REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

Civil Case 9 of 2008

KAMDSAR INVESTMENT COMPANY LTD PLAINTIFF

VERSUS

SAVINGS & LOAN KENYA LTD:……..….DEFENDANT

R U L I N G

KAMOSAR INVESTMENTS COMPANY LTD the plaintiff/Applicant is the registered owner of the piece of land situate within Nairobi city and known as LR. No.209/2455/6. The Plaintiff filed suit on 15th January,2008 simultaneously with a chamber Summons of even date stated to be brought under Order XXXIX Rule 1 & 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 52 of ITPA and all enabling provisions of the Law praying for orders:-

1. ……

2. **THAT pending the hearing and determination of this suit, the defendant be restrained either by itself, servants, auctioneers or otherwise howsoever from selling, disposing off, offering for sale or alienating in any manner whatsoever the plaintiff's property known as LR. No.209/2455/6.**

3. **THAT orders be made under section 52 of the Indian Transfer of Property (Amendment) Act 1956 that during the pendancy of this suit, all further Registration or change of registration in the ownership, leasing, subleasing, allotment, user occupation or possession or in any kind of right, title or interest in all THAT parcel of land known as LR. No.209/2455/6 with any land registry, Government Department and all other registration authorities be prohibited.**

4. ……

5. ……..

The said application is based on the grounds that:-

a) On or about the 22nd day of March 1994, the Plaintiff applied for credit facilities from the Defendant. As collateral, the Defendant purported to charge LR. No.209/2455/6 situate off Tom

Mboya street, Nairobi and now valued at above Kshs.70, 000,000/=.

b) At the time of the said 'change; the provision of section 39 of the Central Bank of Kenya Act as read with section 44 of the Banking Act and Gazette Notice No. 4939 of 1989, forbade the changing of interest of more than 19% for loans of a period of over 3 years.

c) By the charge and its letter of offer, the Defendant purported and did charge interest at the rate of 32% way above the legally stipulated rate without first obtaining the consent of the Minister of Finance.

d) The Plaintiff has fully repaid the sums borrowed plus lawfully due interest thereon as shown in the schedule of payments in the plaint as well as the statement and payment slip annexed to the supporting affidavit but due to the illegal rate of interest applied by the plaintiff (sic**) the account is shown to be in debit.**

e) The Plaintiff avers that in view of the express provisions of the section cited here above the contractual stipulation in the charge (and) the letter of offer allowing the charging of variable interest at the rate of 32% and over is void for illegality.

f) By its letter dated 4th October 2007 entitled "Statutory Notice" the Defendant gave the plaintiff 90 days with (sic**) which to redeem its property by paying a sum of Kshs.34, 329,410.17. The said notice expired on or about 5th January, 2008 and the suit premises are in danger of being disposed and/or alienated.**

g) The Plaintiff contends that the charge is null and void for the following reasons:-

I. That the purported change clearly contravenes the provisions of Sections 59 and 69 of the Indian Transfer of property Act in that it was not properly attested as required thereof, in that only one wetness attested instead of two. The certificate therein is incomplete and does not comply with section 69 of the ITPA.

II. That the charge as registered has no redemption. That in view of the above requirements of Section 69(1) and 100 A (1) of the ITPA were not complied with as the provisions thereof were not explained to the Plaintiff.

h) The amount sought to be recovered by sale of the property comprises of charges and interest levied on the account contrary to the Law. The same are therefore not recoverable from the Plaintiff for the following reasons:-

I. That the amount now sought to be recovered comprises of charges levies and interest charged as though the consent of the Minister for Finance was obtained prior thereto which is not the case.

II. The defendant has deliberately put the Plaintiff's account in arrears by failing to credit all payments made thereof as a total of over Kshs.50,000,000/= has been paid to date. The Defendant should therefore give a proper account for the amounts paid.

III. The interest and charges sought to be recovered are statutory barred in view of the provisions of the Limitation of Actions Act……..

i) The premises are of a peculiar location in the Central Business District of Nairobi, décor and design and cannot be replaced in the event of a sale.

j) That the purported powers of sale now being exercised are being so exercised for ulterior motives; that is to compel the Plaintiff to pay sums that are not due and which is not the intention of the law.

k) That in view of the foregoing the statutory powers of sale over the suit property have not arisen nor become exercisable.

l) That unless restrained by this Honourable court the defendant is keen on sale of the property which is the Plaintiff's only business premises thereby visit irreparable loss and damage to the Plaintiff.

m) That if (sic**) is in the interest of Justice that the orders sought be granted.**

The Application is supported by the Affidavits of WILLY ROTICH KAMUREN and other grounds to be adduced at the hearing of the application.

