgage account on 16th February 2011. On 1st December, 2010, the Applicant paid Kshs. 50,000.00 which was credited to a suspense account. The Respondent later recorded the above sums in the Applicant's account on 21st March, 2011. On 9th August, 2011, the Respondent again recorded payments by the Applicant into a different account. The Applicant was not given any prior notification or reasons for the above change; but was directed by the Respondent to use the new account henceforth, against best banking practice.

[7] The Respondent Mortgaged and continues to Mortgage interest on outstanding arrears based on erroneous calculations and figures. At all times material to the transaction herein, the Applicant paid the Respondent in round figures; however, in the bank statements from 2011, the Respondent has indicated the payments with decimals. See the statement of account at page 12 of the Applicant's Supporting Affidavit herein. The Respondent has also neglected to furnish the Applicant with a repayment schedule/bank statements for 2012. Four separate premiums paid by the Respondent are not reflected in the bank records.

[8] Pursuant to the agreement herein, interest on the loan advanced to the Applicant was to be capitalized on a monthly basis. The Respondent has continued to capitalize interest on some purported lump sum arrears/balances. See clause 4 of the offer of advance at page 97 of the Applicant's Supporting Affidavit. The Respondent has imposed a penal interest despite there being no agreement with the Applicant on this. In addition to the foregoing, the Respondent has since 16th January, 2008, Mortgaged Kshs. 1,000.00 default interest per month, without any justification or explanation. The Respondent also Mortgages interests on insurance for the suit property as part of the mortgage facility; despite there being no such arrangement with the Applicant for the said insurance Mortgages. See mortgage protection policy at page 85 of the Applicant's Supporting Affidavit.

[9] So far the Applicant has paid over Kshs. 3,523,700.00 over and above the loan advanced and is, therefore, entitled to the suit property. But, the Respondent's actions herein are fraudulent, actuated by malice and deliberately aimed at depriving the Applicant the opportunity to peaceably own the suit property contrary to the spirit and letter of the agreement herein.

[10] Despite all the above malicious acts, the Respondent has issued a notice of sale of the suit

property for alleged non-payment of purported arrears; and the said notice expires on 26th July, 2012. Service of the purported notification of sale upon the Applicant through Watts Enterprises auctioneers on 23rd May, 2012 was not done in accordance with the relevant law. The purported notice gave the Applicant 45 days thereof to comply, failure to which the suit property would be sold by public auction. The arrears provided by the Respondent are preposterous. In 2011, the Applicant paid a total of Kshs. 395,700.00, out of which only Kshs. 145,700.00 was recorded in the Respondent's bank's schedule/statements. The remaining sum of Kshs. 250,000.00 is unrecorded to date and the Respondent continues to Mortgage interests in "default" of payment thereof. Since the beginning of 2012, the Applicant has paid Kshs. 185,000.00. As of 18th April, 2012 the Respondent had only reflected in its records the sum of Kshs. 180,000.00 leaving a balance of Kshs. 5,000.00 unaccounted for. In total, the Respondent has failed, ignored or neglected to account for sums over Kshs. 500,000.00 paid by the Applicant on various dated from 2008. The Respondent Mortgages interests on the alleged arrears over the said unrecorded payments to the date they are reflected on its records

[11] The Respondent is unclear as to the exact sum it is owed; and is demanding conflicting sums in arrears from the applicant. The applicant does not know what to pay the Respondent. See Applicant's letter of complaint to the Respondent at page 78 of the Applicant's Supporting Affidavit. See also letter from the Respondent at page 2 of the Applicant's Supporting Affidavit demanding Kshs. 862,848.42. The applicant has paid all the monthly instalments regarding the transaction herein. The last payment he made was on 18th April, 2012 and he has been paying since then. Prior to 18th April, 2012 no arrears were owing to the bank for the monthly payments. The Applicant paid lump sum figures to cover for the months he did not pay instalments. The Respondent has failed to post payments for 2012 in its statements supplied to the Applicant on various dates.

