REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 657 of 2008

HUMPHREY WAINAINA MUNGAH .....PLAINTIFF

VERSUS

HOUSING FINANCE LIMITED.....DEFENDANT

R U L I N G

The plaintiff filed a plaint dated 7/11/08 seeking orders:

1. an injunction restraining the defendant by itself, servants and others from advertising or offering for sale, selling and/or in any manner whatsoever interfering with his rights of ownership of the property.

2. a declaration that the further charge dated 21/11/94 is null and void and unenforceable and the plaintiff is discharged from any obligation arising therefrom

3. declaration that the defendant owes the plaintiff a sum of Kshs.2.3 million and has overcharged the plaintiff by Kshs.1,253,941/31 cts and the sums be offset against any claims that may be found owing, if at all and interest thereon until payment in full.

On the same day, the plaintiff filed an application this application dated 7/11/08 under

certificate of urgency since the defendant had threatened to sell the suit property by public auction on 20/11/08. In the said application, the plaintiff sought orders for an injunction against the defendant pending the hearing of the suit and prayer for costs.

The application is supported by the affidavit sworn by plaintiff on 7/11/08. The defendant has filed a replying affidavit sworn by June Njoroge on 13/11/08 in opposition to the application. The first issue has the plaintiff made out a prima facie case with a probability of success at the trial? Firstly, the issue of interest and penalty charges levied by the defendant are alleged to be usurious and unconscionable. The plaintiff has stated that although it applied for a facility of Kshs.1.5 million, the defendant only advanced only Kshs.1,362,000/= in breach of the agreement between the period 1985 and 1994.

The plaintiff submits at this period Section 39 of Central Bank of Kenya Act was operational and so was Section 44 of the Banking Act. In the terms of Section 39 of Central Bank of Kenya Act, legally allowed rate of interest rate was 19% p.a. This rate was applicable upto April 17, 1997 when the Act was amended. Section 44 of the Banking Act forbid any banker from charging/altering the rates of interest without first having obtained the consent of the Minister of Finance.

It is the plaintiff's contention that the rate of interest charged on the principal amount under the second further charge, far exceeded the rate of interest then permissible under the law. As a result of these unlawful charges, the independent report marked "HWM 6B" shows that the defendant has overcharged the loan account by Kshs.3,687,422/19 cts as at 5/12/2001 and annexure marked "HWM 6A" shows that the defendant has been overpaid by Kshs.1,253,941/31 cts as at 5/11/2008.

The plaintiff's account would not be reflecting a debit balance had the correct charges and interest rate been levied on the account. The plaintiff therefore submits that the interest charged is unlawful. Section 39 (1) of the Central Bank Act provides that:

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

Pursuant to this legislation, the Governor of Central Bank published the following Kenya Gazette Notices.`

(a). Gazette Notice No.4939 of 1989 published on 16th October 1999,

(b). Gazette Notice No. 1458 of 1990 published on 27th March 1990,

(c). Gazette Notice No.1617 of1990 published on 2nd April 1990,

(d). Gazette Notice No.3348 of 1991 published on 23rd July, 1991.

Section 39 (1) of the Central Bank of Kenya Act was repealed on 17th April, 1997 by the Central Bank of Kenya (Amendment) Act 1996, being Act No.9 of 1996. Section 17 thereof which provided as follows:-

"*The Principal Act is amended by repealing Section 39, 40 and 41"*

What this means is that until 17th April 1997, there existed a mandatory interest rate regime in Kenya. It is the plaintiff's submission that the rate of interest applied by the defendant from April 18, 1985 upto the 11/9/1986 was unlawful.

The plaintiff relies on the following authorities:

1. Samaki Industries (K) L:td. Vs. Bullion Bank Ltd. – HCC No.485 of 1989 where the court considered the issue of variation of interests at the discretion of the lender and it held:

"*The terms of interest here provides that interests will be at 36% p.a. but the bank has the right to vary the rate of interest without notice to the borrower. This kind of clause is a deviation from the very principles of contract. It is like a contract of addition type of contract imposed by the economically stronger party on the weaker party placing it;*

These terms make a mockery of the freedom of contracting because they are not open to negotiations."

2. The case of Juma vs. Habib [1975] EA 108 the case addresses the issue of whether or not, the court has jurisdiction to intervene on the rate of interest charged to a party when both parties had entered into a contract on such rate.

The court in its ruling held that it had jurisdiction put it thus:-

"*I feel however, that the trial magistrate did not pose to consider whether the interest contracted was excessive. It was not beyond his powers to do so. The court has a discretion to award interest at less*

than the contracted rate when that rate is manifested excessive or unconscionable."

The plaintiff further relied on the case of Givan Okallo & another vs. HFCK – HCC No.79/2007. The court was faced with a situation where the plaintiffs challenged the propriety of charges and interest levied on the account on grounds that they were illegal and uncontractual.

