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

Civil Case 617 of 2006

FREDRICK GACHUHI NGATIRI ……………………….. PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY
OF KENYA LIMITED ………………………………….. DEFENDANT

R U L I N G

By an application made by Chamber Summons dated 20th January, 2010 and taken out under **Order XXXIX Rules 1** and **2** of the **Civil Procedure Rules; Section 63** of the **Civil Procedure Act** and all other enabling acts of law, the applicant seeks orders:-

1. ***THAT the court do issue an order of temporary injunction restraining the defendant, its servants, agents and/or auctioneers from advertising for sale, transferring, taking possession or in any other way dealing with L.R. No. Lari/Kirega/1545 pending the hearing of this suit on 8th February, 2010.***
2. ***THAT this court be pleased to issue interim orders in terms of the above prayer pending the inter partes hearing of this application.***
3. ***THAT the costs of this application be in the cause.***

The application is supported by the annexed affidavit of Fredrick

Gachuhi Ngatiri, and is based on the grounds that the main suit is fixed for hearing on 8th February, 2010; that the property is scheduled for sale on 23rd February, 2010; that the defendant's actions have caused unnecessary anxiety on the plaintiff leading to his inability to prepare for the hearing of case on the scheduled date; and that unless the defendant is restrained from advertising the suit property for sale, the plaintiff's health stands at a great risk. It is further the applicant's case that the issue of a notification for sale by the respondent when there is an early hearing date amounts to an interference with the court process.

Opposing the application, the respondent filed a replying affidavit sworn by one Joseph Kania, its Manager, Legal

Services, on 3rd February, 2010. In that affidavit, Mr. Kania sets out the history of the matter, starting with the charging of the suit premises in favour of the respondent in 1992 and the creation of a further charge in 1993. Upon the applicant's failure to service the mortgage account, the applicant's indebtedness to the respondent had risen to Kshs.7,455,822.35 as at 30th April, 2009. The applicant had not made any attempts to settle the outstanding amount, and the last time he made any payment was on 11th February, 2000.

Mr. Kania further deposes that the applicant had filed a similar application to this one on 10th November, 2006, on the basis of which the respondent was restrained from advertising the suit property pursuant to the statutory notice dated 17th March, 2006. However the respondent issued a fresh notice dated 21st February, 2008, which now forms the basis for the present intended sale. Mr. Kania contends that it is the applicant who is abusing the court process by coming to a court of equity which he is not doing equity. He therefore prays that the application against the respondent be dismissed with costs.

At the hearing of the application, Mr. Wambugu for the applicant argued that even if the applicant owes the respondents any amounts, such amounts are not as much as the respondents contend, and the true amount owing to the respondent will become clear only after a full trial. He then submitted that the true quantum due to the respondent was a triable issue. Counsel further argued that the suit property had been advertised on 8th February, 2010 and submitted that if the applicant was not granted an injunction as prayed, he would suffer irreparable loss.

On the other hand, Mr. Sagana for the respondent referred to an earlier injunction application filed by the applicant on 2006, seeking similar orders to those sought in this application. He then referred to the ruling of Hon. Justice Okwengu on the former application and submitted that the injunction order issued by the learned Judge in the said application was conditional, and to raise the same issues dealt with in that application offends the doctrine of *res judicata.* Since the respondents were left at liberty to serve a fresh statutory notice on the plaintiff, the only issue in the present application is whether such a fresh notice had been filed. Counsel then submitted that such a fresh notice had been issued and its validity was beyond dispute. He further submitted that the applicant had never paid a single installment since 2000 and therefore he was not deserving of an equitable order. He then referred to **NATIONAL BANK OF KENYA LIMITED** v. **SHIMMERS PLACE, CIVIL APPEAL NO. 26 OF 2002** and submitted that the statutory right of charge should only be restricted to ensure that a proper statutory notice is issued. He asked the court to dismiss the application with costs.

In reply, Mr. Wambugu reiterated that the issue of interest can only be dealt with at a full hearing, and that the respondents had not pleaded that they would suffer any prejudice if the injunction was issued. Although the respondent had pleaded a multiplicity of suits, the first suit was dismissed for non attendance, and a mistake of Counsel should not be visited upon the client. Mr. Wambugu finally invited the court to consider the amount demanded *vis-à-vis* the amount

borrowed.

