REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 10 OF 2010

SCHOLARSTICA NYAGUTHII MUTURI……..…APPLICANT/RESPONDENT

VERSUS

HOUSING FINANCE CO. OF KENYA LTD ….....……..……DEFENDANT/RESPONDENT

RULING

By this application, the Plaintiff/Applicant seeks an order that a temporary injunction be issued restraining the Defendant/Respondent whether by itself, officers, Directors, Servants or/or agents Messrs Nguru Enterprises or whomsoever is acting on its behalf from selling, advertising for sale, transferring and/or dealing with L.R. No. 14668 – MUTHITHI GARDENS, KIAMBU MUNICIPALITY, in any manner whatsoever pending the hearing and determination of this suit. She prays for an order that the Respondent do deliver accounts to her respecting her "**mortgage account No. 600 0001838 on the amounts of monies deposited in those accounts**" (sic) by the Applicant. The application is brought by a Chamber Summons taken out under Sections 3 and 3A of the Civil Procedure Act; Order XXXIX Rules 2,3,4,5 and 9 and Order XIX of the Civil Procedure Rules, and all other enabling provisions of the law.

The application is supported by the annexed affidavit sworn on 13th January, 2010 by the Applicant herself, and is based, *inter alia,* on the grounds that the charge instrument pursuant to which the Defendant is proceeding is void for want of compliance with Section 59 of the Indian Transfer of Property Act as regards to attestation. She also claims that she has paid all that was required of her and that the amounts claimed by the Defendant are based on illegal and unlawful interest charges on the Plaintiff's accounts. She further contends that she has not been served with the requisite Statutory Notice and that the only Notice she was served with was one dated 10th May, 2004, which has since been overtaken by events as the parties have renegotiated the loan and new terms agreed on after which she made all the payments.

Opposing the application, the Defendants filed a replying affidavit sworn by Geoffrey Kimaita on 3rd February, 2010, in which he avers that the Applicant has not paid all her dues to the Defendant as she alleges, and that she has been duly served with requisite Statutory Notice.

On 11th February, 2010, the Applicant filed a Notice of Preliminary Objection on the ground that

the Respondent's replying affidavit is incurably incompetent and fatally defective. The reason advanced is that the deponent has no *locus standi* to depose to the contents of his affidavit and is otherwise a stranger to the proceedings herein. The said affidavit is also alleged to have been sworn and filed in contravention of the mandatory provisions of the law.

With leave of the court, the parties filed their respective written submissions which they thereafter adopted without any highlighting. After considering the pleadings and the written submissions, I find that the main issues to be determined are whether the replying affidavit is incurably incompetent and fatally defective as alleged or all; whether the mortgage document is invalid as it was attested by only one witness; whether the Applicant has paid all her dues to the Respondent; and whether the Applicant was served with the requisite Statutory Notice.

On the issue of the competence of the replying affidavit sworn by Geoffrey Kimaita on behalf of the Respondent, the Applicant's counsel submitted that it was now a matter of judicial notoriety that a document filed in court by a corporate body must be accompanied by an authority giving the deponent power to swear on behalf of the corporation. Such authority must be filed in court before the document is filed, and there was no authority attached or filed in court giving the deponent the power to swear on behalf of the Respondent which is a corporate body. He submitted that the deponent of the replying affidavit was therefore a stranger in the proceedings and had no *locus standi* to depose to the contents therein. He referred to Order 1 Rule 2 (2) of the Civil Procedure Rules and submitted that this Rule requires an authority to be in writing and filed in court.

The Rule referred to by the learned Counsel states as follows –

"**12. (1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceedings, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.**

(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."

The wording of this Rule (which is replicated in the new Civil Procedure Rules under Order 1 Rule 13) suggests that the said Rule contemplates a situation in which there are more than one Plaintiff or more than one Defendant. In the instant case, there is only one Plaintiff and one Defendant. Clearly, the rule does not and cannot apply to this matter as we don't have more than one Plaintiff or more than one Defendant.

