



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
CIVIL CASE 256 OF 2011

DR. PETER OKINS OJWANG' RAKWACH

t/a CRATER MEDICAL CENTRE.....PLAINTIFF

VERSUS

TRANSNATIONAL BANK LIMITED.....DEFENDANT

RULING

This Ruling concerns an application by way of a Notice of Motion dated 19th September, 2011 and filed on 22nd September 2011 in which the Plaintiff/Applicant sought orders that -

(1) *THAT this application be certified urgent and be heard ex parte in the first instance.*

(2) *THAT pending the hearing and determination of this application, the Defendant by itself, agents and/or servants be restrained jointly and severally from selling, disposing of either by public auction or private treaty or in any other manner dealing with the Plaintiff's property known as Title Number NAKURU MUNICIPALITY BLOCK 16/88, 89 & 90 in a manner detrimental to his interest, rights and ownership over the same.*

(3) *THAT pending the hearing and determination of the suit herein, the Defendant by itself, agents and/or servants be restrained jointly and severally from selling, disposing of either by public auction or private treaty or in any other manner dealing with the plaintiff's property known as Title Number NAKURU MUNICIPALITY BLOCK 16/88, 89 & 90 in a manner detrimental to his interest, rights and ownership over the same.*

(4) *THAT the costs of this application be provided for.*

The principles upon which a temporary or interlocutory injunction may be given, are now well settled in our law. They are discussed and referred to in many cases. One of the first in cases which those principles were sun expounded is the case of **GIELLA VS. CASSMAN BROWN [1973] E.A. 358**. These principles are -

(1) *the Applicant must establish a prima facie case with a probability of success;*

- (2) *the Applicant will suffer irreparable loss and damage if the injunction is not granted;*
- (3) *if in doubt the court should decide on the balance of convenience.*

The Applicant's case is that they took a loan of Ksh 14 million from the Respondent Bank and that he has to-date repaid over Ksh 33 million of the loan and interest. There is no charge on the property to secure the loan from the Bank. The property is now valued at Ksh 69 million at the market value, but has a value of Ksh 45 million at a forced sale.

The issue Mr. Orege learned counsel for the Applicant argued, is what constitutes interest rates, under Section 44(a) & (b) of the Banking Act, (*Cap. 188, Laws of Kenya*), after paying over Ksh 33 million from the sum of Ksh 14 million originally borrowed? The Borrower does not dispute that he borrowed the money from the Bank but he disputes that the existence of a charge over the property. The Applicant therefore disputes the legality of the Notification of Sale by Valley Auctioneers dated 22nd July, 2011 purporting to sell his property.

The Applicant contends that the Respondent Bank has been changing interest rates at will. For instance the Notification of Sale by Valley Auctioneers refers to an interest of 28%, the Respondent's Replying Affidavit of 12th October 2012 refers to an interest rate of 29.05% again charged unilaterally.

For those reasons the Applicant prays that the property be preserved while they seek alternative finance to pay off the loan due.

In opposition to the application Mr. Kurgat learned counsel for the Respondent Bank contended that they had not made a prima facie case. Counsel submitted that the issue is one of accounts, that there is pleading that the interest rates are high or varied without reference to the Applicant, and that in any event there is no basis for such complaint as parties agreed, there is a Letter of Offer, duly acknowledged by the Applicant, and signed on each page.

The Respondent's Affidavit of Mr. P. K. William Komen, sworn on 12th October 2011 avers that accounts of the loan were duly served, and that the applicant never controverted them.

The Respondent acknowledges payment of Kshs 33 million, but there was no evidence that the Applicant had complied and stuck with the programme of repayment. The Applicant knows the amount he is supposed to pay and he has severally sought indulgence from the Bank from time to time and that there is correspondence to that effect.

Counsel also submitted that the provisions of Section 44 (a) & (b) have no application. The **duplum** rule only applies where a loan becomes non-performing. The loan here was being serviced as activity in the accounts shows.

Counsel submitted that the applicant had not complied with the terms of the loan agreement and the charge and that is why the Bank had exercised its statutory right which had crystallized under the charge.

