



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Case 298 of 2008**

**DUNCAN NDIRITU WAMAE.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT**

**RULING**

This is an application by the plaintiff made under the provisions of Order XXXIX Rules 1 & 2 of the Civil Procedure Rules. The plaintiff is seeking an order of interlocutory injunction to restrain the defendant by itself, its servants or agents from selling, alienating, transferring or in any manner whatsoever disposing of the plaintiff's property known as LR 209/8294/351 South C (*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 he has fully repaid the loan that was advanced to him. He denied having received the statutory notice dated 23<sup>rd</sup> November, 2004 or any other statutory notice as stipulated by the law. The plaintiff contends that the defendant had acted in bad faith contrary to the requirements of Section 77 of the Registered Land Act.

The application is supported by the annexed affidavit of Duncan Nderitu Wamae, the plaintiff. In the said affidavit, the plaintiff depones that he was advanced a sum of KShs.3,363,760/= by the defendant in 1996. He annexed the copy of the charge dated 20<sup>th</sup> September, 1996. He deponed that he faithfully repaid the loan plus the accrued interest, and by the time he filed suit, he had paid the sum of KShs.8,657,177.45. He stated that despite having overpaid the amount owed by KShs.27,695.59, the defendant was demanding a further payment of KShs.2,788,179.20. He deponed that according to the calculations made by the Interest Rates Advisory Centre (IRAC) an accountancy firm, the said amount claimed by the defendant was in respect of interest which was charged contrary to provisions of Section 44 of the Banking Act. The plaintiff deponed that he had repaid an equivalent of about 2 ½ times of the amount originally borrowed. The plaintiff admitted signing a contract with the defendant to reschedule the loan on 10<sup>th</sup> February, 2004 but stated that he had signed the said contract under duress since the defendant had threatened to sell the suit property. He deponed that he had not been served with any statutory notice. He was apprehensive that the defendant would sell the suit property at a reserve price that was greatly below the true value of the property. He annexed a copy of a valuation report which put the value of the suit property at KShs.9,000,000/=. He urged the court to grant the order of injunction sought since the suit property was his only home. He swore that he would suffer irreparable damage not likely to be compensated by monetary terms if the suit property is sold.

The application is opposed. Joseph Kania, the defendant's manager, legal services, swore a replying affidavit in opposition to the application. He deponed that the plaintiff had defaulted in repaying the loan which was advanced to him and which amount stood at KShs.2,183,367.60 as at 30<sup>th</sup> April, 2008. He deponed that the interest rate which was charged was contractual and could not be varied by parties who were strangers to the contract. He stated that the plaintiff had admitted in writing owing the said sum to

the defendant and had indeed undertaken to repay the outstanding sum. A copy of the said letter was annexed to Joseph Kania's affidavit.

Mr. Kania further swore that the defendant had indeed given consideration to the plaintiff's plea to be allowed to reschedule the repayment of his loan, the agreement of which the plaintiff had failed to honour. He reiterated that the plaintiff was served with the statutory notice dated 23<sup>rd</sup> November, 2004 which was served to the plaintiff by registered post at his last known postal address. He deponed that the plaintiff had not satisfied the conditions precedent for the grant of the equitable remedy of injunction. He swore that the plaintiff had come to court with unclean hands since he had issued a cheque of KShs.120,000/= in part repayment of the debt due, and which cheque upon presentation to the bank was dishonoured. He urged the court to dismiss the plaintiff's application.

At the hearing of the application, I heard the submissions made by Mrs. Othieno on behalf of the plaintiff. She submitted that the scope of damages not being an adequate remedy in an application for injunction was extended in the cases of Waithaka vs. Industrial & Commercial Development Corporation [2001] KLR 374 and Muiruri vs. Bank of Baroda (K) Limited [2001] KLR 183 to include situations where the defendant's conduct in the transaction is oppressive. She reiterated the contents of the plaintiff's application and argued that the plaintiff had established a prima facie case since he had fully repaid the loan which was advanced to him. She submitted that the defendant had no right to the exercise of the statutory power of sale since the plaintiff had repaid the loan that was advanced to him. In the circumstances, she was of the view that the defendant had clogged the plaintiff's equity of redemption by applying unlawful interest and other levies not provided for in the charge instrument. She submitted that the statutory notice purportedly issued by the defendant on 23<sup>rd</sup> November, 2004 was caught by the doctrine of laches and the same could not be considered as having been served upon the plaintiff. She insisted that the said notice was issued a long time ago and could not therefore constitute a valid statutory notice. She submitted that the plaintiff was apprehensive that the defendant would sell his property at an undervalued price since the reserve price of KShs.5.2 million was less than the true value of the suit property of KShs.9 million.

