REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 556 of 2007

GEORGE NJOROGE GICHIA…… ……PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED……DEFENDANT

RULING OF THE COURT

The Application and the Prayers Sought

1. The application is the Chamber Summons dated 23rd October, 2007 brought under Order 39 Rules 1, 2 and 3 of the Civil Procedure Rules, (CPR) and sections 3A and 63 (c) of the Civil Procedure Act, cap 21 of the Laws of Kenya and Sections 65 and 74 of the Registered Land Act. The plaintiff/applicant prays for one substantive order in terms of prayer 2 of the application:-

"**2 THAT a temporary injunction do issue restraining the defendant whether by itself its appointed auctioneers, servants or agents or Advocates from advertising for sale selling by Public Auction or private treaty or otherwise howsoever alienating, transferring, leasing or in any other manner whatsoever interfering with ALL THAT PROPERTY known as land Reference No. Ngong/Ngong/6829 situated in Ngong within the Republic of Kenya pending the hearing and determination of this suit"**

The Applicant's Case

2. The application is premised in eight grounds on the face thereof inter alia, (a) The defendant has threatened to advertise and thereafter sell by public auction the suit property to recover an alleged debt owed by the applicant to the respondent in the sum of Ksh.904, 089.35, (b) the applicant has repaid the loan fully; (c) the statutory power of sale which the respondent has threatened to exercise has not accrued. (d) the defendant has altered the agreed terms of the lending agreement with regard to interest resulting in the respondent unilaterally loading the applicant's account with excessive unreasonable unconscionable and illegal interest and penalty charges; (e) the defendant has not served the applicant with a proper and valid statutory notice and (f) it will be in the interest of justice and the balance of convenience to preserve the suit property pending the hearing and determination of the suit.

3. The application is also supported by the sworn affidavit of GEORGE NJOROGE GICHIA, the applicant herein dated 23rd October, 2007 in which he has deponed that he is the registered owner L.R. NO. Ngong/Ngong/6829 (the suit property) as per annexture "GNI" (copy of the certificate of Title). The following facts and allegations emerge from the applicant's affidavit:-

(a) That vide letter of offer dated 18th March, 1986, signed between the applicant and the respondent, the respondent advanced to the applicant a loan facility in the sum of Ksh. 450,000/= at staff interest rate

of 5.5% repayable within twenty five (25) years by monthly installment of Ksh. 3064/= inclusive of interest, which loan was secured by a legal charge on the suit property.

(b) The applicant duly executed the legal charge dated 8th April 1986 whose terms were, inter alia (i) interest payable was 5.5% p.a. on annual rests as determined by Central Bank of Kenya from time to time, (ii) chargee could vary the interest payable subject to limits set by the Central bank of Kenya (iii) the respondent to serve the applicant with fourteen (14) days notice in case of variation of the rate of interest with such increased or reduced monthly installments to become due and payable on the first day of the month next after the date of notification of the amount payable.

(c) The applicant was advanced a further Ksh.150,000/= loan facility by a further letter of offer dated 1st December, 1986 for a similar repayment period of same interest rate and on the security of the suit property.

(d) That as a result of the acquisition of the applicant's former employer (Home Savings and Mortgages Ltd) by the respondent, the applicant's services with his former employer were terminated with effect form 21st April 1992.

(e) That following the termination of employment of the applicant, the respondent started applying commercial rates of interest on the loan facility without the applicant's consent, knowledge and/or approval.

(f) That to date the respondent has not served upon the applicant the requisite notice on variation of or intention to vary the rate of interest in accordance with the express terms of the charge document.

(g) That the applicant believes that he has fully repaid the loan advanced plus interest thereon since October, 1994 and that in fact there is an overpayment by Ksh. 811,010/35 which sum the applicant claims from the respondent under paragraph (e) of the reliefs sought.

(h) That the applicant believes that the respondent has made substantial misrepresentations on the status of the loan facility and has acted illegally and unreasonably by charging unconscionable and illegal interests.

(i) That the loan facilities advanced to the applicant were for the construction of a family home and that having done so the applicant and his family would suffer irreparable loss if the suit property is sold.