Counsel also submitted that the value of the property is not a ground for injuncting the Respondent, as once a property is charged, it becomes a commodity for sale.

Article 159 of the Constitution does not assist the Applicant because it does not set aside established principles of law as stated in the various cases cited in Respondent's List of Authorities, such as **MRAO LTD VS. FIRST AMERICAN BANK LTD & 12 OTHERS [2003] KLR 125-139, AND SAMEH TEXTILE INDUSTRIES AND CHUNIBHAI M. SAWANI VS. DELPHIS BANK LTD (Milimani Commercial Court HCCC No. 2186 of 2000).**

Counsel submitted also that the Bank had kept to the terms of the contract of lending and the application ought not to be granted.

In a brief reply to the Respondents' counsels' submissions, Mr. Orege submitted that performance of a loan does not exclude the application of Section 44(a) & (b) of the Banking Act. The applicant would suffer irreparable loss if the property were not preserved pending the hearing of the suit herein. The distinguishing feature between the authorities cited, and this case is that unlike in those cases there is no charge or further charge in the Applicant's case, and for those reasons, urged the court to grant a temporary injunction.

I have considered the rival counsel's arguments as set out above, and I set out in the following passages of this Ruling my opinion on them.

In order to establish a prima facie case with a probability of success an applicant needs to show either that the Respondent's right to exercise its statutory power had not arisen, or that the Respondent had not given the mandatory statutory under Section 74 of the Registered Land Act, (*Cap. 300, Laws of Kenya*), or that the charged property had not been valued, or that the Auctioneers had failed to give the necessary 45 days statutory notice (*under the Auctioneers Rules*) before the charged property could be sold, or as the applicant claimed, that there was no charge or further charge upon which the Applicant could base its statutory power of sale.

On the question of security, there is attached in the Replying of P. K. Komen, the Respondent's Nakuru Branch Manager as Annexure PKK 2 a Certificate of Lease, Section C of which is entitled, Encumbrances and Entry 6 thereof refers to a First Charge to Transnational Bank to secure Sh 4,000,000/= and a further entry of 14th June 2005 refers to RIGHTS UNDER sections 83 and 84 RESERVED.

Section 83 of the Registered Land Act, which makes for a provision or a clause in a charge for a chargee to make further advances or give credit to the chargor on a current or continuing account - except that if no such provision is made, such further advances shall not rank in priority to any subsequent charges except with the consent in writing of the proprietor of the subsequent charge, otherwise there is no right to tack.

Section 84 of the Act also prohibits consolidation of charges unless first reserved under the charge, and noted in the register against all the charges so consolidated.

As noted above, the subsequent advances were permitted under the First and Further Charge as deponed by the Affidavit of the Respondent, and were duly noted in the register. The action of the Appellant in exercise of its statutory rights under Section 74 of the Act was well within its rights under the First and Further Charge and cannot be impeached by the applicant, particularly as the applicant does not dispute the borrowing. The application for injunction fails on this ground. There is no prima facie case.

OF PUNITIVE INTEREST

I have great sympathy with borrowers. To grow their businesses, they must borrow as their initial seed capital is never nearly enough to carry on with the business. The number defaults among high profile companies and individuals are testimony to this view. After borrowing at free-fall interest rates, the return from their investment from borrowed funds is not enough or about enough to service the interest costs, and hardly the principal sums borrowed. If the interest is adjusted upwards, and the cost of services (*for those in the service industry such as the Applicant*) remain the same, or cannot be adjusted upwards to meet the equivalent cost of interest to the lending Bank, an accumulation of interest, and therefore default, is bound to arise.

When this arises, the borrower's first defence is that the default has arisen because of the unilateral increase in the rate of interest. It is invariably correct that the interest rate has been hiked by the lending bank without reference to the borrower like the Applicant in this case. Unfortunately, the borrower is his own worst enemy. He has often while in urgent need of the funding, failed to negotiate that any additional cost to the loan in particular interest, shall be notified to him before being implemented. In the

Kenyan Banking situation, this never happens unless he is a massive borrower whose cumulative default would affect the lending bank's annual balance sheet.