The Application was brought under a certificate of urgency and was on the 15.01.08 heard exparte when the same was certified urgent and ordered to be served on the Defendant for inter parte hearing on 28.01.08. An interim injunction in terms of prayer (2) above was granted pending the hearing of the Application. Inter parte hearing was on the 10.04.08. Counsel for both parties filed bulky submissions and attended court on the said date of 10.04.08 to highlight their submissions. Their highlighting was just as bulky, or is it lengthy, as the written submissions. The court may be forced to be just as lengthy to be able to address and consider all the issues raised.

Sometime during March 1994 the Plaintiff obtained a credit facility from the Defendant. The agreed interest rate was 21% and the Defendant reserved the right to change that rate from time to time in its sole discretion. The Plaintiff's property known as LR. No.209/2455/6 was charged as a security for the credit facility. The Defendant through a notice dated 4th October 2007 demanded payment of the sum of Kshs.34, 329,410.17 in default of which the Plaintiff's property would be sold to recovery the same. The charge over the Plaintiff's property was for the sum of Kshs.20,950,000/= at the rate of interest of 32% per annum and the Plaintiff contents that as at the time of filing suit herein it had paid a sum of Kshs.45,261,813/= thereby making an overpayment of Kshs.8,748,664/= which sum it was claiming from the defendant. The above is briefly what led to the filing of this suit. Having set the background as above I now propose to consider the application as hereunder, before which I need to mention that the Defendant, through its Advocates on record filed its Defence on 08.04.08 after filing Grounds of Objection dated 23.01.08 on 24.01.08. It's Replying Affidavit sworn by **CHRIS WARURU** was filed on 06.02.08.

The Plaintiff's case is that it has fully repaid the loan advanced to it. It is its case that it has indeed even overpaid. In an attempt to show that there exists a prima facie case with a probability of success at the trial the Plaintiff said when during March 1994 it took the loan of Kshs.20,950,000/= from the Defendant section 39 of the Central Bank of Kenya Act cap 491 was operational and so was section 44 of the Banking Act cap 488. The Plaintiff contents that the rates of interest charged on the Principal loan amount far exceeds the rate of interest then permissible under the law. In terms of section 39 of the Central Bank of Kenya Act the legally allowed rate of interest was at the time 19% per annum and this rate was applicable up to 17th April 1997 when the Act was amended. The Plaintiff's further contention is that Section 44 of the Banking Act was then and still is in force. This latter section forbids any banker from changing and/or altering interest rates without first seeking and obtaining the consent of the Minister of Finance. The Plaintiff contents and has annexed documents to its affidavits to show that the defendant did charge the Plaintiff interest over and above the lawfully permitted rate at the time and charged 32% per annum instead of 19% per annum. The plaintiff's case is that proper charging of interest would show that the plaintiff has over paid by a sum of over Kshs.8 million as per annexure marked "WRK/1" and hence the amount shown to be in arrears would not arise.

Learned Counsel for the plaintiff **Mr. Kingara** submitted before me that the control of interest rates and charges by the relevant laws means that any contract or variation of the interest beyond the permissible rate is unlawful and renders any amounts arising out of using such interest rates illegal and irrecoverable. His further argument was that a chargee who exceeds the allowable interest rates does not act within the Law and in effect clogs and fetters the charger's equity of redemption. It was Counsel's view that amounts resulting from an overcharge or application of the wrong interest rate cannot and ought not to be

recovered by the exercise of the statutory power of sale of the charged property. He added that the charge in those circumstances cannot be a security for the overcharged amount. Counsel concluded here that this overcharge made the right to redeem the property virtually impossible.

The Defendant's learned Counsel **Mr. Munyu** raised five issues in opposing the Application.