5. The applicant also filed a further Affidavit dated 19th November, 2007 and filed in court on 20th November, 2007. By the said affidavit the applicant questions the respondent's purported notifications of change of interest, and says that even of such notices were served, they did not give him the minimum 14 day notice period. The applicant also complains about two statutory notices allegedly issued by the respondent on 7th August, 2007 and (31st October, 2007 respectively. The applicant concludes at paragraph 5 of the further affidavit that the respondent could not issue a second statutory notice without the leave of this honourable court, and that having not obtained such leave, the statutory notice dated 31st October, 2007 and received by the applicant on 9th November, 2007 was null and void.

6. The applicant also says that though he wrote some letters to the respondent (see annexture marked "JG3" to the Replying Affidavit) apparently admitting the debt and asking for time to pay, he says he did so without the benefit of proper information and professional advice, and further that he did so under duress from the respondent who was threatening to dispose of the suit property if no payments were received or proposals on repayments made.

The Respondent's Case

7. The application is opposed. The Replying Affidavit is sworn by one JULIUS GIKONYO, officer in charge Remedial Credit with the Defendant Bank/Respondent. The deponent says that the rate of interest

charged on the loan facilities advanced to the applicant was as per the contract between the parties and that whenever such rate of interest was varied, the applicant was duly informed. Annexed to Mr. Gikonyo's Affidavit was a bundle of letters marked "JG2" among them letters from the respondent to the applicant dated 28th June, 1993, 5th November, 1993, the latter of which advised change of interest rate from 25% p.a to 30% p.a with effect from the month of November 1993. Another letter dated 24th June, 1993 advised of change of interest from 22% to 25% with effect form 1st July, 1973.

Another letter dated 13th April, 1993 advised the applicant that the rate of interest had been increased from 19% p.a to 22% p.a effective from 15th April, 1993. It is not clear from the Replying Affidavit how these various notices were dispatched to the applicant. The notice given vide the letter dated 5th November, 1993 was to operate retrospectively while the letter dated 24th June 1993 gave eight (8) days notice and the letter of 13th April, 1993 gave two (2) days notice.

8. Mr. Gikonyo also says that the applicant was fully aware of his indebtedness to the respondent and that as his letters show (annexture "JG3") the applicant fully admitted his indebtedness and that it is,

therefore only fair and just that the respondent be allowed to realize the suit property.

The Submissions and the Law

9. Mr. Kangethe, Counsel for the applicant contends that this application was precipitated by the statutory notice date 7th August, 2007 issued by the bank and served on the plaintiff, with the bank demanding some Ksh. 904,089/35 together with interest thereon at 20% p.a. Mr. Kangethe says that the amount demanded of the plaintiff is not only not due under the contract but that the same is illegal and excessive and that it has been arrived at after the bank accumulated illegal interests. The plaintiff also complains through his advocate that the bank did not serve a proper statutory notice as required by section 74 of the Registered Land Act (RLA) Cap 300. Section 74 provides at subsections (1) and (2) thereof as follows:

"***74 (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.***

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under sub section (1) the chargee may -:

(a) appoint a receiver of the income of the charged property, or

(b) sell the charged property.

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the charger fails to comply, within three months of the date of service, with a further notice served on him under that sub section"

10. Regarding the facts of this case, Mr. Kangethe reiterated the grounds on the face of the application and the averments of the affidavit in support of the application and pointed out that according to the lending agreement(s) the interest to be charged was 5.5% unless a valid notice varying such interest was issued and served upon the plaintiff and that the notice period required is 14 days. Mr. Kangethe contends that at no time was any such notice, or valid notice served upon the plaintiff varying the rate of interest payable in accordance with the relevant legal provisions. To demonstrate this point, Mr. Kangethe says that the purported statutory notice served upon the plaintiff indicates an interest rate of 20% p.a. but that there is no other information to explain to the plaintiff how the 20% interest has been arrived at.

