REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

Civil Suit 143 of 2011

JACKSON KAMAU NDEGWA.....1ST APPLICANT

SARAH NJERI KAMAU.....2ND APPLICANT

VERSUS

HOUSING FINANCE CORPORATION OF KENYA.....DEFENDANT

RULING

It is not in dispute that in 1985 the respondent extended to the applicants a loan facility in the sum of Kshs.160,000/= on the security of the latter's' property known as NAKURU/MUNICIPALITY/BLOCK 3/852 – Koinange Estate. The rate of interest at the time was agreed at 5.5% as the second applicant was an employee of the respondent. It is the applicants' case that they made substantial repayments but disagreement arose on the question of interest and the failure of the respondent to furnish them with accounts.

The respondent maintained that as at the time this suit was instituted in 2007, the loan sum outstanding stood at Kshs.1,175.484.60. In order to mitigate losses the respondent appointed a Receiver Manager of the charged property. Subsequently, the respondent in exercise of its statutory power of sale put up the property for sale.

The applicants moved to court and obtained restraining orders against the respondent on 3rd October, 2008. Those orders notwithstanding, the respondent has once more gone ahead and issued a Notification of Sale of the suit property prompting the applicant to bring this application for orders to once again restrain the respondent from alienating, selling, exercising its statutory power of sale or further recharging the suit property until the suit herein is heard and determined.

The respondent in response has accused the applicants of being vexatious litigants; that the principles for the grant of an injunctive order have not been satisfied; that the applicants have approached the court with dirty hands.

Being an application for temporary injunction, the court must satisfy itself that the strictures enunciated in the celebrated case of **Giella** Vs. **Cassman Brown and Company Limited** (1973) EA 358 have been satisfied. Have the applicants demonstrated that they have a *prima facie* case with a probability of success at the trial; that unless the orders sought are not granted, they stand to suffer substantial loss that may not be compensated by an award of damages. Finally, should the court be in doubt, it must decide the matter on a balance of convenience. Of course injunction being an equitable remedy, the party seeking it must conform with the principles of equity.

In considering the first question – whether there is *prima facie* case, this court is not concerned with the merits of the parties cases and therefore must not make any definite findings of either law or fact as that can only be done after the trial. At this stage, the court is only expected to ascertain whether there is apparent violation of the applicants' rights by the respondent, to necessitate the calling upon the latter to rebut the alleged violations. See **Mrao Limited** V. **First American Bank of Kenya Limited** (2003) KLR 125.

It is clear to me that the applicants at some stage defaulted in the repayment of the loan prompting the respondent to initiate the process of realizing the security and forcing the applicants to seek restraining orders.

It has been stated time without number that when an adult person of sound mind and with capacity to contract sets out and offers his property as security to secure a loan facility, it is presumed that the person has made a conscious decision to avail the said property for sale by the lending institutions in the event that there is default in meeting the terms of the facility accorded by the lending institution.

See **Simion Ndambiri Gachibi** V. **Housing Finance Company of Kenya Limited,** HCCC No.365 of 2006. It is also established that the courts will not normally restrain a mortgagee from exercising its statutory power of sale merely because the amount due is in dispute, or because the mortgagor objects to the manner in which the sale is being arranged or because the penalty, interest and default charges are in dispute.

See **Joseph Okoth Wandi** V. **National Bank of Kenya**, C.A. Civil Appeal No.77 of 2004, **Ng'ayo Traders Ltd** V. **Savings and Loan (K) Limited**, Civil Application No. NAI.165 of 2005, **John Nduati Kariuki T/A Johester Merchants** V. **National Bank of Kenya** (2206) e KLR.

The main grounds upon which the instant application is brought are that there are pending orders in the nature of injunction with regard to the suit property yet the respondent has gone ahead and issued a notification of sale; that the amounts sought to be recovered are not only fictitious but also a ploy to defraud the applicants of their lifetime investment; that the respondents have not complied with the orders to render account.

In granting the injunctive orders of 3rd October, 2008, the court (Lesiit, J) also ordered:

" 1. …….

