REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 623 OF 2007

ESTHER CHELIMO KAVEMBA.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LTD.....DEFENDANT

R U L I N G

The plaintiff filed an application under the provisions of **Order XXXIX Rule 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** seeking an order of interlocutory injunction to restrain the defendant by itself or its agents from advertising for sale, interfering, alienating or otherwise howsoever dealing with LR. No. Nairobi/Block 111/36 Koma Rock Estate, Phase 1 Nairobi *(hereinafter referred to as the suit property)* pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The plaintiff contends that she was not served with the requisite statutory notice as provided by **Section 74** of the **Registered Land Act**. She further states that she was served with a redemption notice by the auctioneer on 17th September, 2007, which notice in her view was invalid since it was not made on the basis of a valid statutory notice. The plaintiff complained that the defendant had breached the underlying agreement by imposing illegal penalties, interest and uncontractual charges.

The plaintiff further complained that the defendant had failed to notify her whenever it desired to change the rate of interest as provided by clause 5 (iii) of the legal charge. In the premises, the plaintiff contends that she had established a *prima facie* case with a high chance of success. She further contended that damages would not be an adequate remedy where the defendant was purporting to sell the suit property pursuant to an illegal, null and void process of realization of security. She urged the court to grant her the order in view of the fact that part of the debt had been paid by the insurance company under the mortgage insurance scheme. The application is supported by the annexed affidavit of Esther Chelimo Kavemba, the plaintiff. She swore a further affidavit in support of the application.

The application is opposed. Joyce Njoroge, the defendant's assistant manager, Legal services, swore two affidavits in opposition to the application. She deponed that the averments made by the plaintiff in the pleadings in support of her case were meant to mislead the court. She swore that the interest rate charged by the defendant was contractual and was further in compliance with the provisions of **Section 44** of the **Banking Act**. She explained that even if the defendant had not complied with the said section of the **Banking Act,** it did not absolve the plaintiff from her obligation to repay the mortgage facility under the provisions of **Section 52(1)** of the **Banking Act**. She deponed that the sum of Kshs.103,000/= which was paid by the plaintiff was on account of the notional rent agreement which was executed by the plaintiff and which sums were clearly not meant to reduce the outstanding debt. She deponed that the defendant had properly and rightfully sought to exercise its statutory power of sale after the plaintiff had defaulted

in repaying the mortgage amount. She annexed copies of statements in respect of the mortgage account which supported the defendant's contention that the plaintiff indeed owed the sum of Kshs.2,501,322/25 as at 1st January, 2007. She deponed that a valid statutory notice was issued to the plaintiff before the defendant sought to exercise its statutory power of sale. She annexed to her affidavit, a copy of the statutory notice and the certificate of posting. She admitted that after the death of the plaintiff's husband, the defendant received the sum of Kshs.486,940/= pursuant to the mortgage insurance policy which sum was applied to settle the debt owed. She deponed that the defendant had not charged a rate of interest that was not specifically provided for in the instrument of charge. She further deponed that the plaintiff was estopped from denying being indebted to the defendant since by various correspondences the defendant had admitted owing the said debt. She urged the court to disallow the plaintiff's application.

Mr. Kyalo, counsel for the plaintiff and Mr. Issa, counsel for the defendant filed skeleton submissions in support of their respective client's cases. They further filed lists of decided cases in support of their respective client's cases. At the hearing of the application, Mr. Kyalo made oral submissions urging the court to allow the application. Mr. Issa for the defendant urged the court to disallow the application in view of the fact that the plaintiff had failed to establish a case to enable this court reach a determination in her favour.

I have carefully read the pleadings filed by the parties herein in support of their respective cases. I have also carefully considered the written and oral submissions made by Mr. Kyalo and Mr. Issa. The issue for determination by this court is whether the plaintiff established a case to enable this court grant her the injunction sought. The principles to be considered by this court in determining whether or not to grant an application for injunction sought are well settled. *In* ***Giella vs Cassman Brown [1973] EA 358*** at page 360 Spry VP held that:

"*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (****E.A. Industries v. Trufoods, [1972] E.A. 420****.)"*

