

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Commercial Civil 173 of 2006

AMRATLAL BHIMJI DAVDA

**SAILESHKUMAR BHIMJI DAVDA t/a BABU
MOTORS.....PLAINTIFFS**

VERSUS

**ORIENTAL COMMERCIAL BANK LTD.
.....DEFENDANT**

R U L I N G

Amratlal Bhimji Davda and Sailesh Kumar Bhimji Davda trading as Babu Motors, took out a summons pursuant to Order XXXIX rules 1,2,3 and 9 of the Civil Procedure Rules in which they sought for an order of injunction to restrain Oriental Commercial Bank Ltd, the defendant herein, from advertising for sale or in any manner selling the parcel of land known as Mombasa/Bock XIX/40 pending the hearing and determination of the main suit. The summons is supported by the affidavit of Amratlal Bhimji Davda sworn on 10th July 2006. The defendant opposed the application by filing the replying affidavit sworn by Atul Kumar I Dave dated 19th October 2006.

The dispute between the plaintiffs and the defendant arose out of a debt advanced to the plaintiffs by the defendant which debt fell into arrears.

It is not in dispute that the plaintiffs pledged Plot No. Mombasa/Block XIX/40 as security. It is not also not in dispute that the defendant has expressed its intention to realize security to recover its debt which now remains outstanding.

The plaintiff has come to this court seeking for an order to stop the defendant from selling the security. It is the argument of Mr. Weloba, learned advocate for the plaintiffs that the defendant has kept on altering the rate of interest without seeking for the prior consent of the Minister of Finance as required by law. It is also argued that the rate of interest is so exorbitant that it has created a clog on the equity of redemption.

On his part, Mr. Khagram learned advocate for the defendant was of the view that the application has no merit. It is Mr. Khagram's submission that the plaintiffs admitted in numerous correspondences that they owe the defendant the debt. It is argued that the dispute over the rate of interest is not a ground for the grant of an order of injunction.

I have considered the rival submissions. I have also considered the material placed before me. In my appreciation of these submissions, it is apparent that the debt due is not being disputed. What is disputed is the rate of interest which has made the outstanding debt look so exorbitant. In other words the plaintiffs are saying that the rate of interest applied has made them unable to meet their obligation as debtors hence creating a clog over the equity of redemption. It is not denied by the defendant that it never

sought the permission of the Minister for Finance to vary the rate of interest as required by law. It is also admitted that the rate of interest kept on changing as shown in the statements of account annexed to the affidavit of Amritlal Bhimji Davda. When a party alleges that the rate of interest was altered without the prior consent of the Minister of Finance, that is a fundamental question of law and fact which can only be canvassed through a trial. That ground is not the same as saying that the rate of interest kept on varying without the plaintiff's consent or notice. The question is whether or not the Minister's permission was sought and obtained. For this reason I find that the appellants have shown that they have a prima facie case with a probability of success. For this reason I grant the order as prayed in the summons dated 10th July 2006. Costs of the summons shall abide the outcome of the suit.

Dated and delivered at Mombasa this 28th day of March 2008.

J.K. SERGON

J U D G E