Regarding the competence of Geoffrey Kimaita to swear the replying affidavit, I note that in Paragraphs 1 and 2 of his deposition, he states that –

"(1) I am employed by the Defendant as Head of Recoveries and I am duly authorized to swear this affidavit.
(2) I am aware and familiar with the matters hereto."

As the Defendant is a body corporate, Order III (replicated in Order 9 of the new Rules) of the Civil Procedure Rules comes into play. Rule 1 thereof requires that any application to or appearance or act in any court required or authorized by law to be made or done by a party in such court may be made or done by the party in person, or by his recognized agent, or by an Advocate duly appointed on his behalf. In the case of recognized agent, Rule 2 thereof states that –

"**The recognized agent of parties by whom such appearances, applications and acts may be made or done are –**
(a) …
(b) …
(c) In respect of a corporation, an officer of the corporation duly authorized under the

Corporate Seal."

A person swearing an affidavit on behalf of a corporation must therefore satisfy two conditions. Firstly, he must be an officer of the corporation, and secondly, in that capacity, he must be authorized under the Corporate Seal to swear the affidavit.

In the instant case, Mr Geoffrey Kimaita has made it clear in Paragraph 1 of his affidavit that he is employed by the Respondent as the Head of Recoveries. That constitutes him an officer of the Respondent. He has further stated that he is "**duly authorized to swear the affidavit**." One cannot ask for more without prying into the internal management of the Respondent's affairs. This case is therefore distinguishable from that of **MUMIAS SUGAR CO., LTD** v **ONIANGO** [2005] 1 KLR 373 on which the Applicant relies and in which, according to the court, the deponent merelyclaimed to be **"… competent to swear the affidavit but did not indicate that he had authority to do so."** For the failure to do so, the court found that the same was defective. Similarly, in the case of **ELITE EARTHMOVERS LTD** v **KRISHA BEHAL & SONS** [2005] 1 KLR 379 the deponent of the replying affidavit deposed that he was the General Manager of the Plaintiff Company. However, he failed to state that he had been authorized to swear the affidavit. On that basis, his purported affidavit was held to be defective and incompetent.

Whereas an affidavit by a corporation, whether in verification of a Plaint or an application thereunder, will be struck out on the grounds of being defective or incompetent if it is not authored and signed by a person who is not only an officer of the corporation, but also who is authorized to swear it, both these conditions were satisfied in this case. I therefore find that the replying affidavit is competent and valid. For that reason I find and hold that the Preliminary Objection raised herein is the one that is itself incompetent.

Regarding the issue of attestation, the charged document in this case demonstrates clearly that the suit property is registered under the Registration of Titles Act (Cap 281, Laws of Kenya). Whereas Section 59 of the Indian Transfer of Property Act requires mortgage instruments to be signed by the Mortgager and attested by at least two witnesses, Section 58 of the Registration of Titles Act states as follows –

"**Every signature to an instrument requiring to be registered and to a power of Attorney whereof a duplicate or an attested copy is required to be deposited with the Registrar shall be attested by one of the following persons –**

(a) Within Kenya –
(i) a judge or magistrate;
(ii) a registrar of titles;
(iii) a notary public;
(iv) an advocate;
(v) a justice of the peace;
(vi) the Registrar or Deputy Registrar of the High Court;
(vii) an administrative officer;

In the light of these disparities between the provisions of the Transfer of Property Act and the Registration of Titles Act, Section 1 (2) of the Registration of Titles Act provides that –

"**Except so far as is expressly enacted to the contrary, no Act in so far as it is inconsistent with the Act shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Act."**

Since the suit property in this matter is registered under the Registration of Titles Act, Section 59 of the Transfer of Property Act does not govern this matter as it is inconsistent with Section 58 (1) of the Registration of Titles Act under which attestation by one person is validated. An Advocate is among the persons who are authorized to attest as in this case. In **COAST BRICK & ORS** v **PREMCHAND & ANOR** Civil Appeal NO. 37 of 1962, the Privy Council held that Section 8 of the Registration of Titles

Act supersedes the provisions of Section 59 of the Transfer of Property Act. Consequently, the attestation of the charge by an Advocate in accordance with Section 58 of the Registration of Titles Act suffices and the charged document is validly attested. In any event, equity aids the vigilant and not the indolent. It does not hold water for the Applicant to raise the issue of the invalidity of the charge in 2010 when it was created in 1998 – a good twelve years down the line. Delay defeats equity and it is very late in the day to raise the issue at this juncture. It smacks of an after thought.