A small borrower such as the Applicant will usually be required to sign away the right to negotiate the new cost by such clauses as -

(a) interest shall be charged at a base rate of 5% per annum currently 18.5% per annum

(b) the Bank however reserves the right to alter the interest and commissions charged on the facilities without prior notice to the borrower. The Bank shall not be required to advise any change in interest rates, and any failure to do so will not prejudice the Bank's right to recover the interest charges.

The Borrower signed an Offer Letter of 20th August 2003 with the said clauses, the borrower also signed off another Offer Letter dated 25th April 2005 with similar clauses in para. 3 thereof on interest rates. Yet again, Applicant signed a similar Letter of Offer dated 6th March 2007. A long Clause 3(B) - **Repayment on Review**, said in sub-paragraph VII -

"The Statement of the Bank as to the rate or amount of interest payable pursuant to this paragraph shall, in the absence of manifest error, be conclusive."

The Applicant's counsel invoked the provisions of Section 44 and 44A (a) & (b) of the Banking Act, to defeat these clauses. Those Sections say -

"44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.

44A (1) An institution may be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2),

[(2) sets out the formula for determining the income non-performing loan.)]

(3) If a loan becomes non-performing and the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under (a) and(b) of subsection(1) shall be determined with respect to the time the loan last became nonperforming.

(4) ..

(5) (a)
(b)

(c) a loan becomes non performing in such manner as may from time to time, be stipulated in guidelines prescribed by the Central Bank.

The Applicant placed no material before the court that the Respondent did not obtain the requisite approval by the Minister responsible for Finance. Similarly, the Applicant placed no material before the court to support the claim that the loan was non-performing as contemplated under Section 44A(2) and (3) of the Banking Act. Without any such material the court is in no position to say that the Respondent was in breach of those provisions of the Banking Act.

Consequently again, the Applicant fails on the ground of illegal charges of interest rates.

Section 2 of the Law of Contract Act (*Cap. 23, Laws of Kenya*), applies and extends the application (*except as may be provided by any written law*), of the common law of England relating to contract as modified by the doctrines of equity ... to Kenya. This being so, interpretation of the law of contract adapted in England, is highly persuasive in Kenya. For instance Halsbury's Laws of England 4th Edn.

Vol. 16, para. 144 -

"The court will not interfere with the freedom of contract and will not ... merely because a man has made an improvident contract, relieve him from its consequences."

In **GODFREY NGUMO NYAGA VS. HOUSING FINANCE CO. OF KENYA** (Civil Appeal No. 134 of 1987) the Court of Appeal echoing the above principle of freedom of contract said -

"where a party has a statutory right of action, the court will not usually prevent that being exercised except that the court will interfere if there was no basis on which the right could be exercised or it was being exercised oppressively."

Again in **MRAO LIMITED VS. FIRST AMERICAN BANK OF KENYA LTD** (*supra*) Halbury's Laws of England 4th Edn. Vol. 32, para. 725 -

725. When a mortgage may be restrained from exercising the power of sale -

"The mortgage will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged."

He will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims is due to him, unless, on the terms of the mortgage, the claim is excessive."

Lastly, in **J. L. LANUNA & OTHERS VS. CIVIL SERVANTS HOUSING CO. LTD & SAVINGS AND LOAN KENYA LTD (CIVIL APPLICATION NO. 14 OF 1995 (8/95 UP))** P. K. Tunoi, (*then Judge, now Justice of the Supreme Court*), said -

"It is trite law that the very first principle of injunction law is that prima facie, you do not obtain injunctions to restrain actionable wrongs for which damages would be fair or adequate remedy."

All the above leads me to the conclusion that the Applicant has not established any of the **Giella vs. Cassman Brown & Co. Ltd** trilogy a prima facie case with a probability of success, or that he cannot be adequately compensated in damages. As the Respondent is clearly owed moneys the balance of convenience lies with the Respondent.

For all those reasons, the Applicant's course of action rests with talking with the Respondent out of the sale, but the application herein is dismissed with costs to the Bank.

Dated, signed and delivered at Nakuru this 29th day of June, 2012

M. J. ANYARA EMUKULE
JUDGE