[12] The bank varied interest rates and applied on wrong figures caused by poor recording of payments, thus making the Applicant to be perpetually in arrears which are unascertainable. See handwritten breakdown of arrears by the Respondent's branch to the Applicant's Supporting Affidavit. The arrears indicated in the above documents conflict with those demanded. The Respondent lacks proper records for the Applicant's accounts hence the inconsistencies. The bank increased the monthly loan repayment from the agreed sum of Kshs. 45,346.70 to Kshs. 60,592.91; Kshs. 59,898.80; Kshs.92,062.19 respectively. The bank has now unilaterally settled on a monthly premium of Kshs. 76,908.16 payable until 1st March, 2020. All these have been undertaken without any notice to the Applicant, and the Respondent continues to Mortgage interests on the above figures. See the offer of advance at page 97 of the Applicant's Supporting Affidavit and statements on pages 61-64 thereof. The Respondent unilaterally departed from the agreed monthly instalments of Kshs. 45,346.70 thereby increasing the Applicant's indebtedness. The above changes were not notified to the Applicant as required by law.

[13] Going by the Applicant's repayment schedule, the only arrears as at the time of filing the suit herein were for the months of May and June, 2012 totaling to Kshs. 90,693.40. The Applicant incorrectly assumed to be Kshs. 100,000.00 because of the Kshs. 50,000.00 the Applicant usually pays for the monthly instalments. Those arrears have been settled. The Applicant has never admitted any arrears to the bank as alleged but sought clarification from the bank on the various sums demanded by the Respondent in arrears. The Respondent bank refused to give the Applicant a break-down of the arrears despite several requests. See email communication between the Applicant and the Respondent dated 21.5.2012 at page 27 of the Applicant's in support of the application. Since the Applicant is focused on owning the property which is their matrimonial home, he sought to be allowed to make a repayment plan to settle any of the conflicting arrears demanded by the Respondent, a request the Respondent denied! The Respondent's intention arising from its conduct herein is to transfer the suit property to a third party and to divest the Applicant of his interest and rights thereto. The Property is of immense sentimental value to the Applicant; the Applicant will never get or afford a similar property at the same cost anywhere if he loses it. The Applicant is desirous and determined to own the suit property which they occupy

as their matrimonial home. The Applicant is making all necessary efforts to discharge his obligations to the bank in respect to the transaction herein; and he is willing and ready to pay outstanding arrears which are justifiable, if any.

[14] By reason of the matters stated above, the Applicant stands to suffer irreparable financial loss, lost reputation, psychological distress, inconvenience and trauma; and his family put in serious jeopardy if the Respondent actualizes the intended sale. The foregoing losses will not be compensable even by an award in damages. It is in the interest of justice that the order sought herein be granted to obviate an imminent difficulty to the Applicant; conserve the suit property and to enable the honourable court to justly and fairly consider and determine the issues in dispute between the parties on merit. All the foregoing facts are not contested by the Respondent!

[15] According to the Applicant, issues for determination are:-

- a. Whether or not the statutory notice of sale was duly issued/served;
- b. Whether the Applicant has satisfied the requirements under *Giella vs. Cassman Brown & co. Ltd*, for the grant of interlocutory injunction;
- c. Who between the Applicant and the Respondent should bear the costs of the application herein?

[16] The Applicant submitted that Section 74 of the Registered Lands Act, Chapter 300 of the Laws of Kenya (Repealed); and Section 90 of the Land Act, 2012 impose on Mortgagee a duty to issue and serve due notice of sale issues on the Mortgagor before a Mortgaged property is subjected to sale. The notice must give the Mortgagor three months to comply with the Mortgagee's demand. An intended sale can only be undertaken on the expiry of the three months following service of the notice and subsequent non-compliance by the Mortgagor. Service of a valid statutory notice of sale on the Mortgagor is a condition precedent to the exercise of the statutory power of sale. In the event of non-service, any sale that takes place or purported is void. The Respondent instructed their auctioneer who proceeded to address a letter to the Applicant putting him on notice of sale of suit property; this is not a valid statutory notice in law. The purported notice was not duly issued/served as mandated by the repealed Section 74 of the RLA, Cap 300 Laws of Kenya; Section 90 of the Land Act, 2012. Further, the notice did not give the Applicant three months after service thereof to comply before the threatened sale; and is therefore invalid/void. See **Nyagilo Ochieng' & Another vs. Fanuel B. Ochieng' & 2 others Court of Appeal Civil Application No.148 of 1995, p 5-7; Samuel Kiarie Muigai – vs. Housing Finance Co. of Kenya & Another HCCC NO.1678 of 2001, p 12,14,15-18; and Simiyu vs. Housing Finance Co. of Kenya [2001]2 EA. p 19-21,23.**