2. THAT accounts of the 2nd plaintiff's loan and overdraft facility with the defendant be referred to two referees appointed by one each party (sic) for taking of accounts and the filing of a joint report, if possible, within 90 days from the date of reference.

3. THAT each party has 30 days to appoint one Certified Public Accountant of their choice to sit as their referee in (2) above at their own expense.

4. THAT in case of default in (2) and/or (3) above, the parties to have the matter mentioned in court for directions."

The respondent has averred without being challenged by the applicants that on their part (the respondent) and in compliance with the condition set out above (2) and (3), they appointed Patrick Mwangi Ngumi and that fact communicated to the applicants on 29th October, 2008, well within 30 days as directed; that the applicant having failed to comply, the respondent in terms of paragraph 4 of the order, caused the matter to be mentioned for further directions. The applicants subsequently purported to appoint an accountant on 17th November, 2008. On 27th January, 2009 when the matter was listed for directions, counsel for the applicants did not attend court and that the applicants have frustrated the efforts to comply with the orders of the court.

For my part, this application lacks merit. The court having availed an opportunity to the applicants to have the dispute resolved by reconciling accounts, the applicants saw no urgency in the matter and did not comply with order, perhaps because they had an injunction. Secondly, the respondent has deposed that the applicants have brought in total five suits in respect of the same subject matter and have obtained injunctive orders in those suits. This assertion has not been denied by the applicants. As a matter of fact, they have admitted that there is an order of injunction issued on 3rd October, 2008, which in their view was being violated by the respondent. They have explained why they have brought this application thus:

"THAT this application is the only avenue available to enable the plaintiffs/applicants seek stay orders concerning all that property known as L.R. No. NAKURU MUNICIPALITY/ BLOCK 3/852 including but not limited to illegal exercise of statutory power of sale and/or sale via private treaty, public auction plus apertures thereto."

It appears to me that the applicants being aware of the injunctive orders issued on 3rd October, 2008 and believing that the respondent was about to violate them brought this application not for another injunctive order but to stay any action that may affect the status of the suit property. Under the Civil Procedure Rules – the repealed one or the one of 2010 – there is no such a procedure as the one employed here by the applicants.

While the orders of 3rd October, 2008 were still in force and the applicants believed the respondent was violating them, their (the applicants') recourse was to proceed under Order 40 rule 3 of the Civil Procedure rules, 2010 to seek for orders for the attachment of the respondent's property or for their detention in prison for a term nor exceeding six months, for violating the orders of the court.

Secondly, the respondent has pleaded that the applicants are vexatious litigants and have also come to court with unclean hands. The applicants have challenged the intended sale of the suit property in HCCC No.2174 of 2007 where Nambuye , J (as she then was) granted an injunction, Nbi. Milimani CMCC No.2047 of 2008 where D.K. Ole Keiuwa, Resident Magistrate issued an injunctive order against the respondent on 4th April, 2008, Nbi. Milimani C.M.C.C.C. No.3787 of 2008, an injunction was issued by Ms. A. Ireri on 27th June, 2008 in favour of the applicants against the respondent, Nbi. C.M.C.C.C. No.4805/2008 another application for injunction was granted by Mr. Kiema, Resident Magistrate on 8th August, 2008 against the respondent. Once again D.K. Ole Keiuwa, Resident Magistrate granted an injunction on 19th September, 2008 in Nbi. Milimani C.M.C.C. No.585 of 2007 and finally Nbi. Milimani HCCC No.583 of 2007 was brought and application for injunction granted on 3rd October. 2008. The file was subsequently transferred to this court and is the present suit. In total, the applicants have brought five suits in respect of the same suit property against the same respondent and seeking the same orders. Such a conduct cannot be condoned or encouraged.

The court must not allow itself to be used in this manner. The applicants have five suits which remain undetermined but have instead engaged the courts with one suit/application after another. They must decide what to do with all these suits if they expect their grievances to be determined with finality.

The application is dismissed with costs to the respondent.

Dated, Signed and Delivered this 30th day July, 2012.

W. OUKO
JUDGE