REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 246 of 2004

JOHN KINYANJUI KANYA …… PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD. ……... 1ST DEFENDANT
DIKEMWA ENTERPRISES LTD. ……. 2ND DEFENDANT

R U L I N G

By this application, the Plaintiff seeks injunctive orders against the Defendants as follows -

1. ***That this honourable Court be pleased to issue order of temporary injunction restraining the Defendants, their servants and/or agents from selling or otherwise disposing of all that parcel of land known as L.R. No. 4953/1990 and L.R. No. 4953/1991 until the hearing and determination of this suit.***
2. ***That this honourable Court be pleased to issue an order of prohibition prohibiting the Registrar of Lands from transferring the Title to the above parcels of land pending the hearing and determination of this application.***
3. ***That this honourable Court be pleased to issue an order of prohibition prohibiting any further dealings with the Title to the above parcels of land pending the determination of this suit.***
4. ***That this honourable Court be pleased to order that accounts be taken within 35 days from the date of the order to comply with the Court order dated 23rd July, 2004.***

The application is brought by a Chamber Summons dated 29th July, 2009, and is made pursuant to **Order XXXIX Rules 1, 2** and **9** of the **Civil Procedure Rules,** and **Sections 3 A** and **63 (c) and (e)** of the **Civil Procedure Act.**

The application is supported by the annexed affidavit of the Plaintiff himself, John Kinyanjui Kanya, and is based on the grounds that –

(a) The Plaintiff has completed payment of the loan but the 1st Defendant has refused to reconcile accounts and is apparently intent on disposing the Plaintiff's property fraudulently by private treaty.

(b) The Plaintiff repaid the 1st Defendant's loan despite the fact that the 1st Defendant has not furnished him with proper accounts or information on the operation of the loan and overdraft accounts or the interests and other charges applied.

(c) The Plaintiff's business was frustrated by the arbitrary freezing of the overdraft account and subsequent closure of the loan account in breach of the loan agreement and the terms of the charge

which conduct constituted breach of contract and was directly responsible for the delay in repayment of the loan.

(d) That the 1st Defendant has maintained different and varying accounts and has made contradictory demands in breach of contract and in bad faith.

Opposing the application, Nereah Okanga, the 1st Defendant's Legal Counsel in Corporate Recoveries Department, swore a replying affidavit on 9th October, 2009. In that affidavit, she deposes that by a charge dated 21st July, 1999, the Plaintiff charged his properties which are the subject matter of these proceedings. A copy of the charge is annexed to her affidavit. She further avers that the Plaintiff and one Elizabeth Wanjiku Kinyanjui, concurrently executed a guarantee in respect of the said advance. She then states that the Plaintiff has always been aware of the existence of the charge and throughout the period of repayment default been aware of the 1st Defendant's intention to realize its charged property. She further states that the terms of the advance were contained in a charge instrument and there was no requirement of service of notice prior to review of interest rates, and that the interest rates were at all times levied in accordance with the law and the lending agreement.

The deponent further states that the borrower, in default of his repayment obligations under the subject loan accounts, led to his accounts becoming dormant and overdrawn. She believes it to be true that the bank's right to realize its security has crystallized as a result of a default in repaying the loan. She annexed copies of correspondence from the Plaintiff making various proposals for setting the outstanding debt and a copy of the Statutory Notice. Finally, she averred that the Plaintiff had not complied with the said notice and that the suit property had been sold in accordance with the law. She also attached copies of the documents evidencing the sale.

The parties herein, through their respective Advocates, filed written submissions which the Court has considered. The issues arising for determination are whether there was the relationship of a borrower and a lender between the Plaintiff and the 1st Defendant; whether the Plaintiff offered his property by way of security for repayment of the loan; whether the Plaintiff repaid the loan; and if not, whether the alleged sale of the security held by the 1st Defendant was lawful. From the record, it is common ground that the Plaintiff indeed borrowed a sum of money from the 1st Defendant and offered some properties by way of security. The contentious issue remains whether the Plaintiff repaid the loan as alleged or at all and whether the subsequent sale of the property by the Bank by way of realizing the security was lawful.

The Plaintiff's complaint against the Bank is that the loan agreement was for a term of 36 months and the interest was agreed upon at 4% above the Bank's base rate. This was revisable by the Bank subject to the Bank giving the borrower one month's notice in writing of the revised instalments of the principal and interest. However, the Bank subsequently proceeded to revise interest rates without the agreed notice and proceeded to issue instructions for the sale of the Plaintiff's property despite renegotiations of the facility. Furthermore, the Bank arbitrarily amalgamated the Plaintiff's personal account and loan account.

From these pleadings, the real difference between the parties boils down to accounts. Whereas the Bank claims what it considers as money owed to it, the Plaintiff takes the position that he has paid all that he owes to the Bank. As a demonstration of that instance, in a letter dated 16th September, 2008, addressed to the Bank, he wrote that –

"… I have since then struggled and struggled hard to pay the debts to the extent that the principal outstanding debt has since been cleared.

