



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Commercial Suit 21 of 2007

YAKUBALI MUBARAKAI MURIDKHAN1ST PLAINTIFF

MALEK YAKUBALI MUBARAKALI MURIDKHAN....2ND PLAINTIFF

VERSUS

JUBILEE INSURANCE CO. LTD.

JOSEPH MUNGAI GIKONYO

t/a GRAMA INVESTMENTSRESPONDENTS

R U L I N G

The substantive suit is expressed in the plaint dated 11th June 2007. In that plaint, Yakubali Mubarakali Muridkhan and Malek Yakubali Mubarakali Muridkhan, the 1st and 2nd plaintiffs herein, prayed for judgment against Jubilee Insurance Co. Ltd and Joseph Mungai Gikonyo t/a Garam Investments, the 1st and 2nd defendants herein as follows:

- a) *A declaration that the charge is fatally defective and the interest charged by the 1st defendant is excessive and illegal.*
- b) *That the defendants by themselves, their agents, servants and/or assignees by an order of injunction be stopped from advertising all carrying out auction, sale or in anyway interfere with property No. Mombasa/Block XI/18 that property known as Mombasa/Block XI/18 for sale by public auction or disposing the aforesaid property by way of public auction or in any other manner whatsoever interfering with the plaintiffs' interest in the said property.*
- c) *There be an audit of the mortgage account by an impartial audit firm appointed by the court and/or the parties to determine the balance of the interest if any payable to the 1st defendant.*

The defendants entered appearance and filed a defence to deny the plaintiffs' claim. The subject matter of this ruling is the Chamber Summons dated 11th June 2007 taken out by the plaintiffs in which they seek for interalia:

- a) *that pending the hearing and determination of the suit, this honourable court be pleased to issue a temporary injunction restraining the defendant by itself, its servants, agents, auctioneers or otherwise from advertising, offering for sale, selling, alienating repossessing and/or in any other manner whatsoever disposing the parcel of land known as Mombasa/Block XI/18.*

b) *That the costs of this application be provided for.*

The summons is supported by the affidavit of Yakubali Mubarakali Muridkhan sworn on 11th June 2007. When served, the 1st and 2nd defendants filed the replying affidavits of Peter Magati and that of Joseph Mungai Gikonyo respectively to oppose the summons. They also filed grounds of opposition dated 29th June 2007. When the summons came up for hearing Mr. Munyithya learned advocate for the plaintiffs and Mr. Okong'o learned advocate for the defendants recorded a consent order in which they agreed to file and exchange written submissions to dispose of the summons without resorting to oral arguments. Pursuant to the aforesaid consent they filed written submissions.

It is the submission of the plaintiffs that the interest charged at the rate of 24% p.a. set out in the letter of offer was illegal and in particular the increment of that rate from 24% p.a. to 29% p.a. It is argued that the rate of interest was not arrived at, in accordance with the provisions of S.39 of the Central Bank of Kenya (Amendment Act) 2000 and Section 44 of the Banking Act. It is the submission of the plaintiffs that had the defendants followed the law they would have liquidated the entire debt by the time of filing the suit. They claimed that they were never informed of the variation of the rate of interest. The plaintiffs appreciated the fact that the 1st defendant had the absolute discretion to vary the rate of interest under clause 1(a) of the charge document. They however contend that the same is contrary to Section 39 of the Central Bank (Amendment Act) 2000 as read with Section 44 of the Banking Act. The plaintiffs are of the view that they have shown that they have a prima facie case with a probability of success in that they will show that the 1st defendant did not have absolute discretion to vary the rate of interest to the detriment of the charger.

It is also the submission of the plaintiffs that the charge or mortgage document is defective because the same was never attested in accordance with the law. It is said the advocate who witnessed the execution did not explain the implication of section 74 of the Registered Land Act to the plaintiffs. The name of the Advocate who attested the execution of the document is not disclosed.

The plaintiffs are of the view that they will suffer irreparable loss if the defendants are not restrained from exercising their statutory power of sale because going by their age they will be unable to begin life afresh were the property to be sold. They claimed that they are likely to be affected and that their chances of survival as senior citizens will be diminished.

It is further the argument of the plaintiffs that they will be most inconvenienced in that they and their families will be required to relocate in search of other premises to reside on, this being the only matrimonial home.

The defendants on the other hand vehemently opposed the application on the basis that there are no reasonable grounds laid before this court to warrant the granting of the orders of injunction. It is said a dispute over the rate of interest is not a ground for granting the orders sought and that the application does not meet the requirements set out in the case of Giella vs Cassman Brown. The 1st defendant averred that the plaintiffs failed to pay the monthly installments on the due dates and also failed to pay the premiums on the life policy which was a condition precedent to the granting of the loan. As a result of the plaintiffs' default, the loan fell into arrears and attracted interest in accordance with the terms and conditions set out in the contract documents. The 1st defendant averred that it issued through its Advocates, Daly & Figgis a Statutory notice demanding payment of Kshs.6,557,586 in default of which the premises would be sold in exercise of the 1st defendant's statutory power of sale. At the lapse of the three (3) months' statutory notice, the 1st Defendant through its advocates instructed the 2nd Defendant to sell the suit premises by public auction. Requisite notices under the auctioneers Rules, 1997 before advertising the suit premises for sale were issued. It is the 1st defendant's submission that the rate of interest was agreed upon and that this application and the suit were filed for the sole purpose of frustrating and delaying the 1st defendant's realization of its charge over the suit premises. The 1st defendant denied contravening the provisions of S.39 of the Central Bank Act nor S.44 of the Banking Act. It is the defendants' argument that the plaintiffs' application does not meet the conditions for

granting temporary injunctions.