The defendant on the other hand stated that the charges and interest were recoverable on grounds of prevailing customs and trade usage in the banking and financial industry. The court however upheld the plalintiff's position by stating:

"*equally, it is not in the interest of defendant to milk the plaintiff dry and drain all blood from them. The court exists for the sole purpose of determining as to who is entitled to what. In my view, the defendant cannot be allowed to engage in acts or omissions which are in contravention of the law. The imposition of penal interest or default charges without the permission or knowledge of the applicant impedes or inhibits redemption rights of the applicant."*

Again, the plaintiff relies on the case of Duncan Nderitu Wamae vs. HFCK – HCC No.298/2008 in respect of Section 44 A of the Banking Act:

"*The above Section of the Banking Act introduces two concepts which modified the contract between a mortgagee and mortgagor. The first concept introduced was the concept of non performing loan. The morgagee is required to determine the date that the loan becomes non performing.*

Upon determining this date, the interest shall cease to be applied on the loan if the amount owing exceeds the principal loan advanced. The second concept created by the said amendment, is the concept of the limitation of the amount that can be claimed by a morgagee in respect of a loan that has been declared to be non performing.

In both instances, the mortgagee is required to notify the mortgagor of the date the loan became non performing according to the said Section of the Banking Act and secondly, the amount that mortgagee is demanding."

In this case, the plaintiff submits that the defendant has failed to notify when the loan became non performing and also the amount owed by the plaintiff.

In respect of this issue the court held:-

"*I therefore hold that the plaintiff has established that since the defendant failed to give the said notices as required by Section 44 A the right to sell the suit property in exercise of its statutory power of sale has not accrued. The plaintiff therefore, has established a prima facie case."*

The plaintiff has also raised the issue of rent collection by the defendant. The plaintiff is not satisfied by the manner in which the defendant has been collecting rent in the suit premises and the plaintiff claims that the defendant owes him a sum of Kshs.2,311,280,000/= and states that that amount should be credited to his account.

Regarding the statutory notices, the plaintiff says that the same are invalid because they are claiming debts which are not due and there is no basis for exercising the statutory power of sale.

Regarding the second requirement in granting an injunction, the plaintiff submits that he is likely to suffer irreparable loss which cannot be compensated by damages. He states that the property is of great sentimental value to him as he inherited the same. He has also invested heavily in the property to ensure that he converts it into a source of livelihood and that is why he approached the defendant for finances.

The property is valued at Kshs.35 million but the defendant intends to sell it to recover an alleged debt of Kshs.7 million. In the case of Waithaka vs. ICDC [2001] KLR the court said:-

"As regards damages, I must say that in my understanding of the law, it is not uninexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue by using the "normally" the court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not injuncted- if the adversary has 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 in all circumstances and don't you think you can violate another citizen's right only at the paying of damages."

The issue of payment of damages was considered in the case of Muiruri vs. Bank of Baroda (K) Ltd. [2001] KLR 183 and in the case of Bunhill Investment Ltd. vs. Pan African Bank – CC 69/96. The Court of Appeal, was of the considered view that the disputes over land in Kenya evoke a lot of emotion, damages cannot be said that they will adequately compensate a party for its loss.

The third requirement is that balance of convenience. In this case the plaintiff has demonstrated his sentimental attachment to the property, the same being an inheritance and investment for the future. In the circumstances, the mischief to result should the injunction be refused outweighs that which is likely to result should it be granted. Lastly, the plaintiff relies on the case of Prof. Musyimi Ndetei where the court granted an interlocutory injunction.

On the side of the defendant, it is submitted that the plaintiff has not met the criteria for issuance of an injunction order in that the plaintiff has failed to establish a prima facie case with a probability of success. The plaintiff will not suffer irreparable damage if the injunction is not granted. The balance of convenience tilts in favour of not granting an injunction.

The defendant relies on the case of Mureithi vs. City Council of Nairobi KLR 1981 at page 332 and also the case of Giella vs. Cassman Brown EA [1973]. The case of La Belle International Ltd. & another vs. Fidelity Commercial Bank & another [2003] and the case of Maithya vs. HFCK.

I have perused the authorities submitted by both parties. The authorities cited by the plaintiff supports his stand that even the case of disputes of money between mortgagee and mortgagor, an interlocutory order of injunction may be issued. It appears that the courts in this country are loosening the old stand that whenever there is a dispute about money between the chargor and chargee, injunction cannot be granted.

In this case the plaintiff states that he has paid 3 times over the money lent. And that there has been excessive charges of unlawful interest and other charges such as legal fees and auctioneer's charges which has not been verified but loaded on the account without informing the applicant. There is also the major question who decides when the account is to be closed and the property to be sold.

Following the decisions of the authorities relied upon by the applicant, I am satisfied that the applicant has demonstrated a *prima facie* case and that it would be unreasonable to deny him injunction at this stage. It is to be noted that the plaint alleges fraud and negligent conduct on the part of the bank, clog of plaintiff's Equity of Redemption by the bank issues of illegality and irregularly against defendant. All these are matters that have to be investigated at a trial by evidence.

Pending trial, the plaintiff is entitled to orders sought. I therefore allow application and grant orders as granted in terms of prayer 2 of application.

Costs shall be in the cause. The plaintiff shall file an undertaking as to damages within the next 7 days.

It is so ordered.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2009.

JOYCE N. KHAMINWA

JUDGE