11. Mr. Kangethe says in particular that the purported notices annexed to the Replying Affidavit and marked "JG1" are certificates issued by the defendant in compliance with Income Tax Regulations certifying the amount of interest charged to the plaintiff. That in any event, none of the purported notices give the plaintiff the 14 day notice period required before change of interest rate as required by clause 6(ii) of the charge. For example the defendant's letter dated 5th November, 1993 informs the plaintiff that the interest rate has been increased form 25% p.a to 30% p.a effective 1st November, 1993. Another letter dated 24th June 1993 informs the plaintiff that the rate of interest has been increased from 22% p.a to 25% p.a effective from 1st July 1993. Clause 6(ii) of the charge (Annexture "GN3") stipulates that for any change in the interest for the time being payable under the charge, the defendant SHALL serve upon the plaintiff (chargor) not less than Fourteen (14) days notice in writing of such variation "***which notice shall specify the effective date of such variation together with particulars of the increased monthly installments payable".***

12. Mr. Kingara submits that in the absence of a valid notice charging interest rate from 5.5% p.a and in the absence of any evidence of service of such notices in terms of clause 20 of the charge, this court should find that an order of injunction is merited and to grant the same.

13. Further, Mr. Kingara argues that there is evidence to show that the plaintiff has already overpaid his loans by about Ksh.464,317/45 even if the defendant was to apply the commercial rate of interest and further that even if it were accepted that the defendant was entitled to apply commercial rates of interest, the rates charged in the instant case were way beyond the allowed limits. The reason for this argument according to Mr. Kingara, is that the defendant has not availed any documentary evidence to show that it obtained the authority of the Central Bank of Kenya for the rate of interest charged in accordance with sections 39 and 44 of the Central Bank of Kenya, Act, cap 491 (See act No. 8 of 2004) Section 44 of the Act empowers the CBK to act as fiscal agent and banker is public entities in accordance with, and within the scope determined by , any special arrangements made between the Bank and the public entity concerned.

14. Regarding the statutory notice dated 7th August, 2007, Mr. Kangethe submits that the same is fatally defective because:-

(i) It quotes the wrong date of the charge and also quotes the wrong property

(ii) Purports to be issued pursuant to section 69 of the ITPA when the suit property is registered under the RLA.

He also says that though the defendant avers in its defence at paragraphs 5 and 12 that the notice dated 7th August, 2007 is valid, there is an admission by the defendant that the said notice was not valid hence the latter notice dated 31st October, 2007. The latter notice apparently is aimed at regularizing the anomaly created by the earlier notice dated 7th August, 2007. In his view the re-issuance of the statutory notice on 31st October, 2007 goes along way in confirming that the notice dated 7th August 2007 was in fact invalid.

15. Mr. Kangethe cited a plethora of case law for the guidance of the court, among them the case of RAJ KUMAR GANDHI Vs BARCLAYS BANK OF KENYA & ANOTHER – HCCC No. 231 of 2004 (Milimani) in which the court noted that for a party:-

"…….**to seek to serve a properly worded notice when the defective one was already awaiting adjudication before the court was with profound respect, and to say the least is an attempt to steal a march on the plaintiff"**

16. Mr. Kangethe cited other relevant and helpful authorities in support of his client's case, especially dealing with notices to alter the rate of interest under the charge document; on the issue of whether while the defendant is ready and willing to pay damages, an injunction should not issue. The authorities also deal with the general principles for the granting of injunctions. Mr. Kangethe submitted that in the

present case, there is indeed a serious issue to be investigated before the defendant can lay claim to the suit property by way of sale by public auction under its statutory power of sale. He said that the issue of the rate of interest from 5.5% p.a. to 30% p.a is a serious issue more so because notices for such alterations were not given by the defendant and secondly because the defendant failed to give the requisite statutory notice in accordance with section 74 of the RLA.