Having considered the application, the supporting and replying affidavits, the submissions of both Counsel and the authorities they cited, I take the view that the main issue for determination is whether the applicant has made out a case for the grant of an interlocutory injunction. In the leading case of **GIELLA** v. **CASSMAN BROWN & CO. LTD. [1973] E.A. 358,** it was held that the conditions for the grant of an interlocutory injunction were well settled in East Africa:-

> ***"First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."***

With regard to the 1st condition, Mr. Wambugu for the applicant was very forceful and articulate in his argument that even if the applicant owes the respondents any amounts, such amounts are not as much as the respondents contend, and the true amount owing to the respondent will be determined only after the trial. It was also his case that the issue of interest can only be dealt with at the hearing. These submissions render the issue beyond peradventure that the applicant's preoccupation is not so much with liability to pay, but the quantum to be paid. But it is clear from both principle and authority, that no amount of dispute as to the amount of money payable by the applicant can justify the grant of an interlocutory injunction. That principle is clearly expressed in Halsbury's Laws of England, 4th Edition, Volume 32 at paragraph 725 wherein it is stated:-

> ***"The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began 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 approach was adopted by the Court of Appeal in **LAVUNA & ORS.** v. **CIVIL SERVANTS HOUSING CO. LTD. & ANOR. [1995] LL R 366 (CAK)** in which Kwach, J.A. said:-

> ***"… 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."***

In the instant case, there is a dispute especially surrounding the interest payable. In a ruling made by Okwengu, J. on 22nd November, 2007 in an application by the applicant seeking orders similar to those sought in this application, the learned judge found as a fact that there was clear admission that the applicant obtained a loan from the respondent and mortgaged the suit property as security for repayment of the loan. It was equally clear that from the year 2000, the applicant made no payments towards the repayment of that loan, and instead he disputed interest and certain charges

levied on the loan. The court found that according to the calculations done by Interest Rate Advisory Centre as exhibited by the applicant, even if the disputed charges were to be excluded, there was still an amount of Kshs.633,286/96 due and payable by the applicant to the respondent in respect of the loan. The applicant had admitted as much but blamed the respondent for refusing to accept his proposals for payment of the outstanding amount.

For those reasons, the court found that the applicant had defaulted in the repayment of the loan and that the respondent was entitled to exercise the mortgagee's statutory right of sale. Unfortunately, the statutory notice which the respondent had issued was wrongly addressed and the applicant never received it. The court therefore granted an interlocutory injunction only to the extent of restraining the respondent from advertising for sale, selling or transferring the suit property in exercise of the respondent's power of sale pursuant to the statutory notice which was never received. However, the court made it clear that the respondent was at liberty to serve a fresh statutory notice on the applicant. This is exactly what the respondent has done, and this time round the applicant received that notice and this set in motion the chain of events which culminated in the present application.

It is apparent from the face of the record that the applicant has never made any payment since the year 2000 and he is alive to that grave omission. Unfortunately he sits by doing nothing about his indebtedness, but the moment the creditor makes a move to realize its security, the applicant moves with alacrity to obtain a restraining order. This is a court of equity, and he who comes to equity must do equity. A debtor who deliberately refrains from meeting his contractual obligations fails to do equity and should not expect an equitable remedy from a court of equity. That is the applicant's lot in this matter. Upon his failure to meet his obligations as they arise, he has also failed to demonstrate a prima facie case with any probability of success as required in **GIELLA'S CASE.**

As for the second condition spelt out in **Giella's case**, the applicant is dealing with a well endowed financial institution. If the suit property is improperly sold, the respondents will be in a position to fully compensate him, and therefore he will not suffer any irreparable injury which cannot adequately be compensated by an award of damages. If I was in doubt, I would still find that the balance of convenience lies in allowing the sale of property since the interest keeps accruing and whether sooner or later, such interest may escalate to a point where it will exceed the value of the property.

For the above reasons, I find that the applicant has not satisfied the conditions for the grant of an interlocutory injunction, and that his application has no merit. It is accordingly dismissed with costs to the respondent.

Dated and **delivered** at **Nairobi** this 18th day of February, 2010.

L. NJAGI

JUDGE