REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Suit 313 of 2009

1. HAITHAR HAJI ABDI

2. ABDI MAJID HAJI HAITHAR ……..PLAINTIFFS/APPLICANTS

-VERSUS-

DUBAI BANK OF KENYA LIMITED……..DEFENDANT/RESPONDENT

RULING

Along with the plaint of ***8th September, 2009*** the plaintiffs sought interlocutory relief by their Chamber Summons filed on ***9th September, 2009*** and brought under Order XXXIX, Rules 1, 2, 3 and 4 of the earlier edition of the Civil Procedure Rules. The outstanding prayer in the application is thus set out:

"THAT the defendant either by itself, servants, employees and/or agents, specifically Expeditious General Merchants, be restrained by this Court from in any way disposing, alienating, selling by public auction or otherwise on 11th September, 2009 or whenever, all that parcel of land known as MN/VI/1162 (CR No.4318) Magongo Area in Mombasa, until the hearing and determination of this suit."

The grounds for the application, in summary, are as follows:

(i) the amount claimed by the defendant is disputed, the plaintiffs contending they have overpaid the sums due to the defendant;

(ii) the defendant's action is wrongful, unilateral, and devoid of any legal basis or justification;

(iii) the defendant has failed to show how the amount demanded, being Kshs.12,315,275/01, is arrived at;

(iv) the defendant's intention to dispose of the suit premises by way of public auction is sudden and without notice, and will occasion irreparable harm to the plaintiffs;

(v) the maxim "equity will not suffer a wrong to be without a remedy" is applicable.

The first applicant, on behalf of himself and the 2nd applicant, swore a supporting affidavit on ***8th September, 2009*** deponing (in substance) as follows:

(i) the deponent is the registered owner of the suit property L.R. No. MN/VI/1162 (CR. No. 4318) measuring 0.500 acres and situated at Magongo in Mombasa;

*(ii) on **19th October, 2001** 2nd plaintiff took an overdraft facility in the amount of Kshs.1,500,000/00 from the defendant bank: this facility was to remain valid until **31st December, 2002;** the securities offered for the same were Certificate of Lease No. CR.10151/1 and 17171/1, as well as log-books for two motor vehicles (KAL 9285 and KAM 494S);*

(iii) the overdraft facility was used and serviced accordingly, and within the period of agreement, "over Kshs.54,937,994/16 was deposited in the said account";

*(iv) the said overdraft facility continued to be serviced and extended by mutual consent even after **2002**, and in **2004** an agreement was made to convert the same into a **loan**;*

*(v) service of the said loan continued until "sometime [at] the end of **July, 2009** when we received through the post a statutory…notification of sale…[for the] recovery of Kshs.12,315,275/01";*

(vi) the said statutory notice came as a surprise; the applicants have been complying with "[the] conditions of the loan and making all payments"; they are "not aware of how the sum of Kshs.12,315,275/00 was arrived at despite our making considerable payments well…above the amount now claimed by the bank"; for they have continuously operated the said account;

(vii) the deponent believes to be true the advice of his Advocate, that the defendant should first give the accounts, "to show how the exorbitant amount was arrived at";

(viii) the claim made by the defendant "is strongly disputed";

(ix) the suit land belongs to the deponent and his family;

(x) "*it is in the interest of justice that the orders sought be granted*."

Nazir Madatali, the Credit Manager of the defendant based at the head office in Nairobi, swore a lengthy replying affidavit on ***27th October, 2009***, denying most of the statements of a factual kind made by the applicants in the supporting affidavit. The deponent avers that 2nd plaintiff who in ***June 2001*** opened current a/c No. 81018936 with the defendant, *"expressly agreed to abide by the defendant's rules and regulations governing the account";* by the said rules and regulations, *"the defendant would carry out 2nd plaintiff's instructions in connection with his account notwithstanding that such debiting or carrying out [of] instructions might result in the account being overdrawn…*" It was agreed that *"unless otherwise agreed in writing, the defendant could charge interest on the overdrawn accounts at any rate fixed by it."* It was agreed too that *"the defendant was entitled to charge penal interest at the rate of 2-3% per month if the plaintiff exceeded the agreed overdraft limit."*

