



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

Civil Suit 516 of 2009

OMUREMBE IYADIPLAINTIFF

VERSUS

**AGRICULTURAL FINANCE CORPORATION.....1ST DEFENDANT
SHADY ACRES LIMITED2ND DEFENDANT**

RULING

1. The plaintiff admits that he entered into a loan agreement with the 1st defendant in which the 1st defendant advanced the plaintiff a sum of Ksh.14 million and as security for the said loan, a charge was created over property known as House Villa No 8 on LR NO.1008/59 and LR NO.2116/262 KITALE and LR NO.209/12131 INDUSTRIAL AREA (herein after referred to as the suit premises).
2. In this suit the plaintiff is seeking for orders of injunction against the 1st defendant and certain declarations as sought in the plaint. Simultaneously with the filing of the suit, the plaintiff filed a chamber summons under order XXX1X of the CPR, seeking for an order of injunction restraining the 1st defendant from selling, transferring, offering for sale or dealing in any way with Villa No. 8 constructed on LR NO. 1008/59 KAREN. Secondly, the 1st defendant be restrained from charging LR NO. 1008/59 House No.8 KAREN to secure the loan of 14 million which was advanced to the plaintiff pending the hearing and the determination of this suit.
3. This application is premised on the grounds that the plaintiff has not been in breach of any terms and conditions of the loan offer. Thus the defendant cannot invoke the rights to sell

the plaintiff's property when the 1st defendant is sufficiently secured by a charge over LR NO.2116/262 MILIMANI KITALE and LR NO. 209/12131 INDUSTRIAL AREA. Both the properties have a combined value of 18 million which is in excess of the loan. These grounds are elaborated further by the matters deposed to in the supporting affidavit by the plaintiff.

4. According to the plaintiff, on 11th April 2008 he obtained a staff loan from the 1st defendant in the sum of Ksh.14 million, and as security for the loan, the plaintiff claims that a charge was registered in favour of the 1st defendant over LR NO. 2116/262 MILIMANI KITALE and LR 209/12131 INDUSTRIAL AREA which according to the plaintiff are adequate securities. The plaintiff therefore insists the 1st defendant should be restrained from creating another charge over the House No.8 on LR NO. 1008/59 using the assignment and power of Attorney which the plaintiff had executed in favor of the 1st defendant.

5. Moreover, the plaintiff claims that he was an employee of the 1st defendant and when his services were terminated, he ought to have been given three months from the date of termination of employment to redeem the loan account. Since he was not given the option, the 1st defendant cannot sell the property. The plaintiff further would like to sell the property by private treaty so as to recover the colossal sums of money he extended in the development of the Karen property.

6. This application is opposed by the 1st defendant, Counsel relied on the replying affidavit by **Rose Onchanda** the Corporation Secretary of the 1st defendant sworn on 28th July 2009. According to the 1st defendant, the plaintiff applied for a loan of Ksh.14 million which was advanced in accordance with the letter of offer. The loan was to finance the plaintiff to purchase of town house No.8 on LR NO.1008/59/NAIROBI. The securities held were:-

(i) An assignment upon Town House Villa Number 8 on Land Reference Number 1008/59 in Nairobi pursuant to which the Applicant assigned to the 1st respondent all his rights, title, interest, benefit, advantage, property claims, demands whatsoever, present and future. A copy of the said assignment is annexed hereto and marked "**RAO 1**" (page 1-6).

(ii) An irrevocable power of attorney which conferred upon the 1st Respondent the power to deal with Town House Villa Number 8 on Land Reference Number 1008/59 in Nairobi, in any manner that the 1st Respondent deemed fit. A copy of the said power

of attorney is hereto annexed and marked “**RAO 2**” (PAGES 7-9);

- (iii) Charges upon I.R. No. 21325 (L.R. No. 2116/262) and I.R. No. 62214 (L.R. No. 209/12131) whose copies have been annexed to the Applicant’s supporting affidavit as annexure “**OI 3 ‘a’ and ‘b’**”.
- (iv) Upon completion of construction of Town House Villa Number 8 on Land Reference Number 1008/59 in Nairobi, a charge would be created therein.

7. Thus the 1st defendant contends that they are entitled to charge, dispose of or deal with House No.8 in any way. The plaintiff has not complied with the terms of the loan agreement. Having failed to pay the balance of the purchase price to the 2nd respondent. The 2nd respondent who is the vendor has declined to release the lease of the house to enable 1st defendant charge it in terms of the loan agreement. The plaintiff has also failed to pay the monthly installments towards the loan which has continued to accrue in arrears and interest. The balance of the purchase of House No.8 amounting to Ksh.4.865,600/- is also accruing interest. The 1st defendant is entitled to recover the loan according to the contract entered with the plaintiff.

8. The above is the background information and the summary of the rival submissions by both counsel for the plaintiff and the respondent. The thrust of the matter that fall for determination is whether the applicant is entitled to the orders sought. The principles to 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 applicant 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 would determine the matter on a balance of probability.

9. The Court of Appeal has further explained what constitutes a prima facie case in the case in the case of; **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**

“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.”

10. It is not in dispute that the plaintiff was offered the loan. He has been in breach of the repayment of the monthly installments. The plaintiff also admits that he executed several documents as security for the loan, those are the power of attorney, the assignment of the interest in the Karen house, the charge over the Karen house and the other two properties. By advancing the grounds that the securities comprising the Kitale and Industrial area property are adequate is tantamount to the plaintiff asking the court to rewrite a contract between him and the 1st defendant.

11. The plaintiff willingly signed all those documents; there is no allegation of coercion, fraud or undue influence by the defendant. The Court of Appeal held in the case of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) and Another [2001] KLR 112 at p.118** the Court of Appeal held:

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of FINA BANK LIMITED VS SPARES & INDUSTRIES LIMITED (Civil Appeal No.51 of 2000) (unreported).

It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain; it is ordinarily no part of equity’s function to allow a party to escape form a bad bargain.”

12. Being guided by the above principles, I find the relationship between the plaintiff and the defendant is clearly governed by the several documents executed between them. Those documents created rights and obligations and any party failing to comply is in breach of a contract which can adequately be compensated for in damages upon prove. I have gone through those documents I am not satisfied that the 1st defendant has done anything that is not provided for in those documents.

The plaintiff’s case does not meet the threshold of granting an interim order of injunction.

13. Accordingly the application dated 21st July 2009 is hereby dismissed with costs to the 1st respondent. The interim ex-parte order of injunction issued on 22nd July 2009 is hereby discharged.

RULING READ AND SIGNED ON 12TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE