REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 560 of 2009

DR. ANDRAS ROZSA ……………………………………… 1ST PLAINTIFF/APPLICANT

DR. CATHERINE MASITSA SHILOVELE ……………… 2ND PLAINTIFF/APPLICANT

BAUHAUS LIMIMITED ………………………………………. 3RD PLAINTIFF/APPLICANT

VERSUS

CFC BANK LIMITED ………………………………..…….1ST DEFENDANT/RESPONDENT

CFC STANBIC LIMITED …………………………………. 2ND DEFENDANT/RESPONDENT

RULING

1. The applicants and the respondents entered into certain Banking arrangements through which the applicants were granted banking facilities. The applicant's properties namely **NAIROBI/BLOCK101/234, LR NO.12672/56 AND LR NO.12672/57** (herein after referred to as the suit premises) were charged by the respondents as security for the loans.

2. In this suit the applicants claim that the respondents are in breach of the contract by charging interest that was not agreed upon and by issuing notices threatening to exercise their statutory power of sale. The applicants also filed a chamber summons on 5th August 2009 under the provisions of **Order XXXIX of the Civil Procedure Rules** seeking for a temporary order of injunction to restrain the respondents from selling either by public auction or private treaty the suit premises until the suit is heard and determined.

3. This application is premised on the grounds stipulated on the body thereto and the matters deposed to in the supporting affidavit sworn by **Dr. Catherine Masitsa Shilovele** on 5th August 2009. These grounds and the matters contained in the affidavits of the applicants were further expounded by the submissions filed. According to the applicants they have established a prima facie case with a probability of success. The matters pleaded in the plaint clearly show that the defendants are in breach of the terms of lending contained in the letter of offer.

4. The letter of offer does not make reference to a guarantee and the charge over

NAIROBI/BLOCK/101/234 did not secure or cover the sums advanced under the guarantee. The guarantee was given by the 3rd plaintiff due to failure by the Standard Group to honour their undertaking and pay Ksh.4 million which they were supposed to pay to the plaintiff for onward payment to the loan account. There was no advance of money from the defendants to the 3rd plaintiff therefore no interest should have been charged on the guarantee. In any event even the letter of offer clearly indicated no interest rate was to be applied under the guarantee.

5. The respondents are also faulted for debiting the 3rd applicants accounts with the entire sum of 4.4 million which was secured by the legal charge thereby clogging their ability to pay the loan. The respondents are further accused of charging interest rates that was applicable to an over draft on the secured loan accounts. The applicants have also made several attempts to sell the suit properties by way of private treaties but the respondents have withheld the consent by the chargee which has further clogged the applicant's equity of redemption. Finally counsel for the applicants urged the court to find that the debt is disputed, and the respondents have not acted in the best interest of the applicants because the value of the properties charged is double the existing loans. On a balance of convenience the court should grant the interim order of injunction.

6. This application was opposed by the respondents; they relied on the replying affidavit sworn by **Hannah Ndarwa** on 19th November 2009. Counsel for the respondents also relied on their written submissions. The respondents denied clogging the equity of redemption and annexed correspondence where they had expressed their willingness to release the titles charged on terms that required the usual professional undertaking to pay the outstanding loans upon sale. The respondents were not given the professional undertaking to enable them release the titles. In any event a charge is not redeemed according to the borrower's terms. The applicants also indicated they were borrowing another loan from Equity Bank to take over the loan with the respondents. However nothing was forth coming. The respondents' claim that they kept on bending backwards to allow the applicants redeem the loans.

7. According to the respondents, an injunction can not issue in this matter, the applicants'

ultimate objective is to stop the sale by the chargee, so that they can sell by private treaty. This clearly shows the applicants cannot suffer irreparable damage. Moreover the plaintiff's case does not disclose a prima facie case with a probability of success for reasons that northing will turn out after the court has issued an order of an injunction. Will the order of injunction remain in force forever? Counsel submitted that an equitable order cannot be issued in a vacuum as equity does not act in vain.

8. The dispute that is apparent from the plaintiff's case is one based on allegations that the respondents charged interests on the guarantee which interests was transferred to the secured accounts that are secured by the suit premises. It has now been a settled principle in law that a dispute over the amount owing to the chargee is not a ground for granting on an order of injunction. Moreover a glance at the charge documents shows that the respondents are entitled to consolidate or set off the accounts of the borrower

9. Both parties relied on several authorities; I will refer to some of them in the course of my analysis. The thrust of the matters raised in this application which fall for determination is whether the applicants are entitled to the orders sought. The principles which guide the court on whether or not to grant the orders of injunction are well settled in the oft' cited case of **Giella vs Cassman Brown and Company Limited 1973 EA 358**. The applicants case must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise, and if in doubt the court can determine the matter on a balance of probability.

10. The Court of appeal has explained what constitutes a prima facie case in their Lordship's decision in the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KLR 125** the court of appeal held that:

> ***"A prima facie case in a civil application includes but is not confined to a "genuine and arguable case". It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter***."

11. It is determinable from this case that the applicants were granted banking facilities or loans which were secured by the charges created over the suit premises and a guarantee was also

executed by the 3rd applicant. The applicants complain is that interest rates were charged on the unsecured loan by a facility under the guarantee which interests were transferred to the secured loans thereby clogging the applicant's Equity of redemption. The applicants also alleged that the respondent's refusal to give consent for the applicants to sell the charged property by way of private treaty clogged their equity of redemption.

12. It is also discernable from the pleadings that the applicants do not deny that they have defaulted in payment. While determining similar facts in the case of **Habib Bank AG Zurich v Pop- in (K) Limited & Others 1989 LLR 3069 (CAK)** the Court of Appeal cited with approval the Text by **Halsbury's Laws of England Vol.32 4th Edition** paragraph 725 as per the judgment of Kwach JA in these words;

> ***"Notwithstanding the stand taken by Mr. Nagpal, in the ultimate analysis this is a suit brought by chargors to restrain a chargee from exercising its statutory power of sale under the charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service statutory notice is admitted. I have always understood the law to be 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."***

13. As stated in the above decision, l have no doubt in my mind that the law is now settled that an injunction cannot issue solely on the ground that there is a dispute as to the amount due under the mortgage. Further more the applicants willingly signed all those securities, the charge documents and the guarantee thereby agreeing to be bound by the terms and conditions of these agreements which created rights and obligations. Any party who fails to comply is in breach of a contract which in this case if proved can be compensated for in damages. The allegations of breach of contract by the applicants are not apparent on the face of the record. A glance at the charge documents clearly shows that the respondents have a right to consolidate the securities.

14. The applicant's case does not meet the threshold of granting an interim order of injunction. In the result the application dated 5th August 2009 is hereby dismissed with costs to the respondents. The interim order of injunction issued is hereby discharged.

RULING READ AND SIGNED ON 19TH FEBRUARY 2010 AT NAIROBI

M.K. KOOME
JUDGE