The deponent deposed that after the 2nd plaintiff applied for and was granted an overdraft facility of Kshs.1,500,000/=, he *"issued various cheques and instructions which were duly honoured and carried out …by the defendant, causing the account to be overdrawn beyond the stipulated limit."* By a letter of ***14th October, 2002*** the defendant informed 2nd plaintiff that he had overdrawn the account to the tune of Kshs.4,612,739/16: and 2nd plaintiff was asked to "*give a proposal on how he will reactivate the account to its limit and to perfect the security he had offered to the defendant."*

The deponent averred that the plaintiffs, to secure the said overdraft, executed a legal charge over the suit property, L.R. No. MN/VI/1162 (CR. No. 4318), Magongo area in Mombasa, for Kshs.5,000,000/=.

The deponent deposed that the defendant's letter of ***23rd March, 2007*** demanding immediate payment of the outstanding overdraft amount, elicited no response from 2nd plaintiff; by letters of ***9th June, 2009*** and ***29th June, 2009*** the defendant gave the plaintiffs seven days' notice to pay the outstanding sum of Kshs.12,315,275/01; and in default, the defendant intimated it would file suit and also move to realize the security held against 1st plaintiff's property.

The deponent denied averments in the supporting affidavit, and deposed that *"2nd plaintiff is indebted to the defendant in the sum of Kshs.12,524,875/01 as at **26th October, 2009** which continues to accrue interest at the rate of 27% per annum and [an] additional 3% penal interest until payment in full",* as shown in the *"Statement of Account"* annexed as Annexure No.6.

The deponent avers that "*2nd plaintiff has failed to settle the outstanding overdraft amount and has further stopped operating the account"* and deposes that he believes to be true his Advocate's advice, that "*a dispute as to the amount due is not a proper ground in law for granting an injunction."* The deponent, further believes to be true his Advocates advice that, *"as 2nd plaintiff has failed to pay the outstanding overdraft amount and some interest under the overdraft is in arrears and unpaid for two months after becoming due, the defendant's statutory right of sale has arisen and the defendant is entitled to sell the suit property."*

Learned counsel, ***Dr. Khaminwa*** for the plaintiffs, objected to the auctioneer's notification of sale served on ***1st July, 2009***: on the ground that "*the notices by the Bank and their Advocates [are] defective as they do not follow the procedure…laid out in s.69A(1) of the Transfer of Property Act."* It was urged that, by s.69A(1) of the Act, the mortgagee is required to serve a notice of three months; but that the letter from the Bank's Advocate (dated ***9th June, 2009***) had given the plaintiffs only seven days – and that such a notice was defective. Counsel invoked the decision of the High Court (***Ringera, J*** – as he then was) in ***Thathy v. Middle East Bank (K) Ltd & Another*** [2002] 1 KLR 595 (at p.596):

"If the mortgagee despite the existence of the conditions specified in paragraphs (b) and (c) chooses to proceed to exercise its statutory power of sale by invoking the machinery of a notice under paragraph (a) of the same section, he is obliged to comply strictly with the requirements of that paragraph."

Counsel also cited the Court of Appeal decision, ***Trust Bank Ltd. v. Eros Chemists Ltd.*** [2000] 2 E.A. 550 in which it was thus held:

"The starting point of any discussion as to whether there should be an express statutory requirement that a notice should refer to the three months' period is to consider what the object of the notice is. In our judgment, the notice is to guard the rights of the mortgagor because if the statutory right of sale is exercised the mortgagor's equity of redemption would be extinguished."

Learned counsel also contested the defendant's interest rates, on the basis that such rates were contrary to s.44 of the Banking Act (Cap.408, Laws of Kenya) – which requires the approval of the Ministry of Finance for increases to bank rates and other bank charges.

Counsel submitted that the plaintiffs deserve an injunction, "*as there are [too] many defects in the actions of the defendant."* He urged that, considering the value of the subject land, the plaintiffs would suffer irreparable loss and damage if injunction is not granted as prayed.

Counsel submitted that the property in question is subject to a 99-year lease given by the Administrator of the Wakf of ***Kibibi Binti Mohammed Bin Sheikh El-Mombaiya;*** and that, prior to the purchase of it by 1st plaintiff, consent had been given by the Wakf Commissioners of Kenya – as shown in the defendant's affidavit. The lease specifies the permissible activities on the suit property: but the auctioneer's press advertisement does not state the said conditions. Any prospective buyer would have to seek consent from the Wakf Commissioners, in accordance with the terms of the lease.

