REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL CASE NO. 17 OF 2010

1. POLYCAP OKUMU OCHOLA
2. GUARDFORCE SECURITY LTD ……PLAINTIFFS/APPLICANTS

-VERSUS-

DUBAI BANK KENYA LTD…….DEFENDANT/RESPONDENT

RULING

The applicants, by their Chamber Summons application of ***26th January, 2010*** brought under Order **XXXIX** (Rules 1 & 2) of the Civil Procedure Rules and s.3A of the Civil Procedure Act (Cap. 21, Laws of Kenya), came before the Court with two main prayers:

(i) "THAT an interlocutory injunction do issue against the defendants, their servants and/or agents restraining them from advertising or offering for sale the plaintiff's property namely plot No. L.R. 1861/I/MN or any other property pending the hearing and determination of this suit";
(ii) "THAT an injunction do issue against the defendants and their agents restraining them from exercising any power of sale over the plaintiff's premises on Plot No. LR 1861/I/MN pending the hearing of this suit".

Grounds in support of the application are thus stated:

(a) notices had not been served upon 2nd plaintiff's principal officers or designated authorized persons;
(b) the said notices are not based on any document of charge;
(c) the redemption-sum has no basis in the agreement – as regards the outstanding sum and the interest chargeable;
(d) the redemption notice did not give the 90-day statutory period;
(e) since the defendant received and retained the replacement cheques, it is estopped from exercising the statutory power of sale.

The application is supported by evidence set out in 1st plaintiff's supporting affidavit sworn on ***26th January, 2010***. To this affidavit, ***Nicodemus Kikolya***, the defendant's General Manager, swore a lengthy reply on ***30th September, 2010***, deponing *inter alia* that 2nd plaintiff had opened a current account (No. 81053219) on ***28th April, 2005*** and had, at the time, expressly undertaken to comply with the defendant's Rules and Regulations Governing Accounts. The said Rules provided that "*unless otherwise agreed in*

writing, the defendant would charge interest on loan accounts or any other facility granted by it at any rate as fixed by it and that such interest would be calculated on daily balances and debited monthly". It was an express term of the said Rules that the defendant "*was entitled to charge penal interest at the rate of 2-3% per month if 2nd plaintiff exceeded the agreed overdraft limit*". By a Sanction Letter of ***13th December, 2006*** the defendant granted 2nd plaintiff an overdraft facility of Kshs. 2,500,000/= and a term loan facility of Kshs. 7,500,000/=, on terms spelt out in the said letter.

The deponent deposes that the said facilities were secured by a first charge over L.R. No. MN/I/1861, two personal guarantees signed by 2nd plaintiff's directors, and log books for two motor vehicles.

It is deponed that, on ***26th June, 2008***, 2nd plaintiff entered into an agreement in writing with the defendant, whereunder 2nd plaintiff was to pay to the defendant Kshs. 18,000,000/=, in full and final settlement of the outstanding debt, by monthly instalments of Kshs. 300,000/= over a period of five years. The 2nd plaintiff had, on ***25th October, 2007*** executed a charge in favour of the defendant, over the property, L.R. No. MN/I/1861.

The deponent avers that the defendant and 2nd plaintiff did communicate about cheque payments by 2nd plaintiff on ***20th August, 2008***, before such payments were made to the defendant, but most of the cheques were returned unpaid; and the plaintiffs "*refused to provide the replacement cheques until **12th November, 2009** or thereabouts, by which time the Agreement had been discharged*". It is deponed that although the plaintiffs did forward fresh cheques to replace the dishonoured ones, this was done "*more than a year after the Agreement had been terminated by reason of actual breach thereof by the plaintiffs, and the said cheques were rejected by the defendant*". And the defendant issued a 45-day redemption notice dated ***11th December, 2009*** and a notification of sale of immovable property dated ***11th December, 2009***; the 1st plaintiff was duly served with the 45-day redemption notice and the notification of sale of immovable property on ***16th December, 2009***. The deponent believes to be true the advice of his Advocate, that the service of the redemption notice was in compliance with Rule 15(d) of the Auctioneers Rules, 1997.

The deponent deposed that 2nd plaintiff is indebted to the defendant in the sum of Kshs. 21,303,260/79 as at ***1st February, 2010*** and this continues to accrue interest at the rate of 27% per annum.

