REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 386 OF 2009

JAGJIVAN SINGH.....1ST PLAINTIFF
RAJ SINGH KANWAL DADHLEY t/a BARON ENTERPRISES.....2ND PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.....DEFENDANT

RULING

The Applicants in the Chamber Summons dated 23rd November 2009, have moved this court under **Order XXXIX Rules 1,2,3 and 9** of the **Civil Procedure Rules (2009 Revised Edition), Sections 3** and **3A** of the **Civil Procedure Act, Section 52** of the **Indian Transfer of Property Act 1982,** as amended by the **Indian Transfer of Property (Amendment) Act 1989** (hereinafter referred to as "**the I.T.P A.**").

The Applicants pray firstly, for injunctive orders pending the hearing and final determination of the suit, restraining the Defendant from advertising for sale, disposing of, selling by public auction or private treaty, completing by conveyance the transfer or any sale conducted by such means, leasing, letting or otherwise interfering with the 1st Plaintiff/Applicants occupation and ownership of the property known as **L. R. No. 209/7414 NAIROBI.**

Secondly, the Applicants pray that an order be made under **Section 52 of the I.T.P.A,** prohibiting any further registration or change of registration in (sic) the ownership, leasing subleasing, allotment user or possession or any kind of right title or interest in said parcel of land pending the hearing and determination of the suit. The Applicants pray also that leave be granted to them to apply for such further or other orders and/or directions as the court may be deem fit and just to grant, and that costs of the application be awarded to the Applicant.

The application is premised on 21 grounds cited on the face thereof, including fraud, and is supported by two affidavits sworn by the 1st and 2nd Respondents on 23rd November 2009. In opposing the application the Respondent filed a Replying Affidavit sworn by its legal officer, Brian Asin on 8th June 2010. Written submissions with appropriate lists and bundles of authorities were filed in support of the rival arguments for and against the application.

The Applicants moved the court following the issuance, by the 1st Respondent, of a Statutory Notice demanding payment of a sum of Kshs. 12,431,276.45 in relation to a Kshs. 12,000,000/- loan facility granted to the 2nd Defendant/Respondent on 25th October 2004, and secured by a charge over the 1st Respondent's property **L.R. NO. 209/7414** aforesaid. The notice indicated that the property would be sold if the sum demanded, together with interest accrued as stated therein was not paid within the period stipulated in the notice. To pre-empt the disposal of the suit property, the Applicant re-negotiated the existing loan and accepted the Respondent's proposal that the same be rescheduled upon the granting of a further Kshs. 5 million (with interest) at the rate of 18% p.a and 25% p.a on any excess. The rescheduling of the loan resulted in the creation of a term loan payable over a 10 month period.

An earlier application to stop an threatened sale of the suit property, filed alongside the plaint, was dismissed. On 5th August 2009, the Respondent issued the Applicant with a three months statutory notice demanding payment of Kshs. 24,491,457.55 prompting the filing of the present application. It is the Applicant's contention that the arrears for which the statutory notice was issued were brought about by the Respondent's act of charging interest on the loan at a rate (or rates) way out of the rate agreed under the contract and/or allowable under the **Banking Act**. The Applicants consider the same to be unlawful, usurious, oppressive and uncontractual, citing **Section 44** of the **Banking Act** to support their case. The said provision reads as follows:-

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

Without providing the citations thereof, the Applicant has cited the following authorities in this regard.

1. **Joseph Murithi Gichohi –vs- Kenya Commercial Bank & Another.**

2. **Samaki Industries Ltd –vs- Bullion Bank Ltd.**

3. **Prof. David Musyimi Ndetei –vs- Housing Finance Company of Kenya Ltd HCCC No. 456 of 2006**

4. **Givan Okallo Ingari & Another –vs- HFCK Ltd**

Relying on the above authorities the Applicants submit that the Respondent has fettered and clogged the Plaintiffs/Applicants' equity of redemption, adding that neither the date at which the Applicants' loan became non performing nor the principal and interest accruing thereon have been determined or communicated to the Applicants.

The Applicants also raise the issue of defect in the charge document to challenge the exercise of the

chargee's power of sale, stating that it is not drawn in the format provided for under **Section 46** of the **Registered Titles Act,** it bears no payment date and does not specify the interest rate applicable. Flowing from the above, the Applicants submit that they have established a prima facie case against the Respondent, entitling them to the injunctive orders sought and the prohibition sought under **Section 52** of the **I.T.P.A.** They contend further that they are likely to suffer irreparable loss if the exercise of the power of sale is allowed to proceed, owing to fact that the property in dispute is sacrosanct and of a unique character, as is determinable from the value of the land itself, the developments thereon and its locality. Finally, the Applicants have submitted that the balance of convenience favours the granting of the injunction to preserve the suit property as the suit proceeds to final determination, to avoid the same being rendered a mere academic exercise.