Counsel submitted that the defendant had not shown that consent to charge the suit property had been obtained from the Wakf Commission; and that consent had not been given to sell the property at a public auction. By s.14 of the Wakf Commissioners Act (Cap.109, Laws of Kenya) –

"No consent or agreement of any description whatsoever purportedly to sell or to lease or otherwise alienate any property the subject of any Wakf for any period exceeding one year shall be valid unless the sanction in writing of the Wakf Commission has been obtained."

Learned counsel submitted that *"no evidence has been shown by the Bank indicating that they have the written consent"*. Counsel urged that the plaintiffs have *a prima facie* case against the defendants; and that the plaintiffs *"are deserving of an injunction for the main reason that the actions taken by the defendant in attempting to realize their security is defective"*, and "*there are serious anomalies with the accounting methods of the defendant Bank"*.

Learned counsel, ***Mr. Kipng'eno*** for the defendant/respondent, submitted that the applicant had not satisfied the tests for grant of an interlocutory injunction, as set out in the model authority, ***Giella v Cassman Brown*** [1973] E.A. 358.

Counsel contested the claim by the applicant that the respondent had failed to comply with s.69A of the Indian Transfer of Property Act, regarding the notice period to precede the exercise of the mortgagee's statutory power of sale: on the ground that such a statement had not been made whether in the main pleadings or in the Chamber Summons of ***8th September 2009***. So the issues now raised, counsel urged, are a mere afterthought: "*In essence [these] issues were not made a substantive issue for determination in the suit and the application.……"*

Counsel submitted that the defendant had not, in any case, acted in breach of s.69A of the Indian Transfer of Property Act, as the defendant's action was by virtue of s.69A (l)(b) and not s.69A (1)(a) of that Act: and "*on (a) proper construction of s.69A (1) (b) ……. there is no need for the defendant to give the notice when interest for more than two months is due and unpaid"*.

Counsel relied on the Court of Appeal decision in ***James Ombere Ockotch vs. East African Building Society & 2 Others,*** Civil Appeal No.2002 of 1996 in which a statement of the law appears as follows:

"It can be seen straightaway that under section 69A(1)(b) [of the Indian Transfer of Property Act] there is no need for the giving of the three months' statutory notice when interest for more than two months is due and unpaid.."

Counsel submitted from the evidence that 2nd plaintiff had been warned by a letter of ***23rd March, 2007*** and again that of ***9th June, 2009,*** that he ought to pay the outstanding sum of Kshs.12,315,275/01 within seven days; but he took no action: and hence the statutory power of sale had arisen, and the defendant was entitled to sell the suit property.

Counsel submitted that the case authorities invoked by the plaintiffs were inapplicable: for instance, in ***Thathy v. Middle East Bank (K) Ltd*** the mortgagee had proceeded to exercise his statutory power of sale by virtue of s.69A (1)(a) of the Indian Transfer of Property Act and not by virtue of the applicable provision herein, namely, s.69A(1)(b) of that Act – and this does not require the giving of a three-month notice when interest accruing over a two-month period remains outstanding.

On the question of interest rates, counsel urged, from the annexures to depositions, that *"it is not true that the defendant has increased its interest rates [in respect of] the 2nd plaintiff's account."* It was urged that the defendant had not contravened s.44 of the Banking Act "*because it had not increased the rate of banking or other charges in relation to the 2nd plaintiff."*

From the evidence, counsel urged that the plaintiffs were merely disputing the *amount* outstanding and due to the defendant; yet it was now *"settled law that a dispute as to the amount due is not a ground*

in law to restrain a mortgagee from exercising its statutory power of sale." The Court of Appeal had held, in ***Fina Bank Ltd. v. Ronak Ltd.*** [2001] 1E.A. 65 (at p.68) that *"disputes over accounts were no basis for granting an injunction to the respondents against the appellant."* Similarly the Court of Appeal had held in ***Aberdare Investments Ltd. v. Housing Finance Co. of Kenya Ltd & Another*** [1992] 2 E.A. 1 (at pp.4-5), that:

"In order that redemption could be used to stop a sale there must be full payment offered. A chargee can be restrained from selling if the chargor pays the amount claimed into Court or to the chargee. An offer of redemption based upon probable or possible future sales of other properties is no redemption offer."