I have considered the grounds set out on the face of the Chamber summons dated 11th June 2007 plus the facts sworn in the supporting affidavit. I have also considered the grounds of opposition and the facts deponed in the two replying affidavits filed by the defendants. Of course, I have considered the written skeleton arguments filed by learned advocates appearing for both parties. It is not in dispute that the plaintiffs pledged plot No. Mombasa/Block XI/18 to secure a sum of Kshs.4,900,000/- from the 1st Defendant. A charge was registered against the aforesaid title. It is also not in dispute that the plaintiffs fell into arrears when the plaintiffs failed to repay the monthly installments. The outstanding loan as of December 2005, stood at Kshs.24,000,000/-. Parties appear to have negotiated and there was a memorandum of understanding allowing the plaintiffs to pay Kshs.6,000,000/- in full and final settlement of the outstanding debt. It would appear the agreement was not signed. There are many correspondences over the issue of determining the actual figure and the rescheduling of the monthly installments. There is no denial that the 1st defendant demanded for payment of the outstanding debt. There is no dispute also that the 1st defendant issued the statutory power of sale when the plaintiffs defaulted to meet the demand. The plaintiffs have raised two main grounds in seeking for the order of injunction to be issued against the defendants. First, it is said that the rate of interest was varied from 24% p.a. to 29% p.a. in contravention of section 39 of the Central Bank Act as read together with S.44 of the Banking Act. It is the plaintiffs' submission that the 1st defendants had no absolute discretion to vary the rate of interest to the detriment of the plaintiffs. Secondly, it is alleged that the charge is defective in that the name of the Advocate who attested its execution is not stated and that the aforesaid advocate did not explain the implication of s.74 of the Registered Land Act to the plaintiffs before they appended their signatures on the charge. The defendants of course denied the aforesaid allegations. The 1st defendant has not denied the allegation that the plaintiffs were not notified of the variation of the rate of interest from 24% p.a. to 29% p.a. there is also no indication that the aforesaid variation was done with the approval of the Minister for Finance under Section 44 of the Banking Act. I am alive of the legal position that a dispute over the amount due or payable under the legal charge or mortgage do not per se entitle the charger to an automatic order of injunction to restrain the chargee from exercising its statutory power of sale under the legal charge. However the issue at hand is in respect of the breach of the provisions of the statute. It is said the 1st defendant varied the rate of interest from 24% to 29% per annum without giving the plaintiffs notice and without seeking the prior approval from the Minister for Finance. I agree with the submissions of Mr. Muniyithya that the discretion given to the 1st Defendant in the charge document was not absolute. The Chargee must exercise that discretion by giving notice and by seeking prior approval. Failure to do so will create a clog on the chargor's right to redeem the property. I will adopt the statement expressed by the court of Appeal in Margaret Njeri Muiruri (legal representative of the Estate of Joseph Muiruri (deceased) =vs= Bank of Baroda (K) Ltd Civil Appeal No. 9 of 2001 (Unreported) as follows:

“We appreciate that parties to a contract may, as here, agree on the interest chargeable in a financial transaction. It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties to the agreement.”

It is obvious from the above excerpt that the 1st defendant should give notice. The 1st defendant did not discharge the burden of showing that it gave the plaintiffs prior notice of the variation of interest. On this account alone I am convinced that the plaintiffs have shown that they have a prima facie case with a probability of success.

It has been argued that the charge is defective because the plaintiffs were not informed of the implication of S.74 of the Registered Land Act. I have perused the charge document attached to the affidavit of Peter Magati sworn on 30th July 2007. It is clear the same was signed in the presence of an Advocate who was not named. It was incumbent upon the 1st defendant to prove that the charge was read and explained to the chargor and that the implication of S.74 of the Registered Land Act were fully explained to the chargors. There is doubt whether that was done in view of the absence of a named advocate. It is possible the documents were just stamped as a matter of course. Again I agree that the plaintiffs have shown that they have a prima facie case with a probability of success.

There is no doubt that if the order of injunction is not given at this stage, the plaintiff will suffer irreparable loss because they may lose their right of redemption, for it will have been clogged by an unjustified charge of interest. It also goes without saying that the plaintiffs will be seriously inconvenienced if the defendants are not stopped from auctioning the property.

For the above reasons I allow the Chamber Summons dated 11th June 2007 as prayed. Let the suit be listed for hearing on priority basis to avoid the matter procrastinating further.

Dated and delivered at Mombasa this 31st day of October 2008.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Munyiya for the plaintiff/Applicant and

Mr. Okong'o for the Defendant/Applic