REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 669 of 2012

GERALD NGONGA MUGUKU…..PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED...DEFENDANT

RULING

1.The Plaintiff's application dated and filed on 22nd October 2012 has been brought under the provisions of Order 40 Rules 1, 2 and 4 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. Prayer Nos (i) and (ii) are spent and I will therefore not deal with the same. The application sought the following orders;-

i. **THAT** the application be certified as urgent.

ii. **THAT** service of this application be dispensed with the same heard ex parte in the first instance by reason of its urgency.

iii. **THAT** the Defendant be restrained from committing a breach of the contract between the parties herein comprised in the Charge dated 19th January 2007, the Further Charges dated 14th June 2007 and the Second Further Charge dated 26th January 2009 over Plaintiff's (sic) property known as **NGONG/NGONG/38729** pending the hearing and determination of this suit.

iv. **THAT** the Defendant be restrained from calling for immediate payment of the outstanding loan secured by the Charge dated 19th January 2007, the Further Charge dated 14th June 2007 and the Second Further Charge dated 26th January 2009 over the Plaintiff's property known as **NGONG/NGONG/38729** pending the hearing and determination of this suit.

v. **THAT** the Defendant be restrained from varying the interest rate applicable on the Charge dated 19th January 2007, the Further Charge dated 14th June 2007 and the Second Further Charge dated 26th January 2009 over the Plaintiff's property known as **NGONG/NGONG/38729** from 6% to the prevailing commercial rates pending the hearing and determination of this suit.

vi. **THAT** pending the hearing and determination of the suit the Plaintiff do continue to service the loan secured by the Charge dated 19th January 2007, the Further Charge dated 14th June 2007 and the Second Further Charge dated 26th January 2009 over the Plaintiff's property known as **NGONG/NGONG/38729** at the interest rate of 6% and by making monthly payments of Kshs 45,000/= in accordance with the agreement between the parties.

vii. **THAT** costs of this application. (sic)

2. The Plaintiff has set out nine (9) grounds on which he relied on in support of his application. I will summarise the same as follows:-

a. **THAT** the two (2) loan facilities taken by the Plaintiff were long term mortgages repayable over a period of 25 years from the drawdown of each loan.

b. **THAT** the interest rate of the two (2) loans was 4% but was later changed to 6%.

c. **THAT** the Plaintiff had faithfully serviced the loans without default but on 6th August 2012, the Defendant arbitrarily changed the interest rate of 6% to commercial prevailing rates and recalled the immediate payment of the outstanding amount in the sum of Kshs 4,723,406.55.

d. **THAT** the purported revision of the interest rate and demand of immediate payment of the said amount by the Defendant was null and void *ab initio* as it was in contravention of the provisions of Sections 84, 90 and 91 of the Land Act No 6 of 2012 and that it was fair and just that the Defendant be restrained from proceeding as such.

3. The application was supported by the Plaintiff's Affidavit sworn on 22nd October 2012. In his said Affidavit, the Plaintiff reiterated the grounds he had set out in the face of the said application.

4. Regina K. Anyika, the Defendant's Chief Legal Manager swore her Replying Affidavit on 9th November 2012. She was in agreement with the Plaintiff's averments that, at his request and instance, the Defendant advanced him loan facilities secured by property known as **NGONG/NGONG/38729** to enable him purchase and develop the same as a family home. A Charge, Further Charge and a Second Further Charge were created over the said property.

5. It was not in dispute that the interest rate applicable on the borrowings was four per centum (4%) per annum but the same was adjusted upwards to six per centum (6%) per annum at the beginning of 2012 and was thereafter to be revised to prevailing commercial rates.

6.The Defendant's contention was that the Charge, Further Charge and Second Further Charge were preceded by loan facility letters setting out the Terms, Conditions and Special Conditions which the Plaintiff accepted on 10th January 2007, 2nd May 2007 and 16th December 2008. It annexed copies of the said facility letters in its Replying Affidavit.

7. The Defendant's Chief Legal Manager deponent further stated that the house loan was granted to the Plaintiff in his capacity as a staff member but that upon the Plaintiff leaving the Defendant's employ for any reason, the loan became repayable on demand at the sole discretion of the Bank and a commercial interest rate was charged. The Defendant explained that the interest rate for Bank ex-staff remained at six per centum (6%) per annum for a grace period of three (3) months after which the rate was revised to commercial rates.

