



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

Civil Suit 237 of 2009

KEBIRIGO GENERAL STORES LIMITEDPLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITEDDEFENDANT

RULING

The plaintiff/ applicant instituted this suit against the defendant seeking among other orders, a permanent injunction restraining the defendant its employees, auctioneers and others from selling or otherwise dealing with the plaintiff's pieces of land known as LR Kisii Municipality/Block 111/134 and sub division No.3187 section 1 mainland North Mombasa (CR NO.15924). The suit was simultaneously filed with chamber summons dated 7th April 2009, seeking for injunctive relieves against the sale of the suit premises and an order under section 52 of the Indian Transfer of Property Act restraining any dealings with the property until the suit is determined.

The application is premised on the grounds stated on the body thereto, and the supporting affidavit by **Yabesh Mahoga** a director of the plaintiff company. According to the plaintiff, in the year 1991, it borrowed a loan from the defendant which was secured by a charge dated 24th July 1991, and registered over LR NO. Kisii town Block 111/134. In 1992, 1994, the year 2000 and 2002 the 2nd, 3rd and 4th charges were subsequently registered in favor of the defendant over the Kisii property after the advancement of several other loans. The plaintiff also secured overdraft facilities at various times particularly in January 2000, July 2004, February 2004, 16th July 2003, and 26th October 2005.

The plaintiff now complains that the defendant lapped the overdraft facilities which were unsecured with the loans secured by the properties charged thereby clogging the plaintiffs equity of redemption. Further the plaintiff contends that the defendant is seeking to recover interest on a loan which is two years old contrary to the provisions of the Banking Act. The defendant is also faulted for charging high interest rates which are not provided for in the charge document. Moreover the charge does not conform to the statutory form as provided for under the Registration of Titles Act and the effects of section 69(1) and 100 (a) 1 of the Indian Transfer of Property Act 1959 were not explained to the directors when they signed the charge. The same case applies to the provisions of section 74 and 79 of the Registered Lands Act which the plaintiffs claim were never explained to them.

In further arguments in support of the plaintiff's application, counsel for the plaintiff submitted that the plaintiff engaged the services of Interest Rates Advisory Centre (IRAC) to re calculate the rate of interest and penalties. The report shows that the loan outstanding as at March 2009 owing by the plaintiff to the defendant was about Ksh.1.4 million. The plaintiff has already paid 1.9 million and it is their contention that they had fully paid the loan. Counsel referred to the case of **Zachariah Moenga Maangi vs HFCK Hccc. No.598 of 2007 at Milimani** where Lesiit J proceeded to grant an interim order of injunction on

the grounds that the defendants may have charged usurious interest rates on the Applicant's loan. Counsel urged the court to consider the expert report which is an analyses and proper recalculation of the interest rates.

The defendant was also accused of failing to comply with Legal Notice No.52 of 20th April 2007, according to that legal notice; the defendant was supposed to determine when the plaintiff's loan became none performing and to duly inform the plaintiff. Instead the defendant continued to levy interest and charges which are forbidden under section 54 of the Banking Act. Going by the statements of the accounts counsel for the plaintiff submitted that the defendant has been charging illegal interest rates and consolidated the accounts so as to keep the plaintiff in perpetual indebtedness.

Counsel made several references to this court's decisions which I will not analyze in detail save to state that I have taken note of them. Finally counsel argued that the defendant should not take any precipitate action in regard to the property in Mombasa during the pendency of the suit while relying on the doctrine of *lis pendens* as provided for section 52 of the Indian Transfer of Property Act 1959 which provides that the property cannot be transferred when a suit is pending. Counsel submitted that the plaintiff has established a prima facie case with a probability of success based on the several arguments and the fact that the plaintiff had paid colossal sums of money towards the overdraft and loan facilities amounting to over 370 million as calculated by IRAC.

This application was opposed by the respondent. Counsel relied on the replying affidavit by **Mariah Okana and Jane Wanjiku Mwaura**. According to the defendant, the plaintiff was advanced various banking facilities by the defendant who is not denied by the plaintiff. The defendant annexed the charge documents and the various letters of offer which the plaintiff signed. By signing those contracts the plaintiff agreed to be bound by the terms and conditions of lending. Although the plaintiff claims to have paid a sum of 370 million between 2001 and 31st March 2009, there is no evidence shown to support those payments. The defendant has exhibited the statements of accounts which show the status of the plaintiff loan account with all the credits and debits, the debits exceed the credit.

The defendant also annexed several correspondences exchanged between the plaintiff and the defendants where the plaintiff admitted its indebtedness and sought indulgence. The plaintiff made some payment proposals which it failed to honor. Those letters by the plaintiff are dated 15th August 2008, 4th November 2008, and 15th September 2008. There were other letters by the plaintiff's then advocates who were carrying out a transaction on behalf of the plaintiff, they wrote to the defendant on behalf of the plaintiff.

