



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

Civil Case 526 of 2009

FARMERS PARTNER LIMITED1ST PLAINTIFF
ISAAC NJOGU KIRERA.....2ND PLAINTIFF
ZIPPORAH WAMBUI NJOGU.....3RD PLAINTIFF
VERSUS
BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

RULING

The plaintiffs filed suit against the defendant seeking orders of permanent injunction to restrain the defendant, its servants and/or agents from selling by public auction the plaintiffs' parcels of land. In the plaint, the plaintiffs pleaded that they had charged their properties to the defendant, being L.R. No. Nakuru Municipality Block 1(Langa Langa)/570, Nakuru Municipality Block 20/26, Nakuru Municipality Block 6/72 and Njoro/Ngata Block 1/101(*hereinafter referred as the suit properties*) to secure certain financial facilities. The plaintiffs contend that contrary to the loan agreement, the defendant unilaterally raised the rates of interest to an extent that the plaintiffs were unable to repay the amount advanced. The plaintiffs contend that the defendant's action was unconscionable, unlawful and contrary to the law. Contemporaneous with filing suit, the plaintiffs filed an application pursuant to the provision of **Order XXXIX** of the **Civil Procedure Rules** seeking orders of temporary injunction to restrain the defendant by itself, its servants or agents from selling by public auction or otherwise the suit properties. The grounds in support of the application are stated on the face of the application. The plaintiffs contend that the defendant had breached the terms of the loan agreement by charging rates of interest that were not agreed. The plaintiffs state that the defendant failed to keep proper accounts of the loan and thereby produced to the court accounts which were false, hazy and concocted. The plaintiffs argue that unless the defendant is restrained, they would suffer irreparable damage which will unlikely be compensated by an award of damages.

The application is supported by the annexed affidavit of Isaac Njogu Kirera, the Managing Director of the 1st plaintiff and the 2nd plaintiff in the suit. He swore a supplementary affidavit in further support of the application. In the said affidavits, he deponed that the plaintiff charged the suit properties to secure the sum of KShs.6,340,000/- from the defendant. He annexed copies of the charge to his affidavit. He stated that the 1st plaintiff maintained an account with the defendant's Nakuru branch. He was aggrieved that the defendant had in 2004, without consulting the 1st plaintiff, transferred the 1st plaintiff's account from Nakuru to Nairobi and thus caused the 1st plaintiff to suffer inconvenience, loss and damage. He deponed that as a result of the unilateral transfer of the 1st plaintiff's account, the 1st plaintiff's business was inconvenienced, leading the said business to suffer huge losses. He complained that from the time the account was transferred to Nairobi, the defendant had failed to furnish the plaintiffs with bank statements as a result of which the plaintiffs were kept in the dark in regard to the entries made in the said account of the 1st plaintiff. He stated that the defendant had charged exorbitant rates of interest in the said account,

which in his view were uncontractual. He deponed that he sought advice from the Interest Rates Advisory Centre (IRAC) recalculated the rate of interest charged by the defendant and reached the conclusion that the defendant had charged a rate of interest that was contrary to the provisions of **Sections 39** of the **Central Bank of Kenya Act** and **Section 44** of the **Banking Act**. He contends that from the said recalculation, it was evident that the 1st plaintiff owed the defendant a sum less than that which the defendant was demanding. In the premises therefore, the 2nd plaintiff urged the court to grant the temporary injunction sought pending the hearing and determination of the suit.

The application is opposed. The defendant's legal counsel corporate recoveries, Nereah Okanga, swore a replying affidavit in opposition to the application. He confirmed that indeed the plaintiffs charged the suit properties to secure sums of KShs.6,340,000/- and KShs.14,732,000/- in the years 1999 and 2001. He deponed that the 1st plaintiff was advanced a further sum of KShs.6,000,000/- and another ancillary facility in form of a credit card for the sum of KShs.400,000/-. He swore that the plaintiffs defaulted in repaying the amounts that were advanced to them contrary to the terms of the letters of offer and the instruments of charge. He stated that since 2003, the plaintiffs, and particularly the 1st plaintiff, had failed to operate the account, hence being in persistent default. He denied the plaintiffs' contention that the 1st plaintiff's account had been transferred from Nakuru to Nairobi. He insisted that the said accounts were still maintained at the defendant's Nakuru branch. What was transferred was the management of the accounts in light of the plaintiffs' persistent default. He denied that the defendant had charged uncontractual rates of interest as to entitle the plaintiffs to the interlocutory injunction sought. He swore that the statement of accounts which he exhibited in his affidavit reflected the true indebtedness of the plaintiffs, which was to the sum of KShs.36,868,124.54/- as at 13th July 2009. He asserted that the report by IRAC could not be relied on to override the defendant's statements of account, taking into consideration the terms and conditions agreed upon in the letters of offer and the plaintiffs' admission of the debt. He averred that the plaintiffs, having admitted to owing the defendant at least the sum of KShs.13,000,000/-, cannot come to court to seek orders of injunction to restrain the defendant from exercising its statutory power of sale. He deponed that no grounds were disclosed in the plaintiffs' application that could entitle the court to grant the orders of injunction sought. He urged the court to dismiss the application with costs.