Learned counsel, ***Mr. Weloba*** for the plaintiffs, did not deny the averment that, in return for the defendant's financial accommodation, the plaintiffs issued dishonoured cheques; but he blamed the defendant for refusing to return the unpaid cheques, which action, he stated "[*caused] them not to be honoured*". Counsel, on that premise, goes on to contend that the exercise of the defendant's statutory power of sale "*is without [a] legal basis and its exercise is in any event a clog [on] the plaintiff's unfettered right of redemption*". Counsel thus contends, in aid of his client's interlocutory application:

"[*I]f the intended sale by public auction of Plot No. L.R. MN/I/1861 Mombasa proceeds it will be illegal and [will] cause the plaintiffs irreparable loss and [damage*]…." He seeks a conservation of the ***status quo*** "*pending full trial when [the plaintiffs] can demonstrate the illegality of the process, and their right to orders sought in the plaint*".

Counsel submitted that the facility of Kshs. 18,000,000/= was availed to 2nd plaintiff without the security of a charge; that the redemption notice was "*fatally defective because it was not served on the chargors*"; that the redemption sum "*is wrong and without [a] basis in the documents of the facility*"; that the sum of money claimed in redemption is illegal, in relation to the Banking Act (Cap. 488, Laws of Kenya).

In contesting the redemption notice, counsel sought reliance in the High Court's (***Warsame, J***) decision in ***Sharok Kher Mohamed Ali & Another v. Southern Credit Banking Corporation Limited & Another***, Nairobi MCCCCC No. 659 of 2009 [2008]eKLR, in particular the following passage:

"I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss

and/or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right."

The learned Judge in that case was concerned with the notice period before sale by the mortgagee, under s.69A of the Indian Transfer of Property Act, and he thus stated:

"Section 69A clearly and mandatorily provides that a mortgagee intending to exercise its statutory power of sale must give notice of not less than 3 months….., upon the expiration of which if no payment is made the mortgagee may sell the property….[The] mortgagee is not allowed to exercise the statutory power of sale in a manner that can be termed …..capricious or oppressive".

Counsel also invoked s.44A of the Banking Act (Cap. 488, Laws of Kenya), which provides that the interest chargeable on a non-performing loan is not to exceed the principal sum that is owing: and on this basis he urged that the repayment demanded by the defendant represents an illegal sum.

Counsel for the defendant submitted that it was an undisputed fact, there was a settlement agreement (by letter dated ***16th June, 2008)*** between the parties for the consolidated sum of Kshs. 18,000,000/= to be repaid by 2nd plaintiff to the defendant; the agreement is thus expressed:

"We are pleased to advise that the Bank has agreed to accept your offer to pay Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) in full and final settlement of your outstanding debt at a monthly instalment of Kenya Shillings Three Hundred Thousand (kshs. 300,000/=) over a period of five (5) years."

The "*outstanding debt*", counsel submitted, had been advanced through the Sanction Letter dated ***13th December, 2006***, and the level of indebtedness thereunder stood at Kshs. 13,308,134/29 at ***25th June, 2008.***

Counsel contested the plaintiffs' stand, that the charge which was executed on ***25th October, 2007*** for the sum of Kshs. 10,000,000/= was not a document of charge for the settlement agreement in relation to the facility of Kshs. 18,000,000/=; for the later agreement expressly refers to the creation of a further legal charge for Kshs. 18,000,000/= in respect of L.R. No. MN/I/1861. Counsel urged that the charge dated ***25th October, 2007*** "*was not only meant to secure the sum of Kshs. 10,000,000/= which had been advanced to the plaintiffs [under] the Sanction Letter of* ***13th December, 2006*** *but it was also meant to secure payment of interest and other charges by the plaintiffs*…".

What is the status of the "*further charge*" to accommodate the later agreement for repayment of the consolidated sum of Kshs. 18,000,000/=? This question is thus answered by learned counsel for the defendant:

"It is crystal clear that the Agreement dated *16th June, 2008* ***envisaged that a further charge would be executed by 1st plaintiff in favour of the defendant*** *which apparently was not prepared and executed* ***but the mere fact that the said further charge was not prepared and executed does not mean that the charge dated*** *25th October, 2007* ***was discharged by the Agreement dated*** *16th June, 2008.* ***Rather, the further charge was meant to be a collateral security".***

Counsel submitted that the plaintiffs had defaulted in performing their obligations under the Agreement of ***18th June, 2008***: they gave the defendant 12 post-dated cheques, each for Kshs. 300,000/=, for the period ***June 2008*** to ***May 2009***, but when the defendant deposited these cheques on the due dates, most of them were returned unpaid. Thus, it was urged, the plaintiffs have defaulted in the repayment of the loan.