Counsel submitted that the applicants stood to suffer no irreparable loss that could not be compensated by an award of damages; and that "*there is not even the remotest of suggestions that the defendant Bank is bankrupt, or that it would not be able to [pay compensation]…"*

On "*balance of convenience*", counsel relied on the ***Thathy v. Middle East, Bank*** case, invoking the following passage in the Ruling of ***Ringera, J*** [2002] 1 KLR at p.605):

"As regards the balance of convenience, I think the same tilts in favour of refusing the injunction. The plaintiff is not repaying his mortgage debt. From the statement of account, a lot of what is outstanding is interest. That interest continues to accumulate. At the present tempo the charge debt will be more than the value of the security quite soon. In those circumstances, neither the debtor nor the borrower stands to gain anything by maintenance of the *status quo.* ***The Bank would lose because its security would in effect be no security at all if on sale it cannot realize the debt. And the plaintiff will lose because if the property is ultimately sold, he will not benefit from his investment. A sale of the security now appears to me to be in the best interest of both parties.***

"The upshot is that the plaintiff's application for an interlocutory injunction is dismissed with costs .. …"

Short of a full ventilation of evidence in the trial of the suit, the basic facts in this matter are clear enough: the respondent has accounting-information that is *prima facie* credible, showing the existence of a loan agreement with the applicants, and the applicants are in debt, with the shortfalls, and with demands for payment having been well communicated to the applicants.

On this *prima facie* evidence the plaintiffs have already derived financial advantage from the said contractual arrangements; but they are not paying-up; they are relying on their own misgivings about *quanta of debt* to decline to pay, and to so withhold payment for long periods running into months and years; and in the meantime, levels of *accrued interest* mount, and continue to mount. If it were to turn out, during full trial, that the defendant's demands were after all justified, then the plaintiffs could be shouldered with massive repayment burdens, possibly outstripping the values of the charged property. Such an eventuality, on rational criteria, is not what *the applicants* would want; it is against their commercial, contractual interests; and this Court must have a *mitigatory perspective* in endeavouring to solve the question.

As far as the respondent is concerned, it is –*judicial notice* is to be taken – in the business of making financial success; and therefore, it has the moral and contractual right to have all outstanding payments on the charge duly rendered; and failing that, it is contractually and morally justified in *having the security realized,* and the outstanding monies recovered. For the respondent, the proper time for such recovery is now; as it cannot be assured that property-value appreciation over time will keep pace with interest-accrual rate; and there is the risk the respondent will one day find itself the chargee of a property that fetches much less than the accrued debt.

In view of the terms of s.69A(1) (b) of the applicable Indian Transfer of Property Act; in view of the notifications of debt so far made by the respondent to the applicants; and in view of the *prima facie* evidence now before the Court, it is not possible to see that the applicants' position is justified, or that the

position of the defendant is unjustified. At this stage it is not possible to foresee a meritorious case with probabilities of success, in favour of the plaintiffs The plaintiffs have not shown that they stand to suffer irreparable loss not compensable by an award of damages, in the event the defendant proceeds to realize the security, by virtue of s.69A (1) (b) of the Indian Transfer of property Act; they have also not suggested that the defendant is devoid of the capacity to pay any such recompense as the Court may ultimately decree.

While the applicants have challenged the respondent's action claiming that the respondent did not comply with the Wakf Commissioners Act (Cap.109) and the Banking Act (Cap.408), this point was not central in the interlocutory case herein; and I did not get the impression that it is the determining consideration.

From the foregoing evaluation, it is clear to me that the balance of convenience in this matter lies in favour of the defendant, rather than the plaintiff.

Hence the criteria for grant of an interlocutory injunction in favour of the plaintiffs are not, in this case, met; and logically, the finding must be in favour of the defendant.

I dismiss with costs the plaintiffs' application by Chamber Summons dated ***8th September 2009***.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 7th day of February, 2012.

MAUREEN ODERO
JUDGE