[17] The Applicant restated the Principles in **Giella – versus- Cassman Brown & Co. Ltd** and submitted that he has *established a prima facie case* because the Notification of sale of the suit property herein is invalid for violating the peremptory statutory provisions. The Applicant is not in arrears of any monthly payments; and has never admitted any arrears to the Respondent as alleged. The Applicant is not only contesting the sums demanded by the Respondent, but also the propriety/legality of the Respondent's demand which the Applicant says is fraudulent. Statements of the Applicant's accounts furnished by the Respondent give incoherent/conflicting figures as to what is owed to the Respondent. The Respondent has also denied a request by the Applicant for reconciliation of the Applicant's loan account, suggesting the Respondent's bad faith in its dealing with the Applicant. The Respondent's demands are untenable and fraudulent.

[18] The Respondent altered the interest rates in breach Section 44A of the Banking Act; and the suit agreement. The sums demanded in arrears are therefore unlawful. See **Thara Orchards limited – vs- Kenya Commercial Bank Ltd HCCC NO.79 of 2009**. The suit property serves as the Applicant's matrimonial home, and it should be protected against sale by the Respondent pending hearing and determination of the suit herein. **Mrao Ltd. – vs- First American Bank of Kenya Ltd & Others [2003]KLR 137.**

[19] Will the Applicant suffer injury incapable of adequate compensation by an award of damages? The Applicant answered the question in the affirmative based on the fact that the suit property serves as the Applicant's family home, and is thus worthy of protection. The Applicant has sentimental attachments to the property as their matrimonial home; a loss of the property will gravely affect and traumatize the Applicant and his family. The value of the property has appreciated, and the Applicant will not succeed in acquiring a similar property at the same place at the price he acquired the suit property. So far the Applicant has paid over Kshs. 3,523,700.00, over and above the loan advanced of Kshs. 3,240,000.00. The Applicant has liquidated his assets so as to repay the loan; he stands to suffer irreparable loss if the Respondent proceeds with the threatened sale, unless restrained. Availability of damages or the Respondent's ability to compensate the Applicant is an irrelevant consideration. See **Simiyu – vs- Housing Finance Co. of Kenya**[2001]2 EA.p 541,542,549.550; and **Lucy Njoki Waithaka –vs- ICCD – HCCC NO 321 of 2001**.

[20] All these makes the balance of convenience to tilt in favour of granting the orders sought. The Applicant's children enrolled in and are attending a nearby school; he should be allowed to continue peaceful occupation thereof pending hearing and determination of the application herein. Failure to grant the orders sought will expose the Applicant to unjustified, unlawful and inequitable dispossession of the suit property. The Applicant prayed that the application be allowed with costs.

The Respondent opposed the application

[21] Pursuant to the aforementioned agreement, the Applicant was on 15th April, 2005 advanced a mortgage finance facility of Kshs. 3,240,000.00 by the Bank and it was agreed that the Applicant was to make monthly repayment instalments of Kshs. 45,346.70 for a period of 15 years subject to variable interest rate from time to time. The Applicant also executed a Mortgage in respect of the suit property in favour of the Respondent as security for the financial facility advanced to him.

[22] The initial annual interest rate was 15%. However, due to interest rates fluctuations in the Kenyan economy, the mortgage rates rose to 18% in July, 2011, 19.25% in October, 2011, 21.25% in November, 2011 and 27.25% in June, 2012. The changes in the interest rate were communicated to the Bank's Clients, including the Applicant, by print media.

[23] Simultaneously with servicing the mortgage, the Applicant had an outstanding loan obligation which he was servicing so that whenever he made payments, they could either be accounted to the loan or the mortgage as there was no indication to which item an amount should be credited. The Applicant honoured his obligations under the mortgage agreement till the year 2008 when his repayments started becoming irregular necessitating the Bank to demand payment of the arrears. The Applicant having not made payment of his unremitted instalments, the Bank issued a Statutory Notice on 3rd June, 2008 (*annexed at page 19 of the Supporting Affidavit*). Three (3) months after the service of the Statutory Notice on the Applicant, the Applicant still failed to exercise his right of redemption. Before the issuance of the Statutory Notice by the Bank, the Applicant had never at any given moment raised an issue with the Bank on the reconciliation of his accounts or any sum paid by him in the form of instalments.