Was it lawful for the defendant to give the plaintiffs a redemption notice shorter than 90 days? Counsel argued that the shorter notice was not a defect, from the standpoint of ***law***: for, by virtue of s. 69A(1)(b) of the Indian Transfer of Property Act, 1882 there was no need to give such long notice once the unpaid

interest had remained outstanding for ***more than two months.*** On this point, counsel invoked the Court of Appeal decision in ***James Ombere Ockotch v. East African Building Society & Another***, Civil Appeal No. 202 of 1996 [1997]eKLR. Counsel relied on the following passage in that Judgment:

"[We] can see straightaway that under section 69A(1)(b) there is no need for the giving of the three-month statutory notice when interest for more than two months is due and unpaid. On this issue, therefore, the appellant did not have a *prima facie* ***case with any probability of success."***

Counsel submitted that, on the facts of the instant case, the plaintiffs were definitely in arrears of interest for more than two months: they had been in breach of the Agreement of ***16th August, 2008*** in three respects; they defaulted in repaying the loan by way of monthly instalments each of Kshs. 300,000/=; they had stopped payment of cheques which they had rendered to the defendant; they had imposed new conditions for the performance of their outstanding obligations – for instance, a return to them of their cheques which had been dishonoured; and the effect was that the agreement was discharged, and the entire outstanding amount became payable immediately.

Counsel urged that, since the loan agreement had been discharged, the defendant was entitled to charge interest on 2nd plaintiff's loan account at the rate of 27% per annum, in accordance with the Sanction Letter of ***13th December, 2006***.

Counsel urged that if the Court were to find that the defendant should have given a three-month redemption notice to the plaintiffs, then they be not granted injunctive relief, but, instead, ***locus poenitentiae*** be created for the defendant to issue a three-month notice, in compliance with s.69A(1)(a) of the Indian Transfer of Property Act. The relevant authority in this regard is the Court of Appeal's decision in ***National Bank of Kenya Limited v. Shimmers Plaza Limited***, Civil Appeal No. 26 of 2002 [2009]eKLR, which carries the following passage:

"The duration of an order of injunction is at the sole discretion of the trial Judge and depends on the circumstances of each case. In this case, the duration of the injunction until the determination of the suit frustrated the statutory right of the bank to realize the security upon giving a notice which complies with the law. We venture to say that where the court is inclined to grant an interlocutory order restraining a mortgagee from exercising its statutory power of sale solely on the ground that the mortgagee has not issued a valid notice, then…..the order of injunction should be limited in duration until such time as the mortgagee shall give a fresh statutory notice in compliance with the law."

Counsel contested the plaintiffs' position, that the sum of Kshs. 18,000,000/= which was payable to the defendant bore no interest: it was clear enough that "*upon default by the plaintiffs [in paying] any monthly instalments on …due date all the amounts outstanding [became] due and payable immediately; [the] bank was given the right to recall the facility and liquidate the securities held*."

Counsel contested the contention by the plaintiffs that the defendant's repayment claims were in breach of s.44A of the Banking Act, as regards interest. It was submitted that the claim by the plaintiffs had not featured in the plaint, nor in the interlocutory application, and it was being raised as an afterthought. Besides, counsel submitted, this argument was about "*amount due*"; but the legal position is that such a point is not a basis for restraining a mortgagee from exercising the statutory power of sale. The following pertinent passage appears in ***Halsbury's Laws of England*** (4th ed.) Vol. 32 (para. 725):

"*When the mortgagee may be restrained from exercising power of sale****. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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 to be due to him, unless on the terms of the mortgage the claim is excessive".***

This principle has been applied in the Judgment of the Court of Appeal in ***Pelican Investment Ltd. v.***

National Bank of Kenya Ltd. [2000] 2E.A. 488.

Counsel urged that since it clearly emerges in the supporting affidavit to the application that 2nd plaintiff is at least indebted in the sum of ***Kshs. 15,687,500/00*** as at ***February, 2009*** the Court if it should be minded to grant injunctive relief, do order the plaintiffs to deposit the sum of Kshs. 15,687,500/= in a joint interest-earning account in the names of the parties' Advocates, or in Court.

Learned counsel urged that it does not lie in the mouth of 1st plaintiff to contend that he will suffer irreparable loss if injunctive relief is not granted: for the suit premises has been mortgaged as part of ***loan contract*** whereby ***sale thereof*** is one of the objects contemplated; and the effect is that any loss on the property is quantifiable and compensable in ***damages***; and moreover, there has been no attribution of bankruptcy to the defendant as a consequence of which the defendant would be unable to pay compensation.