The main thrust of Mrs. Othieno's submission related to the issue of interest. She submitted that the defendant had charged excessive interest that was not in accordance with the charge instrument. She explained that according to calculations made by IRAC an accountancy firm, the plaintiff had fully repaid the loan that was advanced to him. She insisted that the amount that the defendant was demanding was in respect of interest, fees and levies that were charged contrary to the Banking Act and the interest rate set by the Central Bank of Kenya. She reiterated that the defendant had clogged the plaintiff's right of redemption by charging rate of interest in such a manner that it made it impossible for the plaintiff to repay the loan. She insisted that the manner which the defendant levied interest on the plaintiff's account was unlawful and contrary to the terms of the instrument of charge. She reiterated that the defendant would be prejudiced if the suit property is sold at the reserve price which did not reflect the true value of the property. She conceded that although a dispute over the amount owing would not constitute sufficient ground for the grant of an order of injunction, in the circumstances of this case, the defendant, having charged illegal interest, levies and penalties, the plaintiff had established a prima facie case to entitle this court to grant him the injunction sought. She relied on the case of Mrao Limited vs. First American Bank (K) Ltd & Others CA Civil Appeal No. 39 of 2002 (unreported). She submitted that in the circumstances of the case, the plaintiff had established a prima facie case; the plaintiff had established that he would suffer irreparable damage not likely to be compensated by an award of damages since he would lose his residential house. She urged the court to allow the application with costs.

The application is opposed. Mr. Mungai for the defendant submitted that the plaintiff was not entitled to the grant of the order of injunction sought. He submitted that the plaintiff had admitted being indebted to the defendant and had further defaulted in repaying the mortgage amount. He maintained that the statement prepared by IRAC clearly indicated that the plaintiff failed to pay the monthly installments as agreed in the charge instrument. He submitted that the defendant had not clogged the plaintiff's equity of redemption. He reiterated that the defendant was willing to discharge the suit property provided the plaintiff paid the outstanding sum of KShs.2,183,000/=. He maintained that the defendant had served the requisite statutory notice to the plaintiff and was indeed entitled to exercise its statutory power of sale.

He submitted that the plaintiff was not entitled to the order sought since he had issued a cheque which upon being presented to the bank was returned unpaid. On the issue of the reserve price, he submitted that the forced sale value of the suit property was KSh.6,000,000/=. He reiterated that the price of the suit property could only be determined after the sale by public auction had been conducted. He explained that if the plaintiff was aggrieved by the conduct of the sale by public auction, he would be at liberty to sue for damages.

Mr. Mungai reiterated that a dispute over the amount owed could not be a basis for the grant of injunction. He relied on the case of Labelle International Limited & Anor. vs. Fidelity Commercial Bank [2003] 2EA 541. He further submitted that the fact that the suit property was a matrimonial property was not a bar to the defendant exercising its statutory power of sale. He relied on the case of Simon Ndambiri Gachibi vs. Housing Finance Company of Kenya Ltd Nairobi HCCC No. 365 of 2006 (unreported). He reiterated that the plaintiff had failed to establish that he would suffer irreparable damage. He relied on the case of Maithya vs. Housing Finance Company of Kenya Limited [2003] 1EA 133. He maintained that the defendant had not repaid in full the loan that was advanced to him; neither could the plaintiff rely on the amendments to the Banking Act since the same came into effect in 2000 after the defendant had already advanced the loan to the plaintiff. He urged the court to dismiss the plaintiff's application with costs.

I have carefully considered the rival argument made by counsel for the plaintiff and made by counsel for the defendant. I have also read the pleadings filed by the parties in support of their respective positions in this application. The issue for determination by this court is whether the plaintiff established a case to enable this court grant him the injunction sought. The principles to be considered by this court in determining whether or not to grant the order of 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, the plaintiff basically raised three issues for determination by this court in his bid to establish that he had a prima facie case. The first issue was in relation to the matter of notice. The plaintiff argued that the defendant had not served him with the requisite statutory notice. It was the plaintiff's contention that he had not received the statutory notice dated 23<sup>rd</sup> November, 2004. On its part, the defendant annexed a copy of the said statutory notice together with a copy of the certificate of posting as proof that the said statutory notice was indeed sent to the plaintiff by registered post through his last known postal address. I have perused the said copy of the statutory notice and the certificate of posting. I am satisfied that the plaintiff was duly served with statutory notice in accordance with the provisions of Section 69A of the Transfer of Property Act.

The plaintiff raised an interesting argument that since the said statutory notice was issued four (4) years before the defendant sought to exercise its statutory power of sale, then the said notice was invalid by virtue of the fact that it had been caught by the doctrine of laches. I have considered the said submission. Whereas it is good practice for a mortgagee or chargee to exercise its statutory power of sale at a time that is more or less contemporaneous with the statutory notice, there is no legal bar for the exercise of the said power of statutory sale several years after the said statutory notice was issued. The Transfer of Property Act only provides that a statutory notice must be issued at least three (3) months before a mortgagee exercises its statutory power of sale. I find no merit with the plaintiff's argument on that point.