17. Mr. Njiru for the defendant/respondent says that the plaintiff who has admitted that he is indeed in arrears on loan repayments should not benefit from the discretion of this court particularly when he has persistently defaulted on the repayment despite the defendant's indulgence. Mr. Njiru also says that clause 2 of the letter of offer which forms the basis of the agreement between the plaintiff and the defendant specifically empowers the defendant to charge penalty interest in respect or arrears. Mr. Njiru further says that the notices for alteration of interest were duly served to the plaintiff and that in the circumstances, the plaintiff has not demonstrated a prima facie case with probability of success to warrant the order of injunction sought. Mr. Njiru urged the court to go beyond the four walls of the GIELLA principles and to find that the balance of convenience tilts in favour of the defendant, and further that even if the plaintiff's suit eventually succeeds the defendant is capable of paying damages to the plaintiff. Further, Mr. Njiru has argues that the plaintiff has deprived himself of the benefit of the court's discretion because he (plaintiff) has not even given an undertaking for payment of the disputed amount. Mr. Njiru relies on a number of authorities among them the cases of **Mrao Ltd Vs First American Bank of Kenya Ltd and 2 others {2003}** KLR1 and **Maithya Vs Housing Finance Company of Kenya and Another {2003} EA 133.** In the Mrao Ltd case (above) the court reiterated the principles for the granting of an interlocutory injunction as stipulated in **Giella Vs Cassman Brown Ltd{1973} E.A 358** and also said, inter alia, as follows:-

"*4 A prima facie case in a civil application includes but is not confined to a "genuine and arguable case" It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter"*

18. In the same case, Kwach J.A (as he then was) said the following on page 127:-

"**The principles governing the grant of interlocutory injunctions as set out in Giella Vs Cassman Brown and Co. Ltd {1973} EA 358, have been lucidly analysed by Bosire JA. In recent times a tendency has developed in the Superior court of treating applications by a mortgagor for a temporary injunction to restrain a mortgagee from exercising his statutory power of sale just like any application for injunction in an ordinary suit. The circumstances in which a mortgagee may be restrained from exercising his statutory power of sale are set out in Halsbury's Laws of England, Vol 32 (4th Edition) paragraph 725 as follows:-**

"**725 When a mortgagee may be restrained from exercising power of sale. 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*** **(emphasis added).**

In both the **Mrao Ltd** and **Maithya cases** (above) the court emphasized that those who seek equity must do equity and that unless the evidence shows that an infringement of a right has occurred, and that there is a probability of success of the Plaintiff's case on trial, then an order of injunction should not be given.

The Findings

19. It is not in dispute in this case that the plaintiff borrowed money from the defendants and charged the suit property as security for the same. The first principal amount, borrowed from the defendants predecessor, **Home Savings and Mortgages Ltd**. was Ksh. 450,000/= at the interest rate of 5.5% p.a. calculated at annual rests as long as the plaintiff remained in his employment. The second amount was

Ksh.150,000/= at the same interest rate and repayable over the same period of 25 years. It is also not in dispute that the suit property was charged to the defendant to secure the loan facilities. It is also not in dispute that the chargee was at liberty to vary the rate of interest payable at any time subject to the limits authorized by he Central Bank of Kenya and upon giving notice of such variation to be communicated to the defendant at least fourteen (14) days before the new rate of interest became effective; and that particulars of the increased or reduced monthly installments would also be communicated to the plaintiff by the same notice.

20. It is also not disputed that on the 21st April 1992, the plaintiff lost his job with the defendant, (defendant had acquired **Home Savings & Mortgages Ltd** in or about December 1989) but what is not in agreement is whether by October, 1994, the plaintiff had repaid a substantial or the whole of the loan amount. Nevertheless, the defendant altered the rate of interest and it is the plaintiff's case that no valid notices for the changes in interest rates were served upon him by the defendant. He also complains that the statutory notice required to be served by the defendant under section 74 of the RLA was not served upon him. Of course the defendant says that he has complied with the terms of both the letters of offer and the charge document.

Question(s) for Determination

21. The issue that now arises for determination is whether the plaintiff in this case has shown first that he has either paid into court or has given an undertaking as to the payment of the moneys that the defendant claims are due or whether he has demonstrated that on the terms of the mortgage, the claim is excessive.

22. I have perused the two letters of offer and the charge document as well. I have also studied all the annextures to both the Supporting, Affidavit and the Replying Affidavit. I have also considered the relevant case law cited to me by both counsels. In my view, the plaintiff applicant is entitled to the order of injunction pending the hearing and determination of this suit.

