REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 210 of 2009

STEPHEN CHEGE IMEKE .....1ST PLAINTIFF

MUSTARD SEED COMPANY LIMITED.....2ND PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD. .....DEFENDANT

R U L I N G

Application dated 27/3/2009 is brought under Order 39 Rules 1 and 2 seeking orders of injunction to restrain the defendant from selling, alienating, transferring or in any other way whatsoever disposing of the plaintiffs' property aforesaid until the determination of this case.

The application is based on the grounds set out in the application that notices as required under Sections 65 (2) and 74 of Registered Land Act have not been given. And that the defendant has acted in bad faith contrary to the requirements of Section 77, Registered Land Act. The supporting affidavit of first plaintiff shows that he is the registered owner of the suit land and that in the year 1996 the second defendant of which he is a director borrowed Kshs.1,200,000/= from the defendant.

The security was the plaintiffs' suit property. He repaid the money from 1996 to 2008, a period of 12 years the loan was paid in full. That he engaged IRac – (Interest Rates Advisory Centre) to calculate the amount due to respondent. The Institute made a report exhibit SC12. It was disclosed that the loan was for period of 8 years only and the loan has been repaid to the tune of Kshs.3,454,822/=. The report shows that the applicants have overpaid the amount paid to the bank by the sum of Kshs.544,315/07.

It is also shown that the bank has been charging the account unlawful and uncontractual charges. No notice of 3 months was received. The defendants intends to sell to recover only Kshs.209,990/=. The property is the family home and cannot be replaced with money.

Replying affidavit the defendant has caused an affidavit in reply to be sworn by its Legal Officer. He admits that the money that was Kshs.1.2 million in April 1996 and that the security was the plaintiff property Dagoretti/Riruta/352. Regarding interest it is written in the Letter of Offer (plaintiffs' exhibit No. SC1) as follows:-

"*The interest charged on this loan will be 25% per annum or – "as may be advised from time to time until the loan is fully liquidated. The Finance Company is not liable for failure in communicating any*

interest charge that may arise."

The comment here is that this Clause does not give the bank right to increase interest without informing the plaintiff as stated in paragraph 6 of replying affidavit. The bank states that it did send by registered post Notice under Section 74, Registered Land Act when the debt was Kshs.1,504,794/80 on 14/7/1999 to 2nd plaintiff (the company). The Notice issued was within 3 months' period. That has been held not to be 3 months Statutory Notice. Then an agreement to reschedule repayments was made between the parties thus altering the terms of the loan.

The parties have filed written submissions. The plaintiffs' counsel filed skeletal submissions and highlighted the same in court. She submitted that principles applicable for the granting an injunction are stipulated in the case of Giella vs. Cassman Brown [1973] EA 358 and the extended scope as stipulated in Waithaka vs. ICDC 2001 KLR 374 and Murui vs. Bank of Baroda 2001 KLR 183 to include situations where the defendants conduct is oppressive and it seeks to hide behind the rationale that it can afford to pay damages.

Injunction is prayed on the basis that no money is owed to the defendant who has been overpaid by Kshs.544,315/07. The claim for Kshs.209,990/= is based on unlawful and non contractual interest levies. And the defendant is in breach of Section 77 Registered Land Act which requires a chargee to act in good faith.

It is submitted that the overcharge of interest clogged the chargors right to redeem and the defendant has not complied with Section 44 of Banking Amendment Act. Unlawful interest charges are a valid legal basis upon which an injunction can be granted as in case of Walter Edwin Ominde vs. E.A.B.S. 1785 of 2002 (unreported).

For the defendant, it is submitted that although terms of agreed loan were set out in the letter of offer, it was in the charge document that it was expressly stated the first defendant was to pay principal sum, commissions, other bank charges and legal costs and other costs and expenses interest. The bank reserved discretion to vary interest and was under no obligation to inform the plaintiffs of any changes in the rate of interest.

This was a deviation in terms of offer. In fact by rescheduling the terms of the loan, the contract of lending was varied severally. The defendant states that Section 44 A (1) of the Banking Act is applicable only when the loan is non performing not when it is performing. In this case this issue is disputed. From time to time, the plaintiffs defaulted but the defendant agreed to reschedule the terms of payment therefore the defendant may not complain for default.

It is to be observed that the alleged notice was "payment within 3 months". It has been held several times by our courts that such a notice is not for a period of 3 months, it is for a lesser period and therefore unlawful. By 28th January 2009 a fresh valid Notice ought to have been served of the proposed sale "three months after service of a demand in writing".

I have considered all the submissions by counsel on both sides. It is my view that the applicant has demonstrated a *prima facie* case. The Statutory Notice issued in 1999 was not for a period after the expiry of 3 months and therefore the defendant's right to exercise chargee powers of sale has not arisen. No action can oust the provisions of Statute of Parliament. The act of defendant to reschedule the repayments of the loan from time to time is also a reason to file a fresh Statutory Notice.

The applicant states that the loan has been paid in full and he has report supporting that proposition. He is therefore entitled to present his case for decision by court. For these reasons an award in damages cannot adequately compensate him especially as the amount allegedly outstanding is not a large amount and is subject to proof. The property is his home with sentimental value.

Furthermore, the balance of convenience tilts on his side as he is in possession. In the circumstances, I allow the application and grant orders as prayed.

Costs shall be to the applicant.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 19th day of October 2009.

JOYCE N. KHAMINWA

JUDGE