8 It therefore denied that it had contravened the provisions of Section 84, 90 and 91 of the Land Act (No 6 of 2012) and as such the Plaintiff's application for an injunction was misconceived and prayed that it be dismissed.

9.In his Supplementary Affidavit sworn on 5th December 2012, the Plaintiff averred that the Facility

letters had been overtaken by events after the registration of the Charge, Further Charge and Second Further Charge and that it was for that reason that he did not allude to the same in his Supporting Affidavit. Further, the Plaintiff stated that the immediate recall of the loan and revision of the interest rate applicable made in the Defendant's letter dated 6th August 2012 contravened the express provisions of Sections 84, 90 and 91 of the Land Act, 2012.

10.Both the Plaintiff and the Defendant filed their respective written submissions on 18th December 2012 and 18th January 2013 respectively.

11.When the application came up for *inter partes* hearing on 17th January 2013, both Mr Wanjohi and Mr Liko, counsel for the Plaintiff and the Defendants respectively asked this court to give its ruling based on the said submissions without hearing any oral submissions on their part. They both relied on Order 51 Rule 16 of the Civil Procedure Rules Cap 21 (of the laws of Kenya) which provides as follows that :-

"The Court may, in its discretion, limit the time for oral submissions by the parties or their advocates or <u>allow written submissions</u>."

12.The court acceded to the counsels' request. The ruling herein has therefore been given on the basis of written submissions in the court file.

13.In his submissions, the Plaintiff stated that he was servicing the loans and that he was not in default or breach any of the terms of the Charge Instrument. He argued that the Defendant was not entitled to increase the interest rate or recall the immediate payment of the loan after it dismissed him from employment and that by doing so, the Defendant was in breach of the contract it had entered with him.

14.He submitted that once the Land Act, 2012 came into force, the Defendant was obliged to give notice of increase of interest and to state clearly the new rate to be paid. Instead, the Defendant issued him with the letter of 6th August 2012 recalling the loan in the following words:-

"**Further, note all outstanding loans in your account name will start attracting interest at the prevailing commercial rate with immediate effect until the same are fully paid".**

15.It was the Plaintiff's case that the use of the words "**prevailing commercial rates**" did not state in a manner that was clearly understood the rate of interest to be paid.

16.The Plaintiff relied on Section 84 (1) of the Land Act, 2012 which provides as follows:-

" Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee:-

a. giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and

b. stating clearly and in the manner that can be readily understood, the new rate of interest to be paid in respect of the change."

17.On this issue, the Defendant submitted that though it had a basis and a right to vary the interest, it had not done so and the rate of interest was six per centum (6%) per annum at the time the Plaintiff filed the application herein. The Plaintiff was dismissed vide the Defendant's letter of 6th August 2012 and he filed the application herein on 22nd October 2012. The Defendant therefore argued that the three (3) month's grace period given to Ex-Bank staff before the prevailing commercial rates were implemented had not elapsed. Save for a copy of the said letter which has been attached to the Plaintiff's Supporting Affidavit, there is nothing to suggest that the Defendant had implemented the "prevailing commercial rates" by the time this application was filed. I would therefore agree with the Defendant's submissions that it had not

breached the provisions of the Land Act, 2012 and that the Plaintiff has not established a *prima facie* case for an injunction in this regard.

18.The Defendant argued that the Plaintiff is seeking a blanket restraining order against it from demanding the repayment of the loan. It submitted that the only jurisdiction that this court had was to order that such right be exercised in conformity of the provisions of the Land Act, 2012.

19.I have carefully looked at the wording of the prayers in the Plaintiff's application and note that the same are asking this court to intervene and restrain the Defendant from proceeding in the way it had agreed with the Plaintiff. The Charge, Further Charge and Second Further Charge clearly stipulate that the Defendant could vary interest. Clause 2 of the Charge dated 19th January 2007 stipulates as follows:-

"**The Chargor shall pay commission, interest….at the rate of 4% per annum and upon such terms from time to time agreed with the Bank ,or if not agreed, at such rate or rates (not exceeding any maximum permitted by law) as the bank may in its sole discretion from time to time decide….PROVIDED ALSO AND ALWAYS 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 subsequent to any such change…"**