I therefore request the Bank to discharge its obligation and release the two Titles quoted above that I offered as securities for the said facilities …"

In my view, this was an express admission by the Plaintiff that what he had cleared was the principal debt and

that, by implication, the interest was yet to be paid. As long as any amount is left unpaid and outstanding, even if it be interest alone, the lender is entitled to execute by realization of the security. The Plaintiff's allegation that the Bank revised the interest rates unilaterally without informing him finds a ready answer in Clause 2 of the charge document which states as follows –

"The chargor <u>shall pay commission, interest, fees and charges</u> to date of payment (as well after as before any demand or judgment on the bankruptcy or liquidation of the chargor) <u>at the rate and upon the terms from time to time agreed with the bank or, if not so agreed, at such rate or rates</u> (not exceeding any maximum permitted by law and subject to a minimum rate of six per cent per annum over the base rate of the bank from time to time) <u>as the bank may, in its absolute discretion, determine</u> with power for the bank to charge different rates for different accounts. Interest shall be calculated on daily cleared balances and debited monthly by way of compound interest according to the usual mode of the bank but without prejudice to the right of the bank to require payment of such interest when due." (Emphasis added)

From this Clause, it is obvious that the Bank expressly reserved the right to revise interest rates in its absolute discretion even without the concurrence of the Plaintiff. The Plaintiff executed the charge document willingly, thereby binding himself to all the Clauses therein, including the Clause as to the variation of the interest rates without reference to him.

The complaint that the Bank, further, unilaterally amalgamated the Plaintiff's accounts also finds a ready answer in Clause 22 of the charge document which provides that –

"The Bank may, at any time and without notice or demand and notwithstanding any settlement of account or other matter whatsoever, combine or consolidate all or any then existing accounts … in the name of the Bank (whether current, deposit, loan or of any other nature whatsoever, whether subject to notice or not and in whatever currency denominated) of the chargor alone or jointly with others …"

By this Clause, the Bank clearly had the right and authority to consolidate the Applicant's accounts.

Against that background, the law is very clear that no amount of dispute as to the sums of money owed by an Applicant can warrant the grant of an interlocutory injunction. Provided that an Applicant is indebted to the Respondent in whatever way, the Respondent is entitled to its remedies, including realization of security, and the Court cannot stand in its way. This principle finds expression in Halsbury's Laws of England, 4th Edition, Volume 32 at paragraph 725 where it is stated as follows –

"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 amounts claimed into Court and that is the amount which the mortgagee claims to be due to him unless on the terms of the mortgage the claim is excessive."

The philosophy expounded in this statement has been adopted by the Courts in this country. Suffice it to refer to the case of **<u>LAVUNA & ORS.</u> v. <u>CIVIL SERVANTS HOUSING CO. LTD. & ANOR.</u> [1995] LLR 366 (CAK) Kwach, J.A.** stated as follows –

"… 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."

A dispute as to the amount owing cannot, therefore, constitute a basis for the grant of an interlocutory injunction.

Some two side issues arose from the submissions of Counsel. The first one was that by a consent dated 23rd July, 2004, the parties had, among other things, agreed to take accounts and that the alleged sale in this matter took place before such accounts were taken, and in breach of the Court order which was therefore contemptuous of the Court. I have scrutinized the Court record on that issue. Whereas it is correct to observe that there was a consent along the stated

lines, the Court does seem to have adopted the consent as its order. To claim that there was a Court order is, with respect, stretching the issues a little too far. On the other hand, the very agreement to take accounts is a demonstration of the existence of a dispute as to the amount owing which, alone, cannot forestall the exercise by the mortgagee or chargee of its statutory power of sale.

There is a further allegation that the Defendant's Advocate did not give the mandatory three (3) month's notice before executing the sale of the Plaintiff's properties. This is a misconception which arises from the wording of the Defendant's Advocate's notice. The said notice read in part – **"As Advocates for and on behalf of the said Barclays Bank of Kenya Ltd., we hereby require you to pay to them or to us forthwith the said sum of Kshs.21,970,924.89 together with interest as aforesaid, bank charges and costs and we hereby give you notice that if you make default in doing so for 90 days after service of this notice the said Barclays Bank of Kenya Ltd. will sell the above pieces or parcels of land …".**

In my view, this wording is as compliant as should be. The expression "default in doing so for 90 days after service of this notice" means, in my view, the same thing as "default in doing so within 90 days after service."

Finally, it was also suggested that the Statutory Notice was served on the wrong address. From the records available on the Court file, the correspondence exchanged between the Bank and the Plaintiff shows that the address used by the Defendant's Advocates was the same address always used by the Defendant while communicating with the Plaintiff. I don't find that there was anything wrong with the address to which the notice was sent.

Arising from the above observations, I find that the Plaintiff has not made out a case in satisfaction of the conditions laid out in **GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358** for the grant of an interlocutory injunction. For these reasons, the Plaintiff's application is hereby dismissed with costs.

It is so ordered.

Dated and **delivered** at **Nairobi** this 21st day of May, 2010.

L. NJAGI
JUDGE