[24] It is not true that the Applicant made payments which were not reflected on his accounts with the Bank. All the instalments paid by the Applicant were reflected on his accounts which were availed to him on his request at the branch. As at 29th June, 2012, the Applicant was in arrears of Kshs. 862,848.42 being unremitted instalments from the months of October, 2011 to June, 2012. On the Bank's request, the Applicant visited the Bank with a view of reconciling all payments to his loan account. Pursuant to this visit, the Bank's branch manager wrote to the Applicant on 16th June, 2012 with explanations and reconciliations of his account and advised him to come back in the event that he had further queries or needed clarifications.

[25] The Applicant has in various correspondences admitted to being in arrears with the monthly payments. The Applicant does not dispute that he took out a mortgage facility or that he operated a loan account with the Bank. It is also not disputed that he is yet to complete servicing the mortgage and the loan with the Respondent. The statement of accounts show he is in arrears. The Applicant is a defaulter. See the case of **Hyundai Motors Kenya Limited v East African Development Bank Ltd [2007] eKLR**, Warsame J. (as he then was) stated as follows;

“The application in my view epitomizes the resolute nature of the Applicant and its utter contravention of the requirement of good conscience and commercial ethics. It has borrowed huge sums of money on the strength of the Mortgage document. It admits or acknowledges a debt of Kshs 100 million. There is persistent default but wants to use every trick on earth to restrain the Respondent from selling the suit property. It appears nowadays there is no end to litigation and it has become customary for defaulter to the slightest excuse in order to postpone the day of reckoning. They must have in mind that the money of the lenders is not for free. The loan advanced was not meant to be candy sweets to be enjoyed freely by the Applicant. The monies of the lenders are a carrot accompanied by a stick and the stick can only be used when there is a default. Where there is an absolute default, the party in default cannot avoid the stick simply because it has taken the carrot.

In short I agree with the Respondent’s Advocate that the Applicant is trying to ask for an injunction using the back door, pretending to be asking for interpretation of the Mortgage document. I hold the view the interpretation or validity of the Mortgage document cannot be used to obtain an order preserving the status of the suit property.”

Also the Court of Appeal in **Fina Bank v Ronak Ltd [2001] 1 64** at page 68 held as follows;

“In any event, disputes over accounts were no basis for granting an injunction to the Respondents against the Appellant”

According to the Respondent the dispute which the Applicant is raising is all about accounts. See the entire Supporting Affidavit is on account and interest Mortgageable thereof. This cannot be the basis of establishing a prima facie case for purposes of an injunction. See **Fina Bank v Ronak Ltd** case (supra) the Court of Appeal further stated as follows with regard to the issue of interest;

“As indicated earlier in the Judgment, the interest rate or rates Mortgageable on the credit facilities accorded to the First Respondent by the Appellant on the security of the land parcels number LR 209/8737/1 and LR 209/13658/8 as are set out above were encapsulated in paragraph 1(b) of the Mortgage documents. The Respondents therefore had no reason for complaint in this regard and their application for injunction in the superior court restraining the Appellant from realizing its security in the aforementioned parcels of land was without any sound basis. In the result, we allow this appeal, set aside the order of the superior court restraining the Appellant from advertising for sale and/or disposing of by sale or otherwise the two parcels of land...”

[26] The conduct of the Applicant since he obtained the ex parte injunction herein has been contrary to a bona fide Mortgagor. He has behaved as if he came to court only to be insulated from the contractual obligation. See the decision by Lady Justice Lesiit in **Popat Investments – vs- Barclays Bank Kenya Limited**;

‘... That aside, apart from the IRAC report which needs to be tested in a full trial, there is no cogent evidence before this court to show that the Respondent is not owed money by the Applicants/Applicant. Going by the statements of accounts before me, there is clear evidence that the 2nd Applicant is not servicing the loans and the overdrafts it has with the Respondent. For instance, in the Statement for the account No. 070/500/3254 for the entire period between June 2006 and May 2007, the 2nd Applicant has made only

two credits into that account and both these credits were made in January, 2008 and February 2008. The deposits were made within four months to the date this suit was filed. The situation in the other account is much more different in that no credits have been made into the account for the period covered in the statement. I am not satisfied that the Applicant is deserving of the orders of injunction it seeks in this matter. It has been shown that not only is the Applicant indebted to the Applicant but that no payments have been forthcoming for a long period of time. Even though this application may have been brought to court prematurely, nonetheless, the Applicant is undeserving of the orders it has sought. The Application has offered to meet any condition the court may set as precondition for the injunction in the face of the clear evidence of default on the Applicant's part'.

