



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

**Civil Case 374 of 2006**

**SAMUEL NJIRAINI NGABIA..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD....1<sup>ST</sup> DEFENDANT**

**THOMAS NJENGA NGOTHO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

By a Chamber Summons dated **14<sup>th</sup> July, 2007**, Samuel Njiraini Ngabia the Plaintiff herein has come to this court seeking an order of a temporary injunction restraining the Defendants, their servants or agents or anybody acting for or on their behalf from selling disposing of, transferring or in any other manner dealing with **Title No.Dundori/Lanet Block5/35** and **Title No.Dundori/Lanet Block 5/33** until the hearing and determination of the suit.

The application is supported by an affidavit sworn by the applicant on the **14<sup>th</sup> July, 2006**, and a further affidavit also sworn by the applicant on the **10<sup>th</sup> September, 2007**. According to the two affidavits, the facts giving rise to this application are as follows:

Sometime in 1999, the applicant obtained a loan of Kshs.5,600,000/= from the 1<sup>st</sup> Defendant at an agreed interest rate of 29% per annum with monthly repayments of Kshs.143,500/=. The loan was secured by a charge in favour of the 1<sup>st</sup> Defendant over the Plaintiff's two properties, **Dundori/Lanet Block5/33 (New Gakoe)** and **Dundori/Lanet Block 5/35 (New Gakoe)**. The plaintiff set up a school on the charged property under the name of Navigator Academy Girls Secondary School. The Plaintiff exhibited a copy of the charge and Bank statements, for his loan accounts. The Plaintiff complained that the Defendant unilaterally and without any notice varied the rate of interest upwards. The Plaintiff protested and there was some exchange of correspondences.

On **29<sup>th</sup> December, 2004**, the 1<sup>st</sup> Defendant appointed 2<sup>nd</sup> Defendant the Receiver Manager of the charged property. From then on the Defendants did not provide the Plaintiff with any account of profits, rent or income from the property.

On **15<sup>th</sup> May, 2006**, Legacy Auctioneering Services served the Plaintiff with a 45 days redemption notice purporting to act on behalf of the 1<sup>st</sup> Defendant. The Plaintiff claimed that the 1<sup>st</sup> Defendant clogged his right of redemption by appointing a Receiver as this denied him control over his property.

It was submitted on behalf of the plaintiff that the statutory notice served on the plaintiff was issued in bad faith as the parties were in the process of negotiations. It was contended that the removal of the receiver which was done after the plaintiff came to court, was simply an attempt to change the status quo when no accounts had actually been taken. It was maintained that the notification of sale served on the plaintiff was defective as it fell short of the required period.

Relying on **HCCC No.79 of 2007** Givan Okalo Ingali & Another vs. Housing Finance Company of Kenya, the court was urged to stop the defendant from exercising its statutory power of sale as the defendant had levied penalties, interests and charges not provided for in the charge document. Relying further on **HCCC No.42 of 2007(OS)** Hazel Wanjiku Wamutitu & Another vs. Joreth Ltd, the court was urged to ignore or strike out the replying affidavit sworn by June Njoroge on **22<sup>nd</sup> August, 2007** as the same was filed outside time and without Leave of the court.

For the defendant, it was contended that the replying affidavit having been filed about a month before the hearing of the application, the objection raised could not hold. It was maintained that the plaintiff having not disputed the debt to the 1<sup>st</sup> Defendant and that the 1<sup>st</sup> Defendant having revoked the appointment of the receiver, and issued a fresh statutory notice giving the required period, the plaintiff was not entitled to any orders of injunction.

Relying on the cases of Sarabjit Singh Sehmi & Another vs. Housing Finance Company of Kenya Ltd, **HCCC No.612 of 2005**, and Francis J. K. Ichatha vs. Housing Finance Company of Kenya Ltd (Milimani) **HCCC No.414 of 2004**, Counsel for the Defendant submitted that the plaintiff having persistently defaulted in the repayment of the loan, the Defendant was entitled to mitigate its losses by selling the suit property. It was also contended that the penalties charged on the account were accepted trade practice. It was maintained that the appointment of the receiver was done in accordance with Section 74 of the Registered Land Act and that under Section 76 of that Act, the receiver was the agent of the chargor. It was maintained that the revocation of the appointment of the receiver and the service of the statutory notice were all done in accordance with the law.

The plaintiff's application being one for interlocutory injunction, he must satisfy this court that he has complied with the conditions restated in the notorious case of **Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358** i.e. he must satisfy this court that he has a prima face case with a probability of success and that if the order of injunction is not granted, he is likely to suffer irreparable loss in respect of which damages will not be an adequate remedy. If the court is in doubt, it must determine the matter on a balance of convenience. The plaintiff's suit as is evident from the plaint, and the facts deponed to in the supporting affidavit, is essentially grounded on the defendant's alleged breach of the charge instrument.

