REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO 136 OF 2006

CHARLES NJIHIA NGANGA…....…………………PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA………….....1ST DEFENDANT

ROBERT WAWERU MAINA.………………2ND DEFENDANT

RULING

I have before me in this suit an application brought by the plaintiff under **Section 3A** of the **Civil Procedure Act, Order 39 Rules 1(a), 2, 3(1) and 9** of the **Civil Procedure Rules** as well as **Sections 74** and **159** of the **Registered Land Act** seeking an injunction to restrain the defendants from selling the plaintiff's piece of land situate in Nakuru Town and known as **Title No. Nakuru Municipality/ Block 18/26** under its powers of sale in the charge by the plaintiff over it in favour of the first defendant (the charged property) until this suit is heard and determined. The application is based on three grounds. The first one is that despite the Principal debtor, Oil Crop Development Ltd's being in an advanced stage in securing funds from a third party and therefore having the financial ability to fully repay the amount due to the first defendant, the first defendant has given him notice of its intension to realize the charged property. The second ground is that the proposed sale flouts **Section 65(2)** of the **Registered Land Act**. The third and last ground is that, contrary to the in duplum rule in the Banking Act, the sum of Kshs.18,579, 384.50 demanded by the first defendant is more than three times the principal sum advanced and this is due to the exorbitant and unapproved interest charged on the amount due contrary to **Section 44** of the **Banking Act**.

Basing himself on the averments in the amended plaint and the affidavit in support of the application, Mr. Ndubi for the plaintiff submitted that on the 12th November, 1998 the plaintiff executed a guarantee and a legal charge over the charged property guaranteeing the repayment of a Kshs.5 million loan advanced by the first defendant to the Principal debtor. Due to environmental challenges the Principal debtor's license was cancelled in 2001 thus forcing the Principal debtor to fall into arrears in the loan repayment. He added that the plaintiff's situation was made worse by the first defendant's application to the principal sum of illegal interest not approved by the Minister for Finance as required by **Section 44A(1)** of the **Banking Act.** Whereas the charge provides for interest at the rate of 4% above the base rate, he claimed that the first defendant has been charging 15.5% above the base rate. He further argued that, contrary to in duplum rule as stated in the Banking Act, the first defendant is charging punitive interest on a dormant account. He cited the case of **John Nyabuto Vs Co-operative Bank of Kenya Ltd, Kisumu HCCC No. 49 of 2003** in support of these contentions.

Despite overcoming the environmental challenges and having crops worthy more than the amount due to the first defendant and arranging with a third party to repay the loan, Mr. Ndubi further contended, the

first defendant has through the second defendant served is client with notice to realize the security and thus frustrate the Principal debtor's efforts to repay the amount due. He further claims that the intended exercise of the first defendant's statutory power of sale is illegal for failure to serve the plaintiff with notice under **Section 65** of the **Registered Land Act**. As the charge document has not given the redemption date, he contended that the first defendant should have demanded from the plaintiff under that section the amount due before serving him with the statutory notice under **Section 74** of the **Registered Land Act**. In the premises he concluded that the plaintiff is not only entitled to the injunction sought but also to the prayers sought in the plaint for a declaration that the intended sale of the charged property is in breach of the express legal provisions and therefore null and void and a permanent injunction to restrain the sale.

The application is strongly opposed. Basing himself on the averments in the replying and further affidavits of Nereah Okanga, Mr. Mogere, counsel for the defendants, submitted that the plaintiff is not deserving of the injunction he seeks for three main reasons. First, that the plaintiff having not alleged illegality in the first defendant's exercise of its statutory power of sale under the charge, this suit is incompetent. Secondly, that the plaintiff is guilty of material non-disclosure in that he has not stated the existence and extent of the debt due and the terms of the charge and the Deed of Personal Guarantee. Thirdly, that the claim of an alleged dispute in the amount due does not entitle the plaintiff to the injunction sought. He referred me to the copies of the demand notices annexed to the further affidavit sent to both the plaintiff and the principal debtor. Though the ones sent to the plaintiff were not collected, they are deemed to have been served as the address used is the one given in the charge document. The plaintiff's claim therefore that he was not served with notice under **Section 65** of the **Registered Land Act** is patently false.

