

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 643 of 2008

EPHANTUS NDUHIU NDEGWA.....PLAINTIFF

VERSUS

THE CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT

RULING

The plaintiff filed an application pursuant to the provisions of Order XXXIX Rules 1, 2 and 5 of the Civil Procedure Rules and Section 44 of the Banking Act seeking temporary injunction to restrain the defendant, by itself or through its agents from selling, transferring or in any other way dealing with LR No. Kirimukuyu/Mbogoini/795 (*hereinafter referred to as the suit property*) pending the hearing and determination of the dispute. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff. The application is opposed. Regina K. Anyika, a senior legal officer of the defendant swore a replying affidavit in opposition to the application. Prior to the hearing of the application, the parties agreed by consent to file written submissions in support of their respective cases. Counsel for the parties herein relied on the said written submissions in support of their respective clients' cases.

I have carefully considered the said rival arguments. I have also read the pleadings filed by the parties herein in support of their respective opposing positions. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled. In Giella vs Cassman Brown [1973] EA 358 at page 360 Spry VP held that:

“The conditions for the grant of an interlocutory injunction are now, I think, 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. (E.A. Industries v. Trufoods, [1972] E.A. 420).”

It is common ground that the plaintiff borrowed a sum of Kshs.150,000/= from the defendant. The plaintiff charged the suit property to secure the said loan. The charge in respect of the suit property, dated 29th July 1996, was duly registered. It was apparent that after the said loan was disbursed, the plaintiff fell in financial difficulty and was unable to service the loan.

From correspondence exchanged between the plaintiff and the defendant, it was apparent that due to the non-repayment of the loan, the sum advanced together with the accrued interest escalated to, at one point, Kshs.903,192/=. The plaintiff pleaded with the defendant to waive part of the interest that had accrued in the account. The plaintiff made this plea in his letter dated 6th November 2003. In the said letter, the plaintiff made proposals to pay the sum of Kshs.600,000/= in full and final settlement of then outstanding amount. By its letter dated 30th December 2003, the defendant accepted the plaintiffs' proposal seeking to waive a substantial part of the accrued interest. The defendant duly waived the sum of Kshs.403,192.80 out of the then outstanding amount. The plaintiff was required to pay the said sum of

Kshs.600,000/= in full and final settlement of the debt. The plaintiff was required to pay the said outstanding amount over a period of five months with effect from 31st December 2003. In the period that the plaintiff was required to repay the said agreed sum, the defendant undertook not to charge any interest.

In the event of failure by the plaintiff to abide by the terms of waiver of interest, it was agreed that the defendant would be at liberty to take appropriate action to recover the outstanding amount together with then accrued interest. The plaintiff agreed to the terms of the waiver and in fact paid a sum of Kshs.100,000/=. The plaintiff however failed to pay the balance of Kshs.500,000/=. The defendant sought to recover the said outstanding amount by exercising its statutory power of sale. The defendant instructed the auctioneering firm of Sportlight Intercepts Kenya Ltd to advertise and sell the suit property by public auction. The property was duly advertised for sale on 14th November 2008. It was the advertisement of the suit property for sale that provoked this suit and the filing of the application for interlocutory orders of injunction.

According to the plaintiff, the right for the defendant to exercise its statutory power of sale had not accrued as the defendant had not served him with the requisite statutory notice. According to the plaintiff, the statutory notice was sent to his sister's postal address and not to his official postal address. The plaintiff deponed that the postal address of P.O Box 13492 Nairobi belonged to his sister Catherine Mumbi Ndegwa. His address was either P.O Box 102 Karatina or P.O Box 74328 Nairobi. The defendant countered the plaintiff's argument by stating that the postal address to which the statutory notice was sent was the one that the plaintiff had supplied to the defendant.

I have perused the correspondence exchanged between the plaintiff and the defendant in the course of their dealings. It was evident that the plaintiff indicated his postal address as P.O Box 13492 Nairobi in his letters. The defendant therefore sent the statutory notice as required under Section 74 of the Registered Land Act to the plaintiff in his last known postal address. I hold that the plaintiff failed to persuade the court that he was in the circumstances not served with the requisite statutory notice. The plaintiff admitted that he was served with the redemption notice by the auctioneers. I find no fault with the service of the statutory notice by the defendant to impeach the intended sale by public auction.

As regard the second complaint by the plaintiff to the effect that the bank had applied unconscionable rate of interest, having perused the instrument of charge, I find the said complaint to be without merit. The rate of interest that the plaintiff was charged was contractual. Indeed, the defendant went out of its way to waive part of the interest legitimately due to it when the plaintiff made a request for waiver of interest. The issue as to whether the defendant acted unlawfully in converting the overdraft facility into loan facility without the consent of the plaintiff was not been proved. It appeared that the plaintiff, upon obtaining the loan from the defendant, wrongly assumed that he would not be required to pay the loan plus the accrued interest.

The plaintiff made no effort to repay the loan within the period stipulated in the letter of offer and the instrument of charge. The escalation of the amount to be repaid is solely attributable to the plaintiff's failure to repay the loan within the stipulated period. In any event, the issue whether the defendant charged unconscionable rate of interest is no longer an issue in dispute in light of the plaintiff's admission of debt. He cannot complain that the defendant had charged a rate of interest that was disagreeable to him when he made proposals to repay an amount that included the said accrued interest. Section 44 of the Banking Act is of no assistance to the plaintiff in view of the fact that the provisions of the said section came into effect on 1st May 2007 long after the plaintiff had defaulted in repaying the loan.

In the premises therefore, having carefully considered the facts of this case, I am unable to reach a determination that the plaintiff established a prima facie case to entitle the court grant him the interlocutory injunction sought. The plaintiff has not placed any material before this court that would enable this court exercise discretion in his favour. His application lacks merit and is hereby dismissed with costs.

DATED AT NAIROBI THIS 29TH DAY OF JULY 2009.

L. KIMARU

JUDGE