It is contended that the plaintiff has unilaterally varied the rate of interest and also levied illegal penalty charges thereby inflating the plaintiff's liability with respect to the loan and clogging the plaintiff's equity of redemption. Nevertheless, a copy of the charge document exhibited as annexure "SNN-2" to the affidavit of Samuel Ngabia Njiraini shows at page 3 clause 6 that the interest rate was agreed at 29% but the chargee had the right to increase or decrease the rate of interest provided an appropriate notice is served on the chargor. The statement of the plaintiff's account exhibited as annexure "SNN-4" to the affidavit of the Plaintiff shows that apart from interests, ledger fees and interest on arrears, there were no other charges levied which can be considered uncontractual. Moreover, the interest charged between October, 1999 and December, 2003 was between 29% and 15% per annum which was well within the contractual figure. The statements show the account was in arrears right from the year 2000, the imposition of interest on arrears was therefore neither unjust nor unreasonable.

Indeed a closer examination of the statements show that although according to the charge instrument, the Plaintiff was require to pay a sum of Kshs.143,500/= monthly from 15<sup>th</sup> July, 1999 during the year 1999 no payment was received and in the year 2000, only three (3) payments were received two of which were below half the required monthly payment. Several letters written by the plaintiff to the Defendant pleading for time to repay the loan were exhibited by the Defendant. All in all, it is clear that the Plaintiff defaulted in the repayments and the account was hopelessly in arrears. Prima facie, the interest charged on the arrears appear to be justified. Clause 8(ii) of the charge agreement provided for the appointment of

a receiver and the plaintiff having failed to make the payments as provided in the contract, the defendant had the right to appoint a receiver; provided an appropriate three (3) months' notice was served on the Plaintiff. The defendant has not satisfied this court that any such notice was served on the Plaintiff prior to the appointment of the Receiver. To that extent, the appointment of the Receiver was irregular. The Plaintiff has complained that since his appointment, the Receiver (i.e. 2<sup>nd</sup> Defendant) has failed to account for any income collected from the property. There is a dispute as to whether any monies were collected by the Receiver. Be that as it may, under Section 76 of the Registered Land Act, the Receiver though appointed by the chargor is deemed to be an agent of the chargee. The responsibility for his conduct therefore, falls on the chargee, and the Defendant cannot be held liable for the Receiver's failure to account.

Moreover, a dispute as to accounts is not sufficient reason to restrain a chargor from exercising his statutory power of sale, where it is clear as in this case that there has been default and that the debt still remains owing.

Under Section 74(2) (b) of the Registered Land Act, where a chargor has appointed a Receiver, he cannot exercise his statutory power of sale, unless the chargee fails to comply with a further notice of three (3) months served upon him.

No statutory notice appears to have been served on the Plaintiff by the Defendant under Section 74(1) of the Registered Land Act or Section 74(2) (b) of the Registered Land Act, prior to the defendant instructing Legacy Auctioneering Services to sell the plaintiff's property. Although a redemption notice and a notification of sale appear to have been served on the plaintiff by the auctioneer pursuant to Rule 15 of the Auctioneers Rules. This cannot be a substitute for the required mandatory statutory notice provided under Section 74(1) of the Registered Land Act or Section 74(2) of the Registered Land Act. The defendant appears to have recognized this irregularity hence the cancellation of the appointment of the Receiver and the service of the subsequent statutory notice dated 25<sup>th</sup> May, 2007 on the plaintiff. In his plaint, the plaintiff is seeking

**“a permanent injunction restraining the defendants jointly and severally, their servants, agents or anybody acting under their authority or instructions from dealing with, disposing of, by way of sale, transferring or in any other manner with Title No. Dundori/ Lanet Block 5/35 and Title No. Dundori/Lanet Block 5/33 until the hearing and determination of the suit herein.”**

Although the prayer is for a permanent injunction, it is clear from the wording that the prayer is actually an interlocutory injunction pending the hearing of the Plaintiff's suit. The Plaintiff's application for an interlocutory injunction cannot be grounded on another prayer for an interlocutory injunction. Secondly, the defendant's statutory power of sale is not just contractual, but is also provided by statute. It cannot therefore, be taken away permanently by the court. The court can only intervene to ensure that the power is exercised in accordance with the law. While it may have been possible for the court to restrain the defendant from selling the suit property for failure to serve the required statutory notices, the court cannot restrain such a sale where such notices have been served. In this case, the intended sale based on the Redemption notice and the Notification of sale served on the Plaintiff by Legacy Auctioneers, was illegal no appropriate statutory notice having been served on the plaintiff. The court can only restrain that sale and no more.

The Defendant has by its letter dated **4<sup>th</sup> October, 2006** (Annexure “JN-5”) revoked the appointment of the Receiver and by a Statutory notice dated **25<sup>th</sup> May, 2007** (Annexure “JN-6”) which the Plaintiff admits having received, served an appropriate Statutory notice under Section 74(1) of the Registered Land Act. It is therefore, not necessary for the court to issue any further injunctions except to direct that the statutory power of sale be exercised in accordance with the law.

There is therefore, no infringement of the Plaintiff's right that would justify the intervention of this court by way of an interlocutory injunction.

Accordingly, I dismiss the Plaintiff's application.

These shall be the orders of this Court.

**Dated, signed and delivered this 12<sup>th</sup> day of March, 2008.**

**H. M. OKWENGU**

**JUDGE**