1. **Whether the defendant's right to exercise its statutory power of sale has accrued;**

2. **Whether the Plaintiff is indebted to the defendant;**

3. **Whether the interest charged on the Plaintiff's account is valid;**

4. **Whether the charge between the Plaintiff and the Defendant was properly executed or whether the said charge is valid;**

5. **Whether the Plaintiff has made out a case for the grant of an injunction as sought.**

The Defendant takes the position that the Plaintiff is truly indebted to the defendant and in support of its position the defendant exhibited statements of accounts showing an outstanding sum of Kshs.34, 329,410.17. It also placed reliance on various letters written by the Plaintiff acknowledging its indebtness to the defendant which show the clear acknowledgement of the debt with the plaintiff offering to pay Kshs.20,000,000/= in full and final payment as at 26th January 2004. The defendant's case at this point is that even if it were to be taken that that was the amount due as at that date the offered sum was not paid. Learned counsel **Mr. Munyu** on this submitted that the plaintiff was acting with *mala fides* as it could not admit a debt and then come to count for the equity of an injunction. He submitted further that the plaintiff was probating and reprobating at the same time and that cannot be allowed.

The defendant denied illegal interest rates. The contract between the parties herein, he added, was founded on the letter of offer and on the charge document. The letter of offer gave an interest rate of 21% per annum reserving to the defendant solely the right to change that rate at its own discretion. The charge document bears an interest rate of 32% per annum. **Mr. Munyu** then submitted that the attempt by the plaintiff to question those rates of interest is an attempt to ask the court to rewrite the contract between the parties which is improper and illegal as the role of the court is merely to construe these contracts. It was counsel's further submissions that the plaintiff voluntarily entered into the contract with the defendant and negotiated for terms and conditions including the applicable interest rate. The plaintiff has not demonstrated any breach of that contract by the defendant and so the plaintiff's attempt to obtain an injunction must fail according to counsel. Counsel's further submission was that the issue on the applicable interest rate and hence the amount outstanding amounts to **a dispute of the sum payable** and this cannot found a case for a grant of an injunction and hence the application should be dismissed with costs.

On the issue of whether or not the charge document was properly executed and whether or not the charge complies with sections 59,69 and 100A (1) of the ITPA in terms of whether it was attested by two witnesses the defendant's answer was simple and straight that the suit property is registered under cap 281 of the Laws of Kenya and therefore the applicable law is the Registration of Titles Act. **Mr. Munyu's** contention was that the provisions for attestation of documents under RTA is found under section 58 of the said Act hence sections 59, 69 and 100A (1) of the ITPA are not applicable. He further contended that the ITPA is not relevant on the issue of realization of the security as there are provisions of that aspect in the RTA and as concerns attestation of the charge document the RTA contains its own provisions and this has been complied with in the charge relevant to this case. In counsel's further submissions the Plaintiff's application falls far short of the threshold for the grant of an injunction. He concluded that there is no basis upon which the court could exercise its discretion and grant the injunction sought as the plaintiff had failed to bring its case within the requirements of the famous case of **GIELLA –VS- CASMAN BROWN.**

Both counsel relied on a host of authorities in support of their respective cases which I found useful to

arrive at the decision herein**.**

It is now the court's turn to consider the rival submissions. Let me start at the point of commending both counsel appearing herein for their industry and research and ably presenting their respective client's case. I have given due consideration to the written and oral submissions by counsel on both sides. I have considered all the affidavits and annextures. This ruling will concern itself with the already established principles that the object of granting an interim injunction is to protect the plaintiff against loss for which he could not be adequately compensated in damages if in the end the dispute is resolved in his favour and that where damages would be an adequate compensation and defendant would be in a financial position to pay then no interlocutory injunction should normally issue.

In my consideration resolving the dual issues of whether the charge document was properly executed and the validity or otherwise of the interest charged and loaded on the plaintiff's account also resolves this application.

In answer to the first limp above the plaintiff's case is that the charge document does not comply with sections 59.69 and 100A (1) of the ITPA in that the same was not attested by two witnesses. The defendant's case is that the applicable law is the Registration of Titles Act, in particular section 58 thereof which states:-

1) Every signature of an instrument requiring to be registered and to a power of attorney whereof a duplicate or an attested copy is required to be deposited with the Registrar it shall be attested by one of the following persons;

(a) Within Kenya

(i) A judge or a magistrate

(ii) a registrar of Titles

(iii) a notary public

(iv) an advocate

(v) a justice of the peace

(vi) The Registrar of Deputy Registrar of the High Court

(vii) An administrative officer.

(b)……

(c)…….

(d)……

(2) …….

(3)……..