In the present application, three issues came to the fore for determination by the court. The first issue was whether the defendant issued the requisite statutory notice before it sought to exercise its statutory power of sale. It was the plaintiff's contention that she had not been served with the statutory notice because the postal address that the registered letter was sent to was not the plaintiff's known postal address. She stated that after the death of her husband on 14th May, 2006, she changed her postal address from P. O. Box 25968-00503, Nairobi to P. O. Box 457-00513, Nairobi. She claimed that she had notified this change of address to the defendant. She further claimed that she had informed Madison Insurance Company Limited, the insurance company which issued the mortgage insurance with this notification of change of address as far back as July, 2005. On its part, the defendant insisted that it had issued the requisite statutory notice to the plaintiff. It annexed a copy of the contentious statutory notice dated 17th January, 2007. According to the defendant the said statutory notice was sent to postal address number 25968-00503, Nairobi. A certificate of posting was annexed thereto indicating that the said notice was duly sent on 19th February, 2007. There was no evidence to suggest that the plaintiff had notified the defendant of the change of postal address. I think the defendant was entitled and within its right to sent the said statutory notice to the last known postal address of the plaintiff. I therefore hold that the defendant did indeed and serve issue and serve the statutory notice upon the defendant.

The second issue for determination is whether the defendant charged a rate of interest that was not provided in the charge instrument. According to the instrument of charge, which was annexed to the affidavit of Joyce Njoroge, sworn on behalf of the defendant in opposition to the plaintiff's application, the rate of interest to be applied was to be in accordance with clause 5 of the charge. The said clause provided as follows:

"*It is hereby further agreed that the rate of interest payable on all money hereby secured shall be*

determined as follows: -

(i) Until the service of such notice as it hereinafter referred to interest shall be at the rate shown in the schedule.

(ii) The chargee may from time to time serve on the chargers on demand notice requiring payment of interest at such increased or reduced rate as the chargee shall determine having regard to such circumstances as they consider to be relevant and the decision of the chargee in this behalf shall not be questioned on any account whatsoever.

(iii) In the event of the chargee requiring a variation of the rate of interest under the provisions of sub-clause the chargee will notify the chargers of the amount of the resulting varied monthly installment payable under the provisions of clause 3 hereof and the first of such varied monthly installments shall become due and payable on the first day of the month next after notification of the amount thereof to the chargers.

(iv) All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effect as referring to interest as fixed or altered by the provisions of this clause."

The above clause of the instrument of charge required the defendant to issue notice to the plaintiff before varying the rate of interest. I have perused the statements of accounts. It was evident that on the whole, the defendant varied the interest downward instead of upward. While it was conceded that the defendant had not exhibited any evidence that it had issued notice to the plaintiff in accordance with the said instrument of charge, it was this court's view that the plaintiff was not prejudiced by the defendant's failure to provide such notice. It was clear that on the facts of this case, nothing turns on this aspect of the complaint raised by the plaintiff.

The third issue for determination is whether the defendant had imposed illegal interests and uncontractual charges on the mortgage account. The plaintiff annexed a report prepared by a firm known as Interest Rates Advisory Centre (IRAC) in the affidavit in support of her application for injunction. It was argued on behalf of the plaintiff that on the basis of the said report prepared by IRAC, the plaintiff had established that the defendant had indeed charged rates of interests and other charges that were uncontractual. On its part, the defendant argued that the plaintiff could not rely on a document prepared by a firm that was not well versed with the terms of the contract as contained in the instrument of charge.

I have perused the statements of the plaintiff's account annexed in the replying affidavit of Joyce Njoroge and compared it with the statement prepared by IRAC. What is evident from the statement prepared by the defendant is that for a period of five years from July 1999 to June 2004, the plaintiff made no single payment towards the settlement of the mortgage amount. Prior thereto, the plaintiff and her late husband had erratically paid the mortgage amount to the extent that at one time in 1997, the defendant had given notice to the plaintiff of this intention to realize the security. The statements prepared by IRAC would have been persuasive if the plaintiff had paid the mortgage amount. I think it defies logic that the plaintiff can complain about the rate of interest that was charged on her account, yet on the other hand she deliberately failed to abide by the terms of the loan agreement as contained in the instrument of charge by failing to repay the mortgage amount that was advanced to her by the defendant. The plaintiff's argument in this regard cannot stand in view of the notional rent agreement that was executed on 3rd August 2004 between the plaintiff and her late husband on the one hand, and the defendant on the other in which the plaintiff had then acknowledged being indebted to the defendant to the sum of Kshs.1,916,793/75 as at 31st August 2004.