Counsel submitted that the balance of convenience was not in favour of the plaintiffs who, though several times reminded of their loan-repayment obligation, have only made unfulfilled promises: as at ***February, 2009*** the plaintiffs had only repaid the paltry sum of Kshs. 1,500,000/=, out of the redemption-sum of Kshs. 18,000,000/=, and this showed lack of intention to pay. Counsel submitted that the plaintiffs, by their conduct, were disentitled to the favour of equity; and the balance of convenience stands on the side of refusal of injunctive relief.

Learned counsel submitted that if the defendant is restrained from realizing its security, there would be imminent danger of loss of such security; it is a scenario reminiscent of the case in ***Thathy v. Middle East Bank (K) Ltd & Another*** [2002] 1KLR 595 in which ***Ringera, J*** (as he then was) thus remarked (at p. 605):

"As regards the balance of convenience, I think the same tilts in favour of refusing…..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 will 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 to the first defendant Bank".

The foregoing assessment renders quite clear the material facts, the relevant law, and the proper line of decision-making by this Court.

It emerges as an undisputed fact, that the plaintiffs have not been willing or able to repay a loan granted by the defendant under a formal agreement of ***18th June, 2008***, subject to a charge of ***25th October, 2007***, and amounting to ***at least*** Kshs. 10,000,000/=. There is clear evidence that the total amount of money owed by the plaintiffs to the defendant is about ***Kshs. 18,000,000/=***. On the basis of the charge, the defendant has issued a redemption notice, and has expressed the intention to exercise the statutory power of sale. Has the plaintiffs a basis for seeking the Court's discretion to issue interlocutory injunctive orders?

The plaintiffs contend that the defendant's notices are illegal and should not be allowed to lead to a realization of the security given for the loans in question. The claim of illegality is based on s.69A(1)(a) of the Indian Transfer of Property Act, 1882 which provides for a ninety-day notice period rather than a forty-five-day notice period as in this case. The plaintiffs' contention in this regard, however, does not stand up; for the defendant has shown that the unpaid interests on the loan-monies have remained outstanding for ***more than two months***, and so, by virtue of s.69A (1) (b) the chargee may give shorter redemption notice than 90 days.

The plaintiffs then pursue the theme of illegality by citing s.44A of the Banking Act (Cap. 488, Laws of Kenya), which provides that:

"(1) An institution shall 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) The maximum amount referred to in subsection (1) is the sum of the following –

(a) the principal owing when the loan becomes non-performing;
(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing;
and
(c) expenses incurred in the recovery of any amounts owed by the debtor."

It is not, however, possible to see how the above provision affects the chargee's right, in this case, to realize its security under the charge, given, firstly, that the chargor has not paid up, and even blames the chargee for such failure to pay; secondly, that the contention is not an element in the pleadings in the main cause; thirdly, that the plaintiffs have not shown how the defendant is in breach of the said provision of the Banking Act; and fourthly, that this complaint amounts not to a denial of liability under the charge-document, but only a contest regarding ***amount payable*** . The relevant law is clear enough; as stated in ***Halsbury's Laws of England*** (4th ed.), Vol. 32 (para. 725), "[*the] mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute*…."

The foregoing principle explains why, even though the plaintiffs may rightly argue that no express covenant exists under which a "*further charge*" in favour of the defendant covers an entire sum of Kshs. 18,000,000/= repayable, it remains the case that they are indebted under the original charge of ***25th October, 2007*** and the defendant, therefore, is entitled to realize the security given under that charge.

The overall effect is that the law does not stand on the side of the plaintiffs, and they perhaps appreciate this, except that they crave the Court's discretion to accord them a munificence; but such would be a strained application of the judicial discretion which must be guided by open and structured yardsticks.

It follows that it is unnecessary to consider recourses such as ***locus poenitentiae*** for the defendant to give fresh notices, or orders for depositing in Court the monies owing. This case is much akin to that in ***Thathy v. Middle East Bank (K) Ltd & Another***: and I express agreement with ***Ringera, J*** that "*the debtor….stands to gain [nothing] by maintenance of the* ***status quo***"; and "*the Bank would [lose] because its security will in effect be no security at all if on sale it cannot realize the debt*". Hence the green light to the defendant to proceed and realize its security under the charge. The applicants have made no ***prima facie*** case for the grant of injunctive relief; and their application is dismissed with costs to the defendant.

Orders accordingly.

DATED and **DELIVERED** at **MOMBASA** this ***3rd*** day of ***June, 2011.***

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J. B. OJWANG
JUDGE