4. An instrument executed by a company within the meaning of the companies Act shall be executed by means of the Company's common seal affixed in accordance with the memorandum and articles of association. And it should be noted that section 1(2) of the Registration of Titles Act states:-

Except so far as it is expressly enacted to the contrary, no Act in so far as it is inconsistent with this

Act shall apply or be deemed to apply to land, whether freehold or leasehold, which is under the operation of this Act. This is further elaborated in the case of **SOPHIA HOUSE LIMTIED –VS- BARCLAYS BANK OF KENYA LTD HC.CC.NO.435 OF 2004** wherein it was held as hereunder;

" **In the case of Coast Brick and Tiles Works –vs- Premchand Raichand & another (1964) EA 187, it was held that Section 57 of the Titles Ordinance, now Registration of titles Act provides a code in relation to attestation of instruments required to be registered under the Act, Section1(2) and Section 58 of the that Act must supersede in relation to and under that Act, the requirement of section 59 of the Transfer of property Act 1882 that a mortgage be signed by the mortgagor and attested by at least two witnesses. This view was upheld when the matter went on appeal to the Privy Council who held that S.58 of the Registration of Titles Act, taken with S. 1(2), overrides the provisions of S.59 of the Transfer of property Act 1882 with the consequence that execution of the charge in accordance with S.58 of the Registration of Titles Act suffices, and the charge is not invalidated by want of compliance with S.59 of the Act of 1882."**

This then settles the issue of the validity of the charge. The argument that the charge herein is invalid must fall by the wayside. Section 59 of the ITPA is irrelevant here. The RTA only borrows from the ITPA in cases of realization of the charged security as the former Act lacks provisions for realization. I find and hold that the charge herein is valid on attestation.

On whether the charge is invalid for breaching section 46 of the RTA requiring the charge to be in forms J1 or J2 in the first schedule of the Act, I can do no better that refer to section 33(1) of the RTA which provides;

"**(1) A registrar shall not register any instrument purporting to transfer or otherwise deal with or affect any land except land situated within the registration district for which he has been appointed, and except in the manner herein provided, nor unless the instrument is in accordance with the provisions hereof, <u>but any instrument in substance in conformity with the forms annexed hereto shall be sufficient</u>; (**emphasis mine**) provided that the registrar may reject any instrument appearing to be unfit for registration or unsuitable for a Photostat copy:……"**

I also find the answer to this issue in S.72 of the interpretation and General Provisions Act which states:-

" **Save as is otherwise expressly provided whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation there from which does not affect the substance of the instrument or document or which is not calculated to mislead."**

It is clear that the objection raised against the charge is purely on form and not the contents of the charge. This therefore is defeated by the provisions of section 33 (1) above as underlined. Further I should add that a party that derived benefits from a document cannot turn round in a court of equity and rubbish that very document merely on form. As the defect is on form only and does not go to the root of the substance matter of the document, I find and hold that the same does not invalidate the charge document.

Now I turn to the issue of the interest rate. The Plaintiff's case is that if it were not for the interest rate applied, then the Plaintiff would have fully repaid the loan may indeed overpaid the same. Heavy reliance was placed on the relevant provision of the Central Bank of Kenya Act and the Banking Act. The Plaintiff contended that the Defendant, contrary to the provisions of Section 39 of the Central Bank of Kenya Act and without the consent of the Minister charged interest at high rates and not the 19% per annum allowed by Law at the time and section 44 of the Banking Act forbids the defendant changing or altering the interest rates without the Minister of Finance consent. The Plaintiff's case therefore is that the amounts arising out of the application of those interest rates are illegal and not recoverable. In answer to this the defendant states that the interest rates applied are as agreed between the parties in the letter of offer and in the charge document. The defendant contented that the interest rate market had been freed and parties were at liberty to negotiate rates and that is what was done in the instant case. The case of **NATIONAL BANK OF KENYA LTD –VS- CADOR INVESTMENT LIMITED HC.CC.NO.2005**

OF 2000 was relied on. In that case the court gave an analysis of the history of interest rate control in the context of the Banking Act and the Central Bank of Kenya Act and concluded as I quote:-

