



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 255 of 2008

RIVERSIDE FARM NURSERY SCHOOL LLD.....1ST PLAINTIFF

JOHN JOSEPH KINYANJUI.....2ND PLAINTIFF

- VERSUS -

THE COOPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

R U L I N G

The plaintiffs filed an application under the provisions of **Order XXXIX Rules 1 and 2** of the **Civil Procedure Rules** seeking an injunction to restrain the defendant by itself or its agents from advertising, offering for sale, selling or otherwise disposing the property known as Kiambaa/Kihara/62 (*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 plaintiffs contend that the defendant had, without any colour of right, threatened to dispose off the suit property in purported exercise of a statutory power of sale. The plaintiffs insist that the suit property was charged by the 2nd plaintiff to Cooperative Finance Limited and not the defendant. The plaintiffs further stated that no valid statutory notice was issued to the 2nd plaintiff before the defendant exercised its purported statutory power of sale. The plaintiffs contend that there was no privity of contract between the plaintiffs and the defendant, and in the circumstances, the defendant lacked *locus standi* to sell the 2nd plaintiff's parcel of land. The plaintiffs further stated that the interest charged by the defendant was in any event oppressive, unlawful, unconscionable and non-contractual. The plaintiffs contend that the intended sale was in bad faith due to the laches. The application is supported by the annexed affidavit of John Joseph Kinyanjui, the 2nd defendant. He swore a supplementary affidavit in further support of the application.

The application is opposed. Samuel Mwaura Kibugi, the legal officer of the defendant company, swore two affidavits in response to the plaintiffs' application. In the said affidavits, he deponed that the 2nd plaintiff, then trading as Riverside Farm Nursery School, borrowed the sum of KShs.2,000,000/= from the defendant's predecessors in title. Cooperative Finance Limited and Cooperative Merchant Bank Limited. The said predecessors in title of the defendant were subsequently in 2002 merged with the defendant. He deponed that all the assets and liabilities of Cooperative Finance Limited and Cooperative Merchant Bank Limited were transferred or assigned to the defendant. He swore that as security for the advance of the said KShs.2,000,000/=, the 2nd plaintiff charged the suit property. He deponed that the plaintiffs defaulted in repaying the loan advanced to them. In 1997, when the predecessors of the defendant sought to realize the security, the plaintiffs filed suit i.e. Nairobi HCCC No. 1379 of 1998. The plaintiffs made an application for temporary injunction. The application was dismissed by the court.

Samuel Mwaura Kibugi further deponed that subsequently thereafter, the plaintiffs entered in out of court negotiations with the defendant with a view to amicably resolving the dispute regarding the repayment of the loan. He swore that on 24th May 2004, the plaintiffs accepted the offer made by the defendant for the rescheduling of the loan and further, a rebate was given to the plaintiffs on account of the accrued interest. He deponed that the plaintiffs failed to abide by the terms of the new agreement rescheduling the loan and as a result, the defendant was left with no option but to realize the security. He deponed that the defendant issued demand and the requisite statutory notices before instructing the auctioneer to realize the security. He deponed that the plaintiffs were guilty of non-disclosure of material facts and were therefore not entitled to the injunction sought. He further swore that the plaintiffs had failed to establish a prima facie case to entitle this court grant them the injunction sought. He urged the court to dismiss the plaintiffs' application with costs.

At the hearing of the application, I heard rival submissions made by Mr. Kabue on behalf of the plaintiffs and by Mr. Ngacha, on behalf of the defendant. The two counsel, other than citing several decided cases, basically reiterated the contents of the application and the affidavits sworn by their respective clients in support of their opposing positions. The issue for determination by this court is whether the plaintiffs established a case to enable this court grant them 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, certain facts are not in dispute. It is not disputed that the 1st plaintiff applied and was granted a loan of KShs.2,000,000/= by Cooperative Finance Limited. Cooperative Finance Limited was later merged with Cooperative Merchant Bank Limited. The security for the said loan was the title in respect of the suit property registered in the name of the 2nd plaintiff. The plaintiffs defaulted in repaying the loan. The said Cooperative Merchant Bank Limited attempted to realize security in 1998. The plaintiffs filed suit vide **Nairobi HCC No. 1379 of 1998 John Joseph Kinyanjui and Riverside Farm Nursery School Limited vs. Cooperative Merchant Bank Limited**. The plaintiffs filed an application for injunction in the said suit seeking to restrain the bank from realizing the security. The application was heard by Githinji J (*as he was then*). He dismissed the application.

Cooperative Merchant Bank Limited was later merged with the defendant. The defendant took over the assets and liabilities of the said bank. Although the plaintiffs argued that there was no privity of contract between themselves and the defendant, it was clear to this court that the plaintiffs were aware, and indeed acknowledged that the defendant had taken over the operations of the said Cooperative Merchant Bank. This fact was evidenced by the agreement the plaintiffs entered with the defendant on 24th May 2004. In the said agreement, the plaintiffs accepted the variation of the terms of the loan agreement (*see annexure 'SMK4'*). The plaintiffs could not have agreed to negotiate with the defendant if they were of the view that they had no privity of contract with said bank. I am therefore not persuaded by the plaintiffs' argument that there existed no privity of contract between themselves and the defendant.