The plaintiff acknowledged the fact that at that particular time she was in arrears in repaying the loan that was advanced to her together with the accrued interest. In the said agreement, it was the plaintiff's plea that she should be allowed a breathing space to enable her secure funds to pay the mortgage amount that was in arrears. The plaintiff cannot at this stage repudiate the terms of the said agreement by claiming that the amount that she admitted to as owing to the defendant was illegal and uncontractual. This court is not persuaded by the said argument.

In any event, it is now settled law that this court cannot grant an injunction on the basis that the amount demanded by a mortgagee is disputed. The Court of Appeal in ***Joseph Okoth Waudi –vs – National Bank of Kenya C.A. Civil Appeal No.77 of 2004 (Mombasa)*** *(unreported),* held at page 4 of its judgment that:

"*It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has began redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on terms of the mortgage, the claim is excessive. See* ***Halbury's Laws of England Vol.32, 4th Edition page 725*** *and* ***Lavuna & Others –vs- Civil Servants Housing Co. Ltd & Anor Civil Appeal Nairobi No.14 of 1995*** *(unreported),* ***Middle East Bank (K) Ltd –vs- Miligan Properties Ltd Civil Appeal No.194 of 1998*** *(unreported)."*

In another recent case, ***Ng'ayo Traders Ltd vs Savings & Loan (K) Ltd Civil Application No. Nai.165 of 2005 (UR.99/2005),*** the Court of Appeal held at page 6 of its judgment as follows:

"*Moreover, where there is a dispute as to the amount due under the charge, like in this case, the courts do not normally grant an injunction restraining a mortgagee from exercise his statutory (power) of sale on the ground that there is such a dispute (****Shah vs Devji [1965] E.A. 91****).* *The justification is that, in a case like this one, the chargers statutory remedy for irregular exercise of power of sale is damages only against the chargee (See* ***Section 77(3)*** *of* ***RLA****). The rest of the grounds upon which the suit and application in the superior court are based allege breach of statutory procedures precedent to a lawful exercise of power of sale by the chargee. The procedural irregularity can however be cured by canceling the disputed sale by public auction and by exercising the power of sale afresh after complying with the statutory requirements. There is no law prohibiting the chargee from following that cause."*

The plaintiff made a big issue regarding the applicability of the provisions of **Section 44A** of the **Banking Act** to this case. The said section came into force on 1st May 2007. The said section imports the *in duplum* rule into the **Banking Act**. However by the time the said section of the **Banking Act** came into force, the defendant had already issued the requisite statutory notice to the defendant. In any event, the plaintiff did not plead the applicability of the said section of the **Banking Act** in her statement of claim. The plaintiff raised the said issue during her submissions in court. It is trite that a party can only urge a case on the basis of the pleadings filed in court. While it is conceded that **Section 44A** of the **Banking Act** applies to loans that became non performing before the coming into force of the said section (see **Section 44A(6)** of the **Banking Act**), the said law is not of benefit to the plaintiff in the circumstances of this case. Under the proviso of **Section 44A** of the **Banking Act**, the amount that shall be considered when determining whether the mortgagee is in breach of the *in duplum* rule is the principal amount and interest that is owing on the day the said section came into operation. In the present application, the amount that shall be considered to be applicable is the amount that was owed by the plaintiff as at 1st May 2007.

This court's overall evaluation of the plaintiff's complaints against the defendant is that the plaintiff is essentially pleading with this court to spare the suit property, which she considers to be her matrimonial home. It was clear from the facts of this case that the plaintiff seems to have forgotten that what is borrowed eventually has to be repaid. The plaintiff cannot breach the terms of the instrument of charge by refusing to repay the loan that was advanced to her and then rush to court seeking legal protection when the defendant is seeking to realize its security. I think the plaintiff should be told in no uncertain terms that once she executed the agreement in which she agreed to repay the loan that was advanced to her, she cannot appeal to the court's sympathy by seeking to restrain the defendant from claiming what is lawfully due to it.

It is clear from the foregoing that the plaintiff's application for injunction dated 28th November 2007 lacks merit and is for dismissal. It is hereby dismissed. The defendant shall have costs of the application.

DATED at NAIROBI this 30th day of July 2008.

L. KIMARU

JUDGE