The second argument that the plaintiff advanced was that the interest rate charged by the defendant was excessive and therefore unconscionable. Mrs. Othieno submitted that the interest charged was contrary to the charge instrument. She further argued that the other charges and levies imposed by the defendant were purposely meant to clog the plaintiff's equity of redemption. Mr. Mungai for the defendant argued

that the interest charged was contractual. He further stated that a dispute over the amount owing could not form a basis for the grant of an order of injunction. The plaintiff submitted that he had instructed a firm of accountants who made calculations and determined that he had fully repaid the loan that was advanced to him by the defendant. The plaintiff reiterated that he had paid a sum that was 2 ½ times the amount that was advanced to him by the defendant.

I have carefully considered the argument on this point made by the parties to this application. I think the legal position regarding when a mortgagee can be restrained on account of a dispute over the amount owed was set out in the case of Mrao vs. First American Bank & 2 others CA Civil Appeal No. 39 of 2002 (unreported). In his judgment, Kwach JA had this to say:

*“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 (4<sup>th</sup> Edition) paragraph 725 as follows:-*

*“725. When 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 begun 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)”*

The rate of interest charged by the defendant was provided under clause 4 of the instrument of charge. Clause 4(ii) provided that:

*“The company may from time to time serve on the borrower a demand notice requiring payment of interest at such increased or reduced rate as the company shall determine having regard to such circumstances as it considers to be relevant and the decision of the company in this behalf shall not be questioned on any account whatsoever.”*

Clause 4(iii) of the charge required the defendant to give notice to the plaintiff before it varied the rate of interest. From the document annexed to the affidavit in support of the plaintiff’s application, particularly the report prepared by Interest Rates Advisory Centre (IRAC), it was clear that over time, the defendant varied the rate of interest applied to the plaintiff’s account. There was no evidence to suggest that the defendant had notified the plaintiff before varying the applicable rate of interest.

Further, the clause relating to the rate of interest applicable was varied and modified by the enactment of Section 44 A of the Banking Act which provided the maximum amount of interest that chargeable by a bank. Of particular importance to this application is Section 44 A (3) of the Banking Act which provides that:

*“If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of the subsection (1) shall be determined with respect to the time the loan last became non-performing.”*

Section 44 A (6) of the said Act provides that:

*“This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:*

*Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following –*

*(a) the principal and interest owing on the day this section comes into operation; and*

*(b) interest, in accordance with the contract between the debtor and the institution, accruing after the day*

*this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and*

*(c) expenses incurred in the recovery of any amounts owed by the debtor.”*

The above section of the Banking Act came into operation on 1<sup>st</sup> May, 2007 vide Legal Notice No.52 of 20<sup>th</sup> April, 2007. The above section of the Banking Act introduces two concepts which modified the contract between a mortgagee (the defendant) and a mortgagor (plaintiff). The first concept introduced was the concept of a non-performing loan. The mortgagee is required to determine the date that the loan becomes non-performing. Upon determining this date, the interest shall cease to be applied on the loan if the amount owing exceeds the principal loan advanced. The second concept created by the said amendment is the concept of the limitation of the amount that can be claimed by a mortgagee in respect of a loan which has been declared to be non-performing. In both instances, the mortgagee is required to notify the mortgagor of the date that the loan became non-performing according to the said section of the Banking Act and secondly of the amount that the mortgagee is demanding. This requirement of the law applies to loans which were advanced before the amendment came into operation provided that such a loan became non-performing after the coming into operation of the said amendment to the Banking Act.

In the present case, it is clear that even though the loan became non-performing after the coming into effect of the said amendment, the defendant failed to issue a notice setting out the date when the said loan became non-performing, and secondly issuing a further notice declaring the amount that was owed by the plaintiff at the time it purported to exercise its statutory power of sale. This declaration of the amount must separately state the principal amount and the accrued interest claimed. I therefore hold that the plaintiff has established that since the defendant failed to give the said notices as required by Section 44A of the Banking Act, the right to sell the suit property in exercise of its statutory power of sale had not accrued. The plaintiff therefore established a prima facie case.

The application for injunction dated 3<sup>rd</sup> June, 2008 is hereby allowed. The defendant by itself, its servants and/or agents are hereby restrained by means of interlocutory injunction from selling, alienating, transferring, or in any manner whatsoever from disposing of the plaintiff's property known as LR 209/8294/351 South C pending the hearing and determination of the suit. The plaintiff shall have the costs of this application.

DATED at NAIROBI this 9<sup>th</sup> day of JULY, 2008.

**L. KIMARU**

**JUDGE**