Similarly Lady Justice Kasango did in Mombasa HCCC NO. 99 of 2013 **John Edward Ouko –vs- National Industrial Credit Bank Limited** hold;

“... If courts were to allow debtors to avoid paying their just debts by taking some defences I have seen in the 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 capital into a country whose courts are a haven of defaulters.”

[27] A court of equity cannot and should not aid a person whose default is the very reason why a statutory power of sale is being exercised. It is settled that a party cannot derive benefit from his own wrong. See the decision in **Kwality Candies & Sweets Limited –vs- Industrial Development Bank Limited**. The Applicant has not even met the test in the Giella case. The Applicant offered the suit property as security to secure a facility granted to him; he has defaulted on his contractual obligations to the Bank; he is raising allegations of non-crediting of the amounts which is mere smoke-screen as shown in the Replying Affidavit of Elizabeth Hinga. The prayer (c) of the plaint tells of the real intent of the proceedings; to re-write the contra herein. It seeks for;

“An order that the Respondent agrees with the Applicant on a repayment plan, subject to reconciliation of the arrears and the interests herein by a mutually agreed independent interest rate expert’.

The Court should resist being used to re-write the contract; instead the Court should enforce the contract. Further, the fact that a property is matrimonial property does not warrant the issuance of the orders sought. The property once pledged as security becomes a potential commodity of sale. The sentimental attachment placed upon is diminished once the property is pledged as security. The Applicant has not established a prima facie case as it is him who in breach of his duty to the court as he misrepresented to the Court and obtained ex-parte orders. After obtaining the injunction herein, the Applicant has never sought to have the alleged dispute as to accounts resolved. He has failed to act in the spirit of the overriding objective in Section 1A and 1B of the Civil Procedure Rules and since the notice he has not paid a single cent nor made an effort to redeem the loan. See paragraph 22 of the Replying Affidavit.

[28] In any case, the Respondent stated that the value of the suit properties is ascertainable and it has not been shown that the bank would be unable to meet the damages in the event the Applicant succeeds in the main suit. They referred to the cases of **Mrao Limited –vs- First American Bank of Kenya Limited**. [2003]KLR 125 where Kwach JA as he then was stated;

“In recent times a tendency has developed in the superior court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction.... This is a clear case of default, the appellant admitted this, there was no basis, upon which the appellant would obtain an injunction.

And Bosire JA (as he then was) stated that;

Prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

[29] See also the case of **HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)** that;

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

[30] And the case of **HCCC Number 115 of 2012 Abdulkadir atex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)** Musinga J. held;

“It is not disputed that the Borrower is in arrears of its loan repayment to the 1st Respondent. The court has established that an appropriate statutory notice was served upon the Applicant ... in the circumstances, the Applicant has not made out a prima facie case with a likelihood of success.”

[31] The Respondent concluded by stating that this is not a proper case for exercising the discretion of this Honourable Court. The court should dismiss the application with costs.

The determination

Issues

[32] I am able to discern the issues herein to be whether the Applicant has established a case for an injunction to restrain a mortgagee from exercising the statutory power of sale. The validity of the notices issued herein will be discussed as well as the status of the suit property as a matrimonial home which the Applicant argues should be protected. I will begin with the latter argument on matrimonial homes.

Property is matrimonial home

[33] The suit property may be a matrimonial home. But what is startling is the Applicant’s argument which, properly understood, suggest that matrimonial homes should never be sold under the Mortgagee’s Statutory Power of sale. These statements have become quite common in applications for injunction to restrain a Mortgagee from exercising the statutory power of sale. I want to disabuse Mortgagors from what seems to be a misplaced posture especially by defaulters. The true position of the law on matrimonial properties is that a Mortgage will not be created on such property without first obtaining the consent of the spouse. Similarly, no sale of the matrimonial property will be carried through without giving the necessary notices to the spouse or spouses of the Mortgagor. These protections once availed will not prevent sale of a matrimonial home where the necessary consents have been obtained and all notices given to all parties with an interest in the matrimonial home, which is given as security for a loan or credit facility. And many courts have expressed themselves as clearly on the subject. I am content to cite the case of **HCCC Number 82 of 2006 Maltex Commercial Supplies Limited & Another –vs- Euro Bank Limited (In Liquidation)** that;

“... Any property whether it is a matrimonial or spiritual house, which is offered as security for loan/overdraft is made on the understanding that the same stands the risk of being sold by the lender if default is made on the payment of the debt secured”.