On the validity of the charge, counsel submitted that the plaintiff executed that further 2nd and 3rd charge before the advocate of his choice. Counsel for the defendant relied on an affidavit sworn by **Jane Waweru** who deposes that she explained to the plaintiff's directors the effects of section 74 and 79 of RLA when they executed the documents. The plaintiff have admitted having received the loans, this is contradicted by the same plaintiff when they say on one hand it was advanced the money, on the other hand, they are claiming lack of consideration and at the same time, the plaintiff is claiming to have paid a colossal sum of money to the loan accounts. These are all contradictory statements by the plaintiff.

Moreover the allegations of improper attestation is being made several years after the charge was created and after the plaintiff has all along enjoyed the facilities. The charges were executed by the directors, there are no defects in the charge which were properly drawn and substantially conform to the forms set out in the Act. The charges were duly registered and as such they cannot be voided for deviation from the prescribed form which does not affect the substance.

As regards the interest charged, it is expressly stipulated in the charge what interest rates were to be charged. The defendant reserved their rights to voluntarily vary the interest charged. The plaintiff is therefore bound by these contractual obligations which they voluntarily executed. The court therefore cannot interfere with the terms contained in the charge and the various letters of offer. Counsel also urged the court to disregard the calculation of the interest by the IRAC which did not consider the interest rates contracted by the parties. Counsel cited several cases which I have taken note of, among them the

case of; **Transwestern Cane Harvesters Limited Vs Barclays Bank of Kenya Limited. Kisii HCC NO. 97 OF 2008.** Finally counsel submitted that that the plaintiff's case did not meet the principles set down for granting an order of injunction.

Having set out the summary of the rival submissions the issue for determination is whether the plaintiff has established a prima facie case with a probability of success. The plaintiff's dispute as I understand it, is that it was charged unconscionable, irregular and unlawful interest rates by the defendant. Secondly, the defendants lumped together the plaintiff's overdraft facilities with secured loan accounts in order to perpetually keep the plaintiff indebted. The other argument is that the charge documents did not comply with the form set out under the Statutes.

Can the plaintiff be granted an injunction based on the above? It is not disputed by the plaintiff that several facilities by way of loans which were charged to the suit premises and overdraft facilities were extended to them. Each of those loans is governed by a written contract the terms, and conditions as well as the consequences of non performance are well set out in those contracts agreed upon and signed by both the plaintiff and defendant. The defendant registered the charges to secure their interests over the plaintiff's suit premises. Those charges also contain the terms and conditions of the lending, the interest chargeable, penalties and other charges. In those charge documents, they stipulate amount of loans advanced at different times are also clearly indicated. Under those charge documents the defendants has a right to vary the interest rates and to consolidate the plaintiff's other accounts. Am afraid the court cannot rewrite those contracts to factor in the interest rates proposed by IRAC.

The plaintiffs signed those letters of offer and the charge documents willingly. The plaintiff should have realized the consequences of signing the contracts and committing themselves to be bound by those provisions which they now term "unconscionable", "illegal" and "oppressive". It is also determinable from the records that the plaintiff fell in arrears and wrote several letters to the bank seeking for indulgence to pay for the outstanding amounts. Those letters are on record and there is no corresponding evidence that since the plaintiff fulfilled the promises. I have also considered a report by IRAC showing the recalculation of interests which is also denied by the defendant because it is contended that IRAC did not base their re calculations on the amount of interest agreed, but relied on what they believed was the applicable interest rates based on the prevailing Central Bank Act, regulations and the prevailing value of the treasury bill.

Connected to the above is the issue of whether a disagreement based on the calculation of interest is a valid ground for granting an order of injunction. In the case **of Shah vs. Devji 1965 East Africa page 91** it was held

"that the court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the grounds that there is a dispute as to the amount due under a mortgage".

The above was reiterated by a court of appeal decision in the case of **Mrao Limited vs. First American Bank of Kenya & 2 others Civil Appeal No.39 of 2002 where** it was held

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

The plaintiffs also challenged the charge documents for failure to comply with set format. There are affidavits by the advocates who prepared the charge documents and the averments in those documents have not been controverted. In any event under the provisions of section 72 of the Interpretation and General Provisions of Act, a document cannot be voided by reasons of deviation from the subscribed form which does not affect the substance. Moreover even section 108 of the RLA clearly permits the use of any other form as the registrar may approve. This argument cannot entitle the plaintiff the orders of injunction.

Finally, I find the plaintiff's case has not met the principles of granting an order of injunction which are well settled in the oft cited case **of Giella vs. Cassman Brown and Company Limited.** The plaintiff borrowed the loans from the defendant and executed the various documents of contract with clear terms and conditions including the interest rates chargeable. The plaintiff fell in arrears and admitted the indebtedness in various correspondences. The calculations brought by the plaintiff to support their claim are not calculated according to the contractual documents. They have relied on interest rates based on interest rates deduced from other sources not the agreements. In the circumstances, the plaintiff has not satisfied the applicable conditions for this court to grant an order of injunction.

It follows thus the application is dismissed with costs to the defendant.

RULING READ AND SIGNED ON 9TH OCTOBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE