

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Case 453 of 2008

JOHN MBURU KAMAU.....PLAINTIFF

VERSUS

HOUSING FINANCE CO. KENYA LTD.....DEFENDANT

R U L I N G

Application dated 29/7/2008 is brought under Order 39 Rules 1 and 2. The orders sought are to restrain by injunction the defendant by itself, its servants and or agents or otherwise from demanding further monthly payments from the plaintiff until the determination of this suit and costs be provided for. The application is supported by affidavit of the plaintiff John Mburu Kamau and base don grounds written on the application.

The applicant argues that he does not owe the defendant any money at all. However, he continues to pay the respondent installments and he is not in arrears. He therefore complains of demands of payment which he has paid in full together with interest at lawful and contractual rates.

The alleged outstanding interest is non contractual interest and rates and other charges. He relies on the report of experts known as Rates Advisory Centre. The report is admissible pursuant to provisions of Section 48 Evidence Act Cap 80. The legal principles are with regard to Section 39 of Central Bank Act of Kenya Ltd and its applicability up to 17th April, 1997 when it was repealed. He relies on the authority of National Bank of Kenya Ltd versus Cadour Investment HCC No.2105 of 2000 which states that the powers of Section 39 had ceased to apply long before it was repealed. And David Munyini Ndeti versus Daima Bank Ltd. HCC No.2198 of 2000 where the Hon. Judge ruled that the provisions of Section 39 of Central Bank applied up to the date when it was repealed. The judgment in Daima Bank case was after full hearing while the National Bank was after a hearing of application. That the two judges have raised different opinions, the door is not locked. The application of the Section 39 means that until 17/4/1997 there existed a mandatory interest rate regime in Kenya. Kenya Gazette notice cannot repeal an act of parliament. Then considering the ruling in the Bankers Association and Others versus Minister for Finance and Others 2002 IKLR 63. It is argued that the Donde Act as regards the control of interest rates was effective for 55 months between 1st January, 2001 up to 31/7/2005 as the ruling declared void only the retrospective criminal and penal provisions.

The plaintiff has also referred to Section 44 of the Banking Act, Maithya versus HFCK 2003 IEA 133 and Oman versus HCFCK and also Nyamai versus HFCK. These courts merely stated that under the circumstances penalty rates could be reasonably applied if it is a genuine pre-estimation of the loss suffered by the lender when the borrower defaults. But not if they are punitive. It is submitted that the defendant charged interest on arrears and penalty charges which charges have no connection with actual loss suffered. The respondent admits that payment is in the sum of Kshs.6,200,000 is made by plaintiff is made by when the loan was only Kshs.1,500,000. The principal amount has been paid many times over and only interest payable is in question. The applicant argues therefore that he has demonstrated a *prima facie* case with a chance of success and relies on the case of Waitthaka versus ICDC (2001) KLR and Halsbury volume 24 paragraph 987 where it is stated even where damages may be an adequate remedy court may still issue an injunction to stop oppression whether or to protect contractual rights.

I have read the submissions by the defendant who states that there are 3 contentious issues:-

(a) that the bank applied unlawful and non contractual interest rates.

(b) that the plaintiff does not owe the defendant any amount whether there was default by plaintiff.

The issue of interest rates is stated in the charge and the right of defendant to raise rates without notifying the plaintiff. He relies on the authority of Fina Bank Ltd versus Spares and Industries Ltd 2000 IEA 52(CAK) and Pelican Investments Ltd. versus National Bank of Kenya Ltd. 2000. EA 488 and on the issue of Section 39 Central Bank Act and National Bank of Kenya Ltd. versus Cador & Others 2105 of 2000 and submitted that there was no regulations on the interest rates. The interest was negotiated by parties and was contractual as stated in the charge document.

I have considered the other authorities relied on by the defendant. I have also considered the large amount of money already paid by plaintiff and the admission by defendant of payment of Kshs.6,200,000 and that the plaintiff continued willingly to pay what defendant demands.

It is my view that the plaintiff has demonstrated prima facie case for injunction and I grant injunction in terms of prayer 2 pending the hearing and determination of this suit. However, as the plaintiff admits that he continues to pay and he is not in any arrears, the injunction is granted on condition he shall continue to pay installments as he is paying presently pending the hearing and determination of this suit.

No orders as to costs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 15th day of December, 2009.

JOYCE N. KHAMINWA

JUDGE