In reply, the Respondents have submitted that the Applicants have neither established a prima facie case against the Respondents, nor have they demonstrated irreparable loss within the requirements of the celebrated case of **GIELLA –VS- CASSMAN BROWN LTD [1973] E.A 358,** and have come to court with unclean hands, given that there is no dispute that they owe the loan, have defaulted in the repayment thereof and continue in their default. Evidence of their admission of indebtedness and unfulfilled promises to repay the same has been furnished through annextures to the Replying Affidavit. Submitting that the rate of interest charged is contractual, based on the letters of offer and acceptance and the further charge executed between the parties herein, the Respondents, relying on the Court of Appeal holding in **MRAO LIMITED –VS- FIRST AMERICAN BANK LTD (CIVIL APPEAL NO. 39 OF 2002)** are of the view that a dispute on interest cannot be a ground to grant an injunction with a view to stopping the exercise of the chargee's power of sale. They cite also the provisions of **Section 52(1)** of the **Banking Act** which reads as follows:

"52(1). For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act (Cap 491) shall affect or invalidate in any way any contractual obligation between an institution and any other person".

As regards the form of the charge, the Respondents have submitted that the provision of **Section 46** of the **Registration of Titles Act** cannot be relied upon to defeat the chargee's right to exercise its power of sale in view of **Section 33(1)** of the same Act which allows for variation of the prescribed forms and provides, inter alia that:-

"…. any instrument in substance in conformity with the form annexed hereto shall be sufficient."

The Respondent further cites **Section 72** of the **interpretation and General Provisions Act (Cap 2)** which states that:-

"Save as otherwise provided, whenever a Form is prescribed by a written law, an instrument therefrom which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance or instrument or document or which is not calculated to mislead."

The Respondents' position as regards irreparable loss is that the same has not been demonstrated since the charged property became a commercial object when the same was pledged as a security for the borrowings and that any loss or damage as would arise from the exercise of the statutory power of sale would be adequately compensated in damages. Emphasizing that the Plaintiffs are not making any payments towards settling the loan with the result that contractual interest continues to accrue with an

adverse effect on the value of the charged property, the Respondent's position is that the balance of convenience tilts against the granting of the injunction and in favour of the Respondent, who stands to suffer more if the injunction is granted.

I have carefully considered the submissions made and authorities cited to support the rival positions herein. I am not persuaded that the Applicants have established a prima facie case with a probability of success against the Respondents. They have annexed to their submissions the persuasive decision of Kimaru J in **DUNCAN NDERITU WAMAE –VS- HOUSING FINANCE COMPANY OF KENYA LTD HCCC NO. 298 of 2009** in which several authorities relied upon by the Applicants were considered, among them the leading Court of Appeal decision of **MRAO –VS- FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS C.A. NO. 39 of 2002**. The Honourable Mr. Justice Kimaru found in favour of the application before him and granted an injunction. The Applicants before me have asked this court to do the same.

Considering the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale, Kwach JA (now retired) considered the principles set out in **Halsburys Laws of England Vol 32 (4th Edition)** and held, inter alia, that:-

"The mortgagee will not be restrained from exercising his power of sale because the account due is in dispute or because the mortgagor has began redemption action or because the mortgagee objects to the manner in which the sale is being arranged.
He will be restrained, however, if the mortgagor pays the amount claimed in court, that is, the amount that the mortgagee claims to be due to him, unless on the terms of the mortgage, the claim is excessive…"

In the case before Kimaru J, the Applicant had borrowed a sum of Kshs. 3,363,760, had faithfully paid a total of Kshs. 8,657,177.45 which, in his estimation, represented principle and interest chargeable as per the contract with an overpayment of Kshs. 27,695.59. The payments (and possible overpayment) notwithstanding, the Respondent bank in the **NDERITU WAMAE'S CASE** was still demanding an additional Kshs. 2,788,179.20 on account of interest.

The Applicants in the present suit do not dispute the debt or that they are in arrears in the repayment thereof. From the documentation placed before this court, it is clear that they have made offers to pay the same as calculated by the Respondents, even to the extend of making alternative financial arrangements to discharge the security, upon the payment of a lump sum as calculated by the Respondents. The fact that repayments were stopped and have not resumed is not denied by the Applicants, which leads the court to question whether they are entitled to the equitable remedies sought. It is trite that he who comes to equity must do equity and approach the court with clean hands. It has been submitted by the Respondents and I am inclined to agree, that the Applicants cannot be said to have done so. Theirs is a case which clearly distinguishes itself from the **DANCUN NDERITU WAMAE'S CASE (supra).**

In addition to not establishing a prima facie case, I find that the Applicants have not demonstrated irreparable loss that damages cannot adequately compensate. In view of the clear breach of the repayment terms, which breach is persistent and continuous, I am of the view that the balance of convenience would not favour Applicants.

In the premises, I find that the application fails and is hereby dismissed with costs. I accept the Respondent's contention that the alleged defects in the charge document are not material enough to defeat the Respondents' right to exercise its power of sale which I consider to have rightly accrued. In my considered view, the doctrine of lis pendens does not apply to this case.

DATED, SIGNED AND DELIVERED at NAIROBI THIS 29TH DAY OF JULY, 2011

M. G. MUGO

JUDGE

In the presence of:

Mr. Kariuki **For the Applicant**
Mr. Mutuli holding brief for Mr. Onguto **For the Respondent**