



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

**Civil Case 383 of 2009**

**LULE AUTO SPARES LIMITED.....1<sup>ST</sup> PLAINTIFF**

**SAMUEL NYONA OTONGLO.....2<sup>ND</sup> PLAINTIFF**

**NASHON EDWARD OLUOCH NYONA.....3<sup>RD</sup> PLAINTIFF**

**GAUDENCIA ROSE AKOTH.....4<sup>TH</sup> PLAINTIFF**

**MISERU INVESTMENTS LIMITED.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED..... DEFENDANT**

**R U L I N G**

This is a Chamber Summons application dated 26<sup>th</sup> May, 2009 brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. It seeks the following order:

**1. A Temporary and/or Permanent Injunction restraining the Defendant by itself, its servants or agents or otherwise howsoever from selling, alienating, transferring or in any manner whatsoever from disposing of the properties known as**

- 1. Nakuru/Njoro/Ngata Block 1/618**
- 2. LR 209/8275/91 – South C Nairobi**
- 3. Nakuru Municipality/Block 20/10**
- 4. Kisumu Municipality/Block 4/355**

The application is premised on the following grounds:

**1.The 1<sup>st</sup> Plaintiff/Applicant admits to owing Kshs.386,165/59 which it is ready, willing and able to pay and it would be inequitable to sell the properties charged to the Defendant.**

**2. The Defendant/Respondent has charged the Plaintiffs illegal, unlawful and non-contractual levies.**

**3. The Defendant/Respondent has behaved in an oppressive manner by refusing to supply the 1<sup>st</sup> Applicant with statements.**

**4. The Defendant/Respondent has failed to give a breakdown of interest and the principal sum due as required by the Banking Act.**

I have considered the application, affidavits filed by both parties and the submissions by both counsel. The Applicants have to bring themselves within the principles applicable as set out in the case of **Giella vs. Cassman Brown [1973] EA 358** which are:

**1. The applicants must establish that they have a prima facie case with a high probability of success at the trial.**

**2. Failing (1) above that they stand to suffer irreparable loss which cannot be compensated by an award of damages if the injunction is not granted.**

**3. If the court is in doubt it will have to determine the application on the basis of a balance of convenience.**

The Respondent herein seeks to exercise its Statutory Power of Sale over the properties charged to secure the lending to the Applicants. It is trite that a chargee cannot be stopped from exercising its Statutory Power of Sale unless certain conditions are met. In **Halsbury's Laws of England, 4<sup>th</sup> edition, Vol. 32, paragraph 725** it state thus:

***“The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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 amount in court, that is the amount which the mortgagee claims is due to him, unless on the terms of the mortgage, the claim is excessive.”***

The Applicants have brought this application complaining that the Defendant's attempt to sell off the charged properties was oppressive for reason that it has failed to supply to the Applicants with Statements of Accounts. The Respondent has denied failing to supply Statements of Accounts to the Applicants and has deposed that indeed the Interest Rates Advisory Centre (IRAC) report on which the Applicants rely was based on the Defendant's statements supplied to the Applicants for the period between 27<sup>th</sup> December 2000 and 4<sup>th</sup> November 2008. That averment is contained in paragraph 16 of the replying affidavit.

It is instructive that the Applicants did not file any response to that averment. It must be inferred therefore that they admit that indeed Statements of Account were sent to them periodically as required.

I have also looked at the IRAC report annexed to the supporting affidavit as NON 8. In paragraph 2(a) of that report, it is stated that the writer had produced a re-calculation of the Applicants' accounts based on Barclays's Bank statements of account for the period 27<sup>th</sup> December, 2000 and 4<sup>th</sup> November 2008. Going by that report, it is demonstrative of fact that the Applicants had in their possession statements governing a period of eight years. That is precisely the period when the Banking facility the subject matter of this suit has been in existence.

In order to establish that Statements of Accounts were not supplied as required, what the Applicants needed to do was to produce those which were in their possession and then demonstrate gaps that existed in them. As it were, the Applicants has cited as grounds 3 of its application failure by the Defendants not to supply statements. At the same time, the Applicants purport to rely on a report prepared using

statements of accounts the Applicants supplied to the maker of the report. I find that the Applicants have not been candid, that they have deliberately sought to mislead the court and have been dishonest claiming they were not supplied what in fact is in their possession.

The other ground cited for the application is that the sum claimed to be owed is in fact not correct and that it is as a result of illegal, unlawful and non contractual levies. The Applicants, relying on the IRAC report have offered to pay Kshs.386,165/59 being only sum due and owing to the Defendants.

The Defendant has denied levying interest rates and charges outside of the contractual terms. Ms. Okanga in the replying affidavit has annexed various correspondences as proof that the Applicants at no time objected to sums demanded by the Defendant as being due and further that the Applicants made proposals to pay outstanding sum. The proposals were made after the Defendant issued, demand notices to the Applicants. One such letter is annexure No. 3 dated 29<sup>th</sup> July 2008. It is written to the Defendant by the 3<sup>rd</sup> Plaintiff. It makes proposals to clear outstanding balances on the 1<sup>st</sup> Plaintiff's loan account. It states that payment of Kshs.500,000 had been made. It proposes to pay Kshs. 1 million by 15<sup>th</sup> August, 2008, Kshs., 1 million by 30<sup>th</sup> August, 2008 and thereafter to hold discussions on further payments. Ms. Okanga deposes that only the single payment was made. Following default Ms. Okanga deposes that the Defendant gave instructions to its advocates to organize the realization of security. She deposes further upon receipt of the Notification of Sale, the Applicants made other proposals to settle the outstanding debt as supported by annexure 6.