Citing the case of **Daniel Kamau Mugambi Vs Housing Finance Company of Kenya Ltd. [2006] eKLR** Mr. Mogere submitted that **Section 44** of the **Banking Act** deals with bank charges and not interest. Even if it dealt with interest, he said, by virtue of **Section 52(1)** of the **Banking Act** the contractual obligations under the charge are not vitiated and the plaintiff is liable to fully repay the loan. As regards the in duplum rule introduced by **Section 44A (6)** of the **Banking Act** which came into force in 2007 he submitted that the amount due that year was Kshs.11 million. Therefore under that rule the first defendant is entitled to charge up to Kshs.22 million but it is demanding only Kshs.18 million. He urged me to dismiss the application with costs.

I have considered these rival submissions and read the authorities cited. This being an interlocutory application, I cannot at this stage, having not heard evidence in the matter, decide any issue conclusively. To be able to determine the application, however, I have to briefly resolve the issues raised. The first one is the allegation that the Principal debtor is capable of repaying the amount due if given time. That is obviously no ground upon which a court of law can grant an injunction. That is a matter to be put to the chargee and if it is reasonable I am sure the chargee will grant it.

The second ground is that the first defendant has flouted **Section 65(2)** of the **Registered Land Act**. That section provides that:

" **A date for the repayment of the money secured by a charge may be specified in the charge instrument, and where no such a date is specified or repayment is not demanded by the chargee on the specified date the money shall be deemed to be repayable three months after the service of a demand in writing by the chargee."**

The charge document specifies the date of repayment of the loan as the 7th day after the date of the charge. The date of the charge is not specified but it is shown as having been registered on 12th November 1998. As the amount due was not demanded on the 7th day after that date it is the second part of the above provision that is applicable to this case. From the letters exhibited by the further replying affidavit which Mr. Ndubi for the plaintiff said nothing about, I am satisfied that notice was duly given under **Section 65(2)** of the **Registered Land Act**. That ground therefore also fails.

The third and main ground is that the first defendant has, in contravention of the **Banking Act,** charged

illegal interest which is also over and above that specified in the letter of offer. Mr. Mogere urged me not to entertain this contention as this is a dispute over the amount owing which cannot entitle a plaintiff to an injunction. That is in line with the Court of Appeal decision in **Joseph Okoth Waudi Vs National Bank of Kenya, C.A. No. 77 of 2004 (Mombasa)** in which it stated:-

"**It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dipute, or because the mortgagor has began redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It 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 it, unless, on the terms of the mortgage, the claim is excessive."**

See also **32 Halsbury's Laws of England 4th Edition at page 725, Lavuna & Others Vs Civil Servants Housing Co. Ltd & Another, Civil Appeal No. 14 of 1995 (CA)** and **Middle East Bank (K) Ltd Vs Miligan Properties Ltd Civil Appeal No. 194 of 1998**. The Justification for this rule was stated by the Court of Appeal in **Ng'ayo Traders Ltd Vs Savings & Loan (K) Ltd Civil Application No. 165 of 2005 (UR. 99/2005)** to be that in such case, under **Section 77(3)** of the **Registered Land Act**, the chargor's statutory remedy for irregular exercise of the power of sale is only in damages against the chargee. Therefore this ground which is based upon a dispute on the amount due must also fail.

I could have ended this application here. However, because the plaintiff also claims that the interest charged contravenes express statutory provisions, I need to examine this ground further.

The second part of this ground is that the first defendant has charged illegal interest contrary to the letter of offer and **Section 44A (1)** of the **Banking Act**. Both the said letter of offer and the charge itself authorise the first defendant to vary the interest rates charged. Mr. Ndubi again steered clear of those provisions.

Though **Section 44A(6)** of the **Banking Act** admittedly applies to loans that became non- performing before the coming into force of the Act, that provision does not help the plaintiff in this case. The proviso to that **Section** states that the amount that shall be considered when determining whether the mortgagee is in breach of the in duplum rule when a loan becomes non-performing is the principal sum and interest that is owing after the day the Section came into operation which is **1st May 2007**. In respect of an existing loan which become non-performing as at the date of commencement the section provides that the maximum amount shall be:-

"**(a) principal sum and interest owing on the day this section comes into operation; and**

(b) interest in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) **expenses incurred in the recovery of any amounts owed by the debtor."**

It is not clear from the pleadings what the principal sum and interest owing on the commencement date was. It is stated by the first defendant that as at 07.03.2008 the amount due was Kshs. 18, 579,384.50. On the commencement date, that is 01.05.2007, it cannot have been very far from that figure. Mr. Ndubi's contention therefore that the defendant is claiming about three times what is due to it cannot be true. This ground must also fail.

For this reasons I find that the plaintiff has not made out a prima facie case to warrant granting him an injunction. Consequently I dismiss this application with costs.

DATED and delivered this 5th day of March 2009.

D. K. MARAGA

JUDGE.