See also 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 formalized”.

And a work of the court in **Jimmy Wafula Simiyu vs. Fidelity Bank Ltd [2014] eKLR** in the rendition below:

On matrimonial home

It is quite arrogant for the Applicant to think that conversion of a Mortgaged property into a matrimonial home will provide some form of indomitable shield from realization of a security given in a Mortgage under the law. The law on creating Mortgage on and sale of matrimonial home only aims at ensuring the consent of the spouse or spouses is sought before such property is Mortgaged, and relevant notices are served on the spouse who had given consent to the Mortgage before the exercise of Mortgagee’s statutory power of sale. The protection of a matrimonial home within the set-up of the law on mortgages and the Land Act is not, therefore, to be used as the spear by a defaulter on or as absolution of contractual obligations under a Mortgage. On this, see PART VII and specifically sections 79 and 96 of the Land Act. The argument by the Applicant that the suit property is a matrimonial home, has been used improperly and totally misplaced in this application and the less I say about it the better.

[35] The fact that the Mortgaged property is a matrimonial property will only become relevant if the Applicant is alleging lack of consent of the spouse in the creation of the Mortgage herein or notice on the spouse or spouses has not been accordingly issued as by law required. But where the right of Mortgagee’s statutory power of sale has lawfully accrued, it will not be stopped or postponed because the Mortgaged property is a matrimonial home. Now let me consider the substantive issues herein.

Disputes on amount due

[36] The Applicant’s main contention is that the Respondent has not rendered accounts to him on the debt he owes. He says also that some payments were made to the bank and were never reflected in the mortgage account. Sometimes, those payments were credited to unknown accounts but later credited to the proper account after a long delay. In the meantime, the Applicant submitted, the amount of the delayed credit continued to earn interest. Similarly, the Applicant argued that the bank kept on altering the rate of interest upwards without notifying him as required in the law and the banks regulations. At some point, the Applicant submitted that the bank increased the repayment instalment beyond the agreed amount. The ad hoc alterations of interest, failure to credit instalments on time and loading of other un-contractual amounts like the insurance money, made the debt swell beyond the contracted sum. As a result, the Applicant was not able to cope and fell into forced arrears. On the basis of these alleged unilateral, unlawful, malicious and deliberate acts by the Respondent, the Applicant sees prima facie case for the issuance of an injunction.

[37] The Respondent stated that it has rendered accounts to the Applicant. It even invited the Applicant to its office for reconciliation of the accounts and pursuant to the visit; the bank wrote a letter dated 16th June 2012 giving explanations and reconciliations needed. The bank also averred that their advocate invited the Applicant on several occasions to provide them with the receipts for the alleged payments but in vain. The Applicant also did nothing to resolve the issues of accounts after he obtained an injunction. To make matters worse, the Applicant has never paid a single cent

since he obtained the injunction herein. They interpreted the post-injunction conduct by the Applicant to mean he is using the injunction not to pay the debt as per the mortgagee herein. On interest, they urged that they were entitled to vary the interest and used to give notice of the variation in the newspapers to all its customers. They claimed that the Applicant held two accounts; one for loan and the other for the mortgage, and they credited all payments made by the Applicant to the respective relevant account. They insisted this fact has not been disclosed by the Applicant. Therefore, according to the bank, the actual sum owed is as demanded by them.

Procurement of insurance

[38] I have considered the arguments around the accounts, the outstanding amount as well as the variation of interest. I have also considered the argument around the procurement of the insurance policy herein. The latter issue is straightforward and I will tackle it straight away. By clause 2(e) of the Mortgage, the Mortgagor authorized the Mortgagee through its Board for and on behalf of the Mortgagor to effect and keep on foot such insurances as the Board may from time to time require and any payment made by the Mortgagee for effecting and keeping foot such insurances together with interest thereon at the rate specified in the schedule to the Mortgage shall be a Mortgage on the Mortgaged Property. The said clause provided further that if the Mortgagor shall desire to effect any insurance of the Mortgaged Property otherwise than as agreed in the foregoing manner, or in addition to any insurance effected by the Mortgagee under its Rules or the Mortgage, the Mortgagor shall first obtain the consent in writing of the Mortgagee and shall hold all money received under such insurance in trust for the Mortgagee for purposes of reinstatement of the Mortgaged Property or repayment of the mortgage sum. The letter of offer also provided the same. Therefore, the Respondent did not violate the Mortgage or the law by procuring the insurance, paying for it and charging the cost and interest thereof to the Mortgaged Property. The allegations, therefore, that the insurance money and interest having been charged to the Mortgaged Property constituted illegal or un-contractual charges, fail.