The plaintiffs complained that the defendant failed to issue the requisite statutory notice before the defendant purported to exercise its statutory power of sale. The defendant annexed a copy of the statutory notice issued to the 2nd plaintiff on 21st June 2007. The said notice gave the particulars of the loan. The 2nd plaintiff was given three (3) months notice to redeem the property or in default thereof, the defendant would exercise its statutory power of sale. This notice was issued pursuant of provisions of **Section 74** of the **Registered Land Act**. The notice was copied to the 1st plaintiff. The notice was sent by registered post to the plaintiffs. The plaintiffs acknowledged receipt of the said statutory notice vide their letter dated 1st October 2007. The auctioneer, who was instructed by the defendant to sell the suit property,

issued a redemption notice upon the plaintiffs on 15th February 2008. The said redemption notice was served on the 2nd plaintiff by the auctioneer. It was therefore clear that the defendant complied with the law by issuing the requisite statutory and redemption notices to the plaintiffs. The allegation by the plaintiffs that they were not served with the statutory notices is obviously untrue. I find no substance in their claim challenge of the defendant's right to exercise of its statutory power of sale on account of lack or failure to issue the requisite statutory notices.

The plaintiffs complained that the defendant had charged a rate of interest that was oppressive, exorbitant and non-contractual. They alleged that the fact that they had been advanced an amount of KShs.2,000,000/= which had by now escalated to the sum of KShs.24,000,000/=, was sufficient proof that the rate of interest applied was unconscionable. In response, it was the defendant's case that the rate of interest charged was contractual since the same was provided for the instrument of charge. I have considered the arguments made in regard to this issue. It was clear from the loan statements of account maintained by the defendant that the plaintiffs made no effort at all to repay the loan advanced to them in accordance with the repayment schedule agreed with defendant. It appeared as if the plaintiffs were deluded in thinking that the loan advanced to them would not be required to be repaid within the period specified in the instrument of charge. The escalation of the amount owed by the plaintiffs can be attributed to the fact that the plaintiffs made no serious effort to repay or settle the debt owed to the defendant for a period of over five (5) years.

The plaintiffs cannot therefore blame the defendant for applying interest on the amount still outstanding. In any event, the plaintiffs cannot raise the issue regarding the escalated amount that they are now required to pay since in 2004, the plaintiffs spurned the offer made by the defendant which could have resulted in the plaintiffs' repaying only the sum of KShs.5,500,000/= at nil interest rate provided the plaintiffs agreed to repay the said adjusted amount within a period of five (5) years from 31st May 2005. Even after this offer was made, the plaintiffs went to sleep thus leaving the defendant with no other option but to exercise its statutory power of sale in accordance with the provisions of the charge instrument. Due to the plaintiffs' complacency, the offer given to them by the defendant lapsed. The amount the defendant intends to recover is the original amount that the plaintiffs were required to pay. I find no merit with the plaintiffs' complaint in regard to the sum now being demanded by the defendant. I hold that the rate of interest charged by the defendant, in view of the plaintiffs' default in repaying the sum due, was contractual.

The plaintiffs urged the court to restrain the defendant on the ground that it had delayed in exercising its statutory power of sale and thus forfeited its right to realize the security. It was the plaintiffs' case that the defendant was therefore disentitled to exercise the said power ten (10) years after the said right to realize the security had accrued. In support to this proposition, the plaintiffs relied on the case of **Prudential Bank Limited vs. Jassi Holdings Limited & 2 others [2002] 1KLR 221**. The defendant in response to this argument submitted that the instrument of charge gave it power to realize the security whenever it chose to do so in the event that the plaintiffs defaulted in repaying the loan. From affidavit evidence on record, it was evident that the defendant refrained from exercising its statutory power of sale whenever the plaintiffs made proposals that appeared to be reasonable to the defendant. The plaintiffs cannot use the indulgence given to them by the defendant (at their own request) as a ground to impeach the defendant when it now seeks to invoke its statutory powers of sale. The plaintiffs failed to abide by the terms of the new agreement on the rescheduled repayment of the loan. The plaintiffs cannot use the state of affairs which they brought about to defeat the said defendant's legal right.

Finally, it was clear to this court that the plaintiffs failed to disclose that they had previously filed suit against the defendant's predecessor in title (*i.e. Cooperative Merchant Bank Limited*). In the said suit, they applied to be granted an order of injunction. The application was duly considered by the court and subsequently dismissed. The plaintiffs were therefore guilty of material non-disclosure. Although the plaintiffs claimed that they had withdrawn the previous suit before filing the present one, it was apparent to this court that the plaintiffs filed a notice of withdrawal of the previous suit on 13th May 2008, a day before filing the present suit. There is no evidence that the notice of withdrawal suit was indorsed by the court. A suit is only deemed as withdrawn when an order of the court is endorsed in the file approving such withdrawal.

A party cannot argue that he has withdrawn a suit on the basis of a notice of withdrawal of suit. The failure by the plaintiffs to disclose to the court the fact that they had previously made a similar application for injunction means that they are undeserving of the exercise of the equitable jurisdiction of this court. It was apparent that the plaintiffs set out to dupe and mislead this court into granting them ex-parte interim reliefs pending the hearing and determination of the application. This court's equitable jurisdiction was invoked by the plaintiffs when they clearly knew that they had unclean hands.

In the circumstances therefore, it was evident that the plaintiffs failed to establish a prima facie case. In fact, they abused the due process of this court in canvassing an application similar to the one that was previously disallowed by this court without disclosing such fact to the court. The application for injunction lacks merit and is hereby dismissed with costs to the defendant.

DATED at NAIROBI this 9TH day of OCTOBER, 2008.

L. KIMARU

JUDGE