At the hearing of the application, I heard rival arguments made by Mr. Nyakundi for the plaintiffs and Mr. Karori for the defendant. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. From the outset, this court would like to state that submissions made by counsel from the bar can only be considered by the court if it is supported by pleadings filed by the parties. In the present application, the issue for determination by this court is whether the plaintiffs have established a case as to entitle the court to grant them the injunction sought. The principle to be considered by this court in such circumstances is whether the plaintiffs have established a prima facie case with a likelihood of success. The court also has to take into account whether the plaintiffs would suffer irreparable loss that would not likely be compensated by an award of damages if the injunction sought is not granted. In the unlikely event that the court will be in doubt, it shall decide the case on a balance of convenience (see **Giella vs. Cassman Brown [1973] EA 358**).

Certain facts are not in dispute in this case. It is not disputed that the 1st and 2nd plaintiffs charged the suit properties to secure various loan facilities from the defendant. From correspondence exchanged between the plaintiffs and the defendant, and from the bank statements exhibited both by the plaintiffs and the defendant, it is evident that the plaintiffs defaulted in repaying the loan in the manner contemplated in the agreements that formed the basis of the advance of the loan amounts in question. It is clear that the basis of the plaintiffs' suit is that the defendant had charged exorbitant and excessive rates of interest in the said loan accounts. The plaintiffs contend that the defendant charged a rate of interest that was contrary to the law. In support of this argument, the plaintiffs annexed a report prepared by IRAC. I have perused the said report. It is apparent that the conclusions reached in the said report is made on the basis of certain assumptions made after the author of the said report had given an interpretation to certain sections of the **Banking Act** and the **Central Bank of Kenya Act**. The conclusions reached by the said report cannot in the circumstances of this case be said to be the true and correct reflection of the law cited as it relates to the rate of interest charged by the defendant to the loan accounts of the plaintiffs. I stand to be corrected, but I think a court of law can only reach a finding based on the agreement reached between the parties to such agreement and the applicable law as is understood by the court. In the circumstance of this case, it was clear that the author of the IRAC report ignored the agreement entered between the plaintiffs and the

defendant (*as contained in the letters of offer and the instruments of charge*) in making the conclusions contained in the report. At this interlocutory stage of the proceedings, I am not prepared to reach any definitive conclusion as to the correctness or otherwise of the said report. Suffice for me to state that I am not persuaded that the said report constitute prima facie evidence upon which this court can reach a determination that indeed the plaintiffs have established that the defendant charged a rate of interest that is not provided for in the agreement between the plaintiffs and the defendant or that such rate of interest is contrary to the law.

The plaintiffs seek equitable relief from this court in the nature restraining orders of injunction. As stated earlier in this ruling, for the plaintiffs to succeed in their application, they must establish a prima facie case. This court's evaluation of affidavit evidence adduced clearly establish that the plaintiffs have failed in their quest to persuade this court that they have prima facie case. It was clear to this court that the plaintiffs were seeking the exercise of this court's discretion on the basis of a dispute over the amount that is owed. It is now established law that a court cannot grant orders of injunction solely on the ground that the party who is seeking the order has established a case that there is dispute over the amount owed (see **Mrao Limited vs. First American Bank of Kenya Limited [2003] KLR 125**).

Further, it was evident that despite the plaintiffs' plea to the effect that the defendant had charged an uncontractual rate of interest, it was evident that the 1st plaintiff had, vide its letter dated 14th November 2008, admitted owing to the defendant at least the sum of KShs.13,000,000/=. If the plaintiffs indeed were candid in their application, and made a disclosure to the fact that they had admitted owing this amount to the defendant (*and then state how they have made an effort to liquidate the admitted sum*), this court, may be, would have been disposed to favourably consider their application. In the circumstances of this case, it was clear that it was established to the required standard of proof that the plaintiffs borrowed certain sums from the defendant, charged the suit properties to secure the same, and have defaulted in repaying the amount advanced together with the accrued interest. The plaintiffs cannot cry foul when the defendant seeks to realize the securities that were offered to it.

For the above reasons, I hold that the plaintiffs have failed to establish a prima facie case to entitle this court grant them the interlocutory injunction sought. Their application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 20TH DAY OF JANUARY 2010.

**L. KIMARU
JUDGE**