20.Perusal of Clause 8 (a) of the said Charge provides that all money and liabilities under the charge were due on demand on the occurrence of any of the following events:-

" **If the Chargor fails to pay when demanded any sum due……or fails to comply with any term of any facility or facility letter from the Bank…"**

21.One of the terms in all the three (3) facility letters states that :-

"**That upon leaving the Bank's service for whatever reason, the loan will become payable on demand at the sole discretion of the Bank."**

22.It was the Plaintiff's case that the loans were not payable on demand and that the facility letters could not bind him as they were not incorporated in the Charge Instruments. He relied on the case of **HCCC No 149 of 1999 Joram Thuo Wairegi vs Kenya Commercial Finance Company Limited** in which, Mbaluto J (as he then was), stated as follows:-

"It is obvious that a chargee's power of sale can only be exercised pursuant to the terms and conditions of the charge."

23.It is clear that the facility letters were incorporated in Clause 8 (a) of the Charge and the Defendant was right in relying on the same. It is therefore not correct as the Plaintiff has alleged that the said letters were not incorporated therein. In that regard, I find the facts of the **Joram Thuo Wairegi** case to have been clearly distinguishable from facts of this case and cannot be of any help to the Plaintiff.

24. In addition, from a plain reading of the said facility letters, it is evident that the loan advanced to the Plaintiff would become due on demand if he left the Defendant's employ for whatever reason. From the facts before me, the Defendant recalled the loans as the Plaintiff left its employ and not because he had defaulted in payment of the loans. It is for that reason that I do not find Section 90 of the Land Act, 2012 relied on by the Plaintiff to be of any assistance to him.

25.The Plaintiff correctly submitted that the relationship between himself and the Defendant was governed by the terms of the Charge Instruments. The facility letters also incorporated in the Charge, Further Charge and the Second Further Charge were executed prior to the commencement of the Land Act, 2012. This court cannot re-write the terms of the contract merely because the law has changed. It would, however, be incumbent on the parties to exercise their rights that may accrue strictly in accordance with the law.

26.Has the Plaintiff succeeded in establishing a *prima facie* case with a probability of success to enable me grant the restraining orders sought?

27.To establish whether the Plaintiff has achieved this, it is important to look at the main principles of interlocutory injunctions encapsulated in **Geilla vs Cassman [1973] EA 358 at page 360.** In that case, 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.”**

28.The Plaintiff has not provided me with any sufficient proof that the Defendant varied the interest or recalled the loans outside the ambit of the Charge Instruments or the law. The three (3) months grace period granted to him by the Defendant had not lapsed by the time he filed the application herein. The application herein is clearly premature as the interest rate at time of filing suit was still being charged at six per centum (6%) per annum. From the circumstances of this case, it is not necessary for me to address myself of the implications and ramifications of the provisions of Sections 90 (1) and 91 of the Land Act, 2012 at this juncture because no evidence has been placed before me showing that there was default in repayment of the loan. Consequently, I do not find that the Plaintiff to have established a *prima facie* case with probability of success in this ground. I am therefore in agreement with the Defendant’s submissions in this regard that the Plaintiff is not entitled to an injunction.

29.Moving to the second principle in the **Geilla vs Cassman** case, the Plaintiff has not provided me with any evidence to show that he will suffer irreparable damage if I did not grant the orders sought herein. I cannot decide this case of a balance of convenience as I am not in doubt that the Plaintiff has failed to establish a good case as the facts of this case are crystal clear.

30.Having had due regard to all the submissions and pleadings filed by both the Plaintiff and the Defendant, I am in total agreement with the Defendant’s arguments that the orders sought by the Plaintiff are intended to stop the Defendant from ever increasing the interest rates or demanding the debt as had been agreed upon in the Charge, Further Charge and Further Second Charge. This court cannot issue blanket orders to stop the Defendant from exercising its rights under the Charge Instruments when it shall deem it necessary to do so now or in the future if the same is done within the confines of the contract between itself and the Plaintiff herein and the law.

31.For the reasons stated hereinabove, I find that the Plaintiff’s Notice of Motion application dated 22nd October 2012 is not merited and I hereby dismiss the same with costs to the Defendant.

32.Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 14th day of March 2013

J. KAMAU
JUDGE