The Defendant's averments that proposals to settle the outstanding sums were made by the Applicants are not denied. The Applicants own annexures, especially the ones marked NON 9 are clearly proposals to repay the amount owed, even though no specific sums are mentioned in the letters.

A dispute as to the exact amount due cannot of itself, without more disentitle a chargee to realize its security. **Halsbury's Laws of England, Vol. 32 (4<sup>th</sup> Edition) paragraph 725** states as follows: -

***"725 When mortgagee may be restrained from exercising power of sale.***

***The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun 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 amount which the mortgagee claims to be due to him unless, on the terms of the mortgage, the claim is excessive."***

I ought also to keep in perspective the holding in the case of **Mbuthia vs. Jimba Credit Finance Corporation & another [1988] KLR 1** where it was stated:

***"The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of fact, but rather to weight up the relevant strength of each side's proposition."***

On the issue of dispute on the sums due, each party will have an opportunity to present their case the trial court. On a prima facie basis however the Applicants have all along acknowledged that they are indebted to the Defendant and to that end various proposals to pay were made but not fully honoured. The issue of accounts and sums due more for the first time when this suit was filed. I am not satisfied that there is bonafide on these grounds.

The Applicants complain that interest and charges applied to the lendings were excessive. In the case of **Kingsway Motors Limited vs. Trust Bank Limited HCCC No. 753 of 1999**, it was observed:

***"A claim that the interest being charged on a loan is excessive cannot of its own be a proper justification for interfering with the mortgagor's power of sale if such interest is being charged in accordance with the terms and conditions of the mortgage."***

Miss Othieno in her submissions argued that sum claimed was Kshs.10 million while loan advanced was 6.2 million and sum paid is Kshs.7.1 million. Counsel attributed the excessive amounts claimed to charging of irregular interest charges which have contributed to clogging the Applicant's ability to pay the amount. Counsel also submitted that Section 44A of the Banking Act was flouted as the Act gives maximum limit which the Bank can recover.

Ms Mate for the Defendant has urged court to note that the Applicant has been indolent in coming to court as first notices were issued in 2007. Counsel also urged court to find that interest applied was as per the Agreement at pages 1 to 90 of the replying affidavit and that issues raised in the application were being raised for the first time as the Applicants have always made proposals to pay the debt. Ms. Mate urged the court to decline injunction sought as there was default and sums owing.

The Applicant has not placed before court anything to substantiate its claim that after demand for Kshs. 10 million as sum due, as reflected in the Notification of Sale (annexure 'NO8'), that the Defendant acknowledge sum due was a paltry Kshs. 4 million. Apart from the IRAC report, no material was placed before the court to show that the Applicants have paid Kshs. 7.1 million. Nothing was easier to produce in order to move this allegation that the statements of accounts the Applicants have in their possessions. By reason of lack of cogent proof, I am unable to find that sum paid on this lending is Kshs. 7.1 million as claimed neither can I find material to establish that indeed the Defendant has admitted that the sum due is far less than one claimed in the notices sent to the Applicants by its various Agents.

There is no material before me to establish that the sum claimed is excessive or does not comply with the Banking Act.

The terms and conditions applicable to the borrowing in issue here are contained in the document at pages 1 to 9 of the Respondent affidavit. At page 3 of this document, the contractual interest is shown, it provides:

***“Interest***

***Interest on overdraft and loan will be charged at 4% over BBK Base Rate (presently 22% per annum) or any other rate that the Bank may decide from time to time, calculated on the basis of actual days elapsed over 365 day year. Interest will be debited to the borrower's current account at the Branch monthly in arrears.”***

The Applicant has not stated how much interest was charged or that it was in contravention of the clear terms of the contract. Mere statements without material to support same are allegations without proof. They are insufficient and bare and no findings can be made against such. Had the Applicants demonstrated that interest claimed varied with the Terms agreed upon by the parties, then only could the burden shift on the Bank to show that interest charged was the proper one, at least at the trial. In absence of any material to establish these allegations I am unable so to find.

The Applicants have offered to pay Kshs.386,165/59 as only sum due from them to the Defendant. That is an attempt to alter the contract between the parties or to use the court to enforce a renegotiation of the matter. A court cannot re-write contracts between parties and such attempt should be declined, which I hereby do.

In conclusion, I am of the view that there is sufficient material with which to conclude that the Applicants are indebted to the Defendant, that there has been default in the repayments and that promises to pay the outstanding sums have been made but not fulfilled. These are good grounds on which to find that the Applicants have failed to establish a prima facie case with a probability of success at the trial.

The suit properties were offered as security for the loan and must have been valued before lending. That means they became commercial properties the moment they were offered as security. See **Maithya vs. HFCK & Anor. [2003] 1EA 133.**

The Applicants cannot argue that the property ought not to be sold on grounds they will suffer irreparable loss. The value of these properties can be ascertained and therefore payment of damages to the Applicants if sale is found at the trial to have been irregular, would certainly be an adequate remedy.

**On the question of convenience, given the circumstances of the case, I would still find that convenience tilts in favour of not granting an injunction. In conclusion, the Application dated 26<sup>th</sup> May, 2009 is dismissed in its entirety for lack of merit. The Applicants will pay for the costs of the application to the Respondent.**

**Dated at Nairobi this 26<sup>th</sup> day of June 2009.**

**LESIT, J.**

**JUDGE**

***Read, delivered and signed in presence of:***

Miss Othieno for the Plaintiffs

Ms Githaiga holding brief for Ms Mate for the Defendant

**Dated at Nairobi this 17<sup>th</sup> day of July 2009**

**LESIT, J.**

**JUDGE**