23. In the first place, the court has found that the plaintiff faithfully paid the monthly installments on both facilities until after 16th April, 1992 when he lost his job. Even after the job loss the plaintiff says that he paid up the whole amount by October 1994. She defendant does not of course agree. What appears to have given rise to the confusion however, is that the defendant, without paying attention to the terms of the agreement between itself and the plaintiff purported to issue notices to the plaintiff without granting the requisite notice periods and as can be seen from annexture marked "JG1" to the Replying affidavit some of the notices were given retrospective effect. In addition the notices were issued in very close succession and none of them gave the required fourteen day period. It is my view that any ordinary person in the position of the plaintiff would have been confused by the defendant's actions. There is therefore, a need to sort out the issue of the notices and also to determine whether such notices were issued in accordance with sections 39 and 44 of Central Bank of Kenya Act. I have no doubt in my mind that such rapidly changing interest rates may have resulted in excessive interests being loaded onto the plaintiffs account and thereby making his ability to redeem the account dimmer by the day. In the circumstances, I do not think that the plaintiff's failure to keep up with the monthly installments was a clear case of default. It has not been shown that the plaintiff had the intention nor does he have the intention of not repaying the loan. What the plaintiff is saying is that he has paid off the whole of the loan facilities even if the highest rate of interest chargeable, was used in computing the amounts due to the defendant.

As regards the statutory notices under section 74 of the Registered Land act (Cap 300) I do agree with counsel for the plaintiff/applicant that the notice dated 7th August, 2007 was defective in some very material particulars and especially because.

- the notice gave a wrong description of the suit property
- the notice also quotes the wrong law under which the notice was given
- the validity of the notice is in dispute.

24. Upon realizing that the notice of 7th August, 2007 was a bad notice upon the three grounds given above the defendant purported to issue another notice on the 31st October, 2007 when this suit was already in court. As it were, the defendant was trying to steal a march on the plaintiff/applicant and the court will not allow the respondent to pursue the plaintiff/applicant in this manner. Authorities now abound on this issue. The clear provisions of sections 65 (2) and 74(2) of the Registered Land Act are clear on what constitutes a valid notice by the mortgagee upon the mortgagor. If the first notice of 7th August, 2007 was valid, why was it found necessary to issue another notice on 31st October, 2007. It would seem to me that the defendant was trying to correct the anomaly in the earlier notice. Surprisingly the notice of 31st October 2007 makes no reference to the earlier notice of 7th August, 2007. The only difference is that the notice of 7th August, 2008 was purportedly given under section 69 of the Indian Transfer of Property Act, (ITPA), while the notice of 31st October, 2007 was now said to be given under section 74 of the Registered Land Act.

25. The position as expressed by Njagi J in the RAJ KUMAR GANDHI case (above) prevails in this case. The defendant cannot hope to validate its notice of 7th August, 2007 with the latter notice dated 31st October, 2007. I reject both notices and find and hold that the plaintiff was never served with the requisite notice in terms of sections 65(2) and 74 of the Registered Land Act.

Prayer for Injunction

26. Has the plaintiff satisfied the conditions for the granting of an injunction as set out in the case of ***Giella Vs Cassman Brown & Co. Ltd {1973} EA 358*** and as expounded by Kwach J.A (as he then was) in the case of **Mrao Ltd** (above) For the application to succeed in this case, he must show first that he has a prima facie case with a probability of success. Secondly, the court will not normally grant an interlocutory injunction unless the applicant might otherwise suffer unrepairable loss and thirdly if the court is in doubt, it will decide the case on a balance of convenience.

27. Applying the above principles to this case, I am satisfied that he has a prima facie case with a probability of success on the basis that the applicant was not served with a proper statutory notice. I have also found that on the face of it the defendant's claim against the plaintiff is excessive.

Conclusion

28. In the result, I have no option but to allow the plaintiff/applicants applications dated 23rd October, 2007 and grant the order of injunction restraining the defendant whether by itself, its appointed auctioneers, servants or agents or advocates form advertising for sale, selling by public auction or private treaty, or otherwise however alienating, transferring leasing or in any other manner whatsoever interfering with **ALL THAT PROPERTY** known as LR. No. Ngong/Ngong/6829 situated, in Ngong within the Republic of Kenya pending the hearing and determination of this suit. Costs of the application are to be borne by the defendant.

Orders accordingly.

Dated and delivered at Nairobi this 6th day of March 2008.

R. N. SITATI

JUDGE