" **It is abundantly clear that even before the repeal of sections 39, 40 and 41 of the Central Bank of Kenya Act and effective from 23rd July 1991 interest rates had been freed from control or regulation by the Minister through the Central Bank of Kenya Act, although the residual power to do so was maintained under S.39, 40 and 41 of the Central Bank of Kenya Act until those sections were repealed by the Central Bank of Kenya (amendment) Act 1996 (No.9 of 1996). Upon repeal of those provisions the residual powers to issue control on or regulate interest rates charged by banks and other financial institutions was also removed and has not to date been re-imposed. The total effect of the revocation of Gazette noticeNo.1617 of 1990 by Gazette Notice No.3348 of 1991 and subsequent repeal of sections 39, 40 and 41 of the Central Bank of Kenya Act was firstly to free bank interest rates regime from control or regulation by the Minister for finance through the Central Bank of Kenya and secondly the power of the Central Bank of Kenya to issue instructions under sections 39, 40 and 41 of the Act was removed from the Governor by the repeal of those sections. This meant that specified banks and other institutions were at liberty to negotiate interest rates with their borrowers."**

This was the subject of a lively debate between the parties herein. The plaintiff contended that during the control period the defendant charged a rate of interest not allowed by the Law and changed and/or altered the rate without the consent of the Minister of Finance. The defendant did not agree and relied on the fact that the control regime was since over.

It is not denied that for some time the Central Bank of Kenya published the minimum and maximum chargeable interest rates to financial facilities. These powers were exercised pursuant to provisions of sections 39(1) of the Central Bank of Kenya Act cap. 491 of the Laws of Kenya which states:-

" **The bank may from time to time acting in consultation with the Minister determine and publish the maximum rate of interest which specified banks or specified financial institutions may pay for the deposits and charge for loans or advances."**

Pursuant to this Gazette Notice No.4939 of 16th October 1989 was made giving the maximum rate of interest for loans and advances as 18% per annum calculated on reducing balances with monthly rests. Gazette Notice No.1458 of 27th March 1990 fixed interest rate at 19% per annum for loans advanced on or before 31st March 1990. Gazette Notice No. 1617 of 2nd April 1990 carried an interest rate of 16.5% per annum for loans not exceeding 3 years and a rate of 19% per annum for loans whose terms exceeded 3 years. This Gazette notice was revoked sometime in 1991 and sections 39, 40, and 41 of the Central Bank of Kenya Act were repealed in 1996. The loan herein lies within this period when there was high mobility in the interest rate regime. The defendant does not deny that sometime during the pendancy of the loan facility herein there could have been contravention of sections 39, 40 and 41 of the Central Bank of Kenya before they were repealed in 1996 as contended by the plaintiff. This to my mind is a matter for investigation by evidence. It is also to my mind important to determine whether the plaintiff was kept posted of the change of the rate of interest applied on its account. The defendant's contention that the letter of offer gave the defendant a free hand to vary the rate of interest was faulted by the plaintiff as being oppressive and unconscionable. The case of **MARGARET NJERI MUIRURI –VR- BANK OF BARODA (K) LTD CIVIL APPEAL No.9 of 2001** shades light on this issue. The court of Appeal held;

"**We appreciate that parties to a contract may, as here, agree on the interest chargeable on a commercial transaction. It is however arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties."**

And I associate myself fully with those sentiments.

There were arguments before me on whether or not Gazette Notices as herein could override and or usurp the provisions of Acts of parliament and whether or not parties could contract outside or against

statute. The letter of offer dated 22nd July 1992 gave an interest rate of 21% per annum. The charge dated 22nd March 1994 gave an interest rate of 15% per annum. On 20th December, 1993 the interest was given as 32% per annum for an additional facility. The issue of variation of interest rates and the defendant's liberty to so vary them are weighty issues for determination before a final decision is made.

The Plaintiff's case that its equity of redemption has been clogged and/or fettered is supported by an attached report from I.R.A.C which indicated that the changes in the Law or interest rates during the life span of the plaintiff's loan was not considered by the defendant in its application interest rates. This report was said to be a professional report which could only be rebutted by another professional report. On this the Plaintiff's contention that evidence and documents must be tendered at the hearing of the suit sounds plausible as only then can the issue of admissibility of the IRAC report be addressed. The inadmissibility or otherwise of that report is central to the Plaintiff's case. The defendant would at that time challenge the report if it so wishes.