Regarding the allegation of illegal and unlawful interest charges on the Applicant's account, this is yet another issue which ought to have been raised earlier. Raising it at this point in time connotes of an afterthought. But be that as it may, I note from Paragraph 20 of the Plaint that the Applicant contends that the amount being claimed by the Respondent has been wholly settled by the Plaintiff. She therefore, prays that the Respondent be permanently injuncted from disposing of the Applicant's property. She further pleads in Paragraph 24 of the Plaint that there is no valid Statutory Notice of Sale in force that can entitle the Respondent to dispose of her property. She also pleads in that Paragraph that "**the only Statutory Notice ever served on the Plaintiff was dated 10th May, 2004"** which she argues is now spent and overtaken by events.

The allegation that the Applicant has settled all her dues to the Respondent is repeated in Paragraph 21 of the Supporting Affidavit wherein she deposes that "**…that the amount being claimed by the Defendant/Respondent has been wholly settled by me as per the terms of the charge document and the Letter of Offer…".** After some pestering by the Respondent, the Applicant states that she consulted the Interest Rates Advisory Centre who recalculated the charges on her account with the Respondent. A copy of the report from the Centre dated 12th September, 2008, a copy of which is exhibited in the Applicants own affidavit, shows that the Applicant is still in arrears to the extent of Kshs 5,134,950.58, and that was the balance as of 31st August, 2008. By the time that this suit was filed in January 2010, the amount had probably gone further up on account of interest. It is therefore untrue for the applicant to say that whatever dues she owed the Respondent had been wholly paid.

Regarding the issue of the Statutory Notice, quite apart from the statement in the Plaint, the Applicant repeats in Paragraph 27 of her supporting affidavit that "**there is no valid Statutory Notice of Sale in force that can entitle the Defendant to dispose of my property. The only Statutory notice ever served on the Plaintiff was dated 10th May 2004 which is now spent and overtaken by events since the parties herein had renegotiated the loan and new terms agreed upon, and I have thereafter made the whole repayments," (sic).** Contrary to this averment, the Respondent's exhibits demonstrate that there were several Statutory Notices the last of which was dated 25th February, 2008. A copy thereof is included in the exhibits attached to the Respondent's replying affidavit. The Plaintiff is not therefore being candid when she attests that the last Statutory Notice was sent to her on 10th May, 2004.

Against that background, I find that the dispute between the parties is not whether the Applicant owes the Respondent any money. It is the quantum that is really in issue, and that in itself is not a ground for granting an interlocutory injunction. On that note, I don't think that the Plaintiff has established a prima facie case with a probability of success as required in **GIELLA'S CASE**. In Halsbury's Laws of England 4th Edition Vol 32 at paragraph 725, the legal position in such circumstances is espoused as follows –

"**The mortgagee will not be restrained from exercising his power of Sale because the amount 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 in to court, that is the amount the mortgagee claims to be due to him, unless, on the terms of the mortgage the claim is excessive."**

Within our jurisdiction, in the case of **LAVUNA & ORS** v **CIVIL SERVANTS HOUSING CO., LTD** [1995] LLR 366 (CAK), the Court of Appeal stated that –

"…A court should not grant an injunction restraining a mortgagee from exercising its Statutory Power of Sale solely on the ground that there is a dispute as to the amount due under the

Mortgage…"

On account of the fore+going, I find that the applicant has not made out a case for the grant of an interlocutory injunction and her application is hereby dismissed with costs to the Respondent.

It is so ordered.

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

L. NJAGI
JUDGE