**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 431 of 2008**

**PETER KUNGU KAGIA……..……1ST PLAINTIFF**

**MONICAH NYAGUTHIE KUNGU…….……2ND PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED…… DEFENDANT**

**R U L I N G**

The application under consideration is the one dated 4th August, 2008. It is expressed to be brought under Order XXXIX rule 1 and 2 of the civil Procedure Rules and Section 3A and 63 of Civil Procedure Act. The Plaintiff seeks prayer 3 of the application which seeks orders:

3. THAT pending the hearing and determination of the suit herein, an interlocutory injunction order do issue to restrain the Defendant either by itself, or its agents and/or servants from selling, transferring, alienating or howsoever interfering with the suit property being Nairobi/Block 111/693 Komarock Estate, Nairobi.

The application is based on six grounds cited on the face of the application as follows:

a) THAT the Defendant through Taifa Auctioneers has advertised the suit property for auction on 6th August, 2008.

b) The intended auction is illegal, null and void for want of personal service of a Statutory Notice of sale under Section 74 of the Registered Land Act (Cap 300 Laws of Kenya).

c) The Defendant has failed to apply the provisions of the Central Bank of Kenya Act, the Central Bank of Kenya (Amendment) Act, 2000 and the Banking (Amendment) Act, 2006.

d) The Defendant never informed the Plaintiffs when the loan became non-performing nor did it inform the Plaintiffs of the statutory limit of the loan payable.

e) The