Is this a case of a dispute on the amount payable so that the plaintiff is not entitled to the grant of the injunction sought? I understand the plaintiff's case to be that but for the wrong interest rate the plaintiff would have overpaid the loan advanced to it. The defendant's case is that the plaintiff accepted that the defendant could vary the interest rate at its own discretion and so coming to court now amounts to asking the court to re-write the contract between the parties. That argument is impressive because it is not the duty of the court to make contracts for parties. The court's role is to construe and interpret the terms and conditions as agreed upon the parties. That being so it is important not, at this interlocutory stage to make final conclusions or prejudice the case of the parties as that is the function of the trial court. At this point I think that the issue of the applicable interest rate and the IRAC report require more evidence so that the court is enabled to arrive at a position to apportion liability as the rate of interest applied, if wrongful, may have put the security beyond redemption. The contest of interest rate applicable by the parties is a central matter for determination. Whether the plaintiff was notified of the variation of the interest rate is an issue for determination.

I note from the statutory notice that the amount due as at 4th October,2007 was kshs.34,329,410.17 and it attracted an interest at the rate of 14% per annum. Earlier on 17th May 2004 the defendant had asked the plaintiff to service a debt of Kshs.19 million for a period of 24 months and advised that the debt as at 4th march 2004 stood at Kshs.27, 671,750.01. There is an amount of about Kshs.15, 000,000/= that arises within a span of between 2004 and2007. This must be explained by evidence at trial. I am of the considered view that an application of a rate of interest higher than that allowed by law and one which is not communicated to the affected party cannot give rise to the exercise of the statutory power of sale by the party applying it. It is my further considered view that a dispute of an amount arrived at by application of a disputed and/or illegal rate of interest is not a mere dispute as to the amount due and owing which would deny the grant of an injunction. Whether or not a debt is due in this case is to my mind a subject of receipt of evidence. For all the above reasons I am satisfied that the Plaintiff has brought itself within the threshold of **GILELLA –VS- CASSMAN BROWN** as to a prima facie case with a probability of success at trial.

The defendant contended that the suit property was offered as a security for the loan advanced and it has a financial value which the court was asked to take judicial notice of was a value the defendant, a bank, could pay. It was the defendant's further contention that once a property has been charged it '**ipso facto'** becomes a commodity for sale and there is no commodity for sale which cannot be compensated in damages. For the plaintiff it was contended that the charged property is of a unique nature as it is located within the central Business District of the city of Nairobi and it would be impossible to get a similar property in the event of a sale and further that the plaintiff had disposed off two other properties one a prime residence in the prime area of Lavington to save the suit property and damages would not be adequate remedy for the loss of this land. On this issue of adequacy or otherwise I turn to Ringera J, as he then was in the case of **Lucy Njoki waithaka –vs- ICDC HC.CC.NO.321 of 2001** for support, and I quote him**:-**

"**As regards damages I must say that in my understanding of the law it is not an inexorable rule**

that where damages may be appropriate remedy an interlocutory injunction should never issue. If that were the rule the law would unduly lean in the favour of those rich enough to pay damages for all manner of trespass. That would not only be unjust but would also be seen to be unjust. I think that is why the East African court of Appeal coached the second condition in very careful terms by stating that NORMALLY **an injunction would not issue if damages would be an adequate remedy. By using the word normally the court was recognizing that there are instances where injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted. I think some of the consideration to be borne in mind include the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary had been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to say money is not everything at all times and in all circumstances and don't you think you can violate another citizen's right only at the pains of damages."**

I apply the above to this case and hold that damages would not be an adequate remedy in this particular case. I get the impression from the conduct of the plaintiff that the plaintiff has been very desirous of redeeming its property and hence has made substantial efforts and sacrifices in attempts to redeem the charged property and its problem, according to it, has been the application of unlawful interest rates which has resulted into frustrating the Plaintiff's right to redeem.

Having found as I have above and not being in any doubt I need not turn to the issue of balance of convenience but even if I were to consider that I would find in favour of the plaintiff and preserve the suit property until final determination of the suit. The issues raised herein as to whether the debt has been fully paid or overpaid; whether admission of debt was by duress, whether the wrong interest rates have been applied and the relationship between Gazette notices and statutes and Les pendens as well as the issue whether amounts paid by the Plaintiff were not credited into account with the defendant shall be left for determination upon evidence by the trial Judge. For me my task is done and ends at exercising my discretion in favour of the Plaintiff and allowing the application with costs.

Orders accordingly.

DATED AT ELDORET THIS 11TH DAY OF MAY, 2009.

P.M.MWILU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF MAY, 2009.

J.W. LESIIT

JUDGE

IN THE PRESENCE OF:-

……Court clerk

……Advocate for the Plaintiff/Applicant

……Advocate for the Defendant/Respondent.