[39] What about disputes on accounts, outstanding amount of debt and the interest? As a general rule, disputes as to the accounts, the amount of loan and or interest have never been a basis for grant of an injunction. See the decision of the Court of Appeal in **Fina Bank v Ronak Ltd [2001] 1 EA 54** at page 68 that;

“...As the Mortgage documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to Mortgage interest at variable rates its absolute and sole 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.”

And specifically on accounts the Court of Appeal in the said case stated:-

“In any event, disputes over accounts were no basis for granting an injunction to the Respondents against the Appellant”

[40] Again on this subject, I am content to adopt a work of Rudd, J in **BHARMAL KANJI SHAH AND ANOTHER v SHAH DEPAR DEVJI** that:

...the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under a mortgage...

[41] Except, however, if, on the terms of the mortgage, the claim is excessive or the interest Mortgaged is illegal and contrary to the terms of the mortgage, an injunction may be issued. But the excessiveness or illegality of the mortgage sum or interest, respectively, should be readily in the plain eye-sight of court without much probing of intrinsic evidence. See Halsbury’s Laws of

England, Vol. 32 (4th Edition) paragraph 725 on when a mortgagee may be restrained to exercise the statutory power of sale. I have in mind a case where the interest Mortgage is not in accordance with the Mortgage and the law. For instance in this case, variation of interest was governed by clause 1(d) (i) and (ii). The relevant clause is 1(d) (i) which provided that:

Notice of intention to vary the rate of interest shall be served in writing on the Borrower and the varied rate shall be payable as from the expiry of Seven (7) days after the date of service of such notice;

[42] The Respondent has stated that it gave notice in the newspapers of the variation of interest under the Mortgage. The said notices were not annexed by the Respondent. But whether this constitutes prima facie case for which an injunction may issue will depend on the entire circumstances of the case. Let me; therefore, decide the other matters in controversy.

Statutory Notices

[43] The Mortgage in question was registered under the Transfer of Property Act and any dispute such as the one before the court is governed by the provisions of the said Act. I have perused the documents provided to court and observe that the relevant demand and statutory notices were issued by the Respondent, except there is a cloud of the variation of interest.

[44] But that notwithstanding, the Applicant has made certain admissions and has written several letters admitting some debt arising out of the Mortgage herein. It is clear he did not pay any single instalment after he obtained the injunction herein despite the order of the court which categorically stated on 31st July 2012 that the injunction does not suspend payment of monthly instalment by the Applicant. I have also perused the file and I do not see any undertaking as to damages by the Applicant as ordered by the Court on 31st July 2012. Such post-injunction conduct by the Applicant is important and relevant in the decision the court makes on an injunctive relief; which is equitable in nature and would demand the Applicant's conduct to be beyond reproach. The ex parte injunction has nonetheless been in force for that long. Without speculating, the Respondent submitted that it gave notice through newspapers to all its customers of variation of interest. I should, therefore, in granting an injunction, consider the traditional grounds for granting an injunction in the case of **Giella vs Cassman Brown**, within the entire circumstances of the case in order to fashion relief which is appropriate to the facts of the case. This approach is in line with the nature of law which ...'***has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before***'. On this see Ojwang Ag.J (as he then was) in the case of **Suleiman vs Amboseli Resort Ltd (2004) eKLR 58**. The guiding principle, therefore, is; ***that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong"*** in granting injunctive relief. These were the words of **Justice Hoffman** in the English case of **Films Rover International (1986) 3 All ER 772 at page 780-781**.

[45] In the circumstances, the order which commends itself to the court is that I should, and I hereby do issue an injunction for a limited period of 120 days to enable the Respondent to render accounts to the Applicant and for the Applicant to pay what is not in dispute. There is also nothing to show the summons and plaint was served. But if it was, parties should file all their documents within 30 days from today. And, thereafter, the Applicant to set the suit down for hearing within the remainder of the global period provided herein above. If the Applicant is in default of any of the conditions above, the injunction will lapse automatically without the necessity to apply in that behalf. Costs shall be in the cause. It is so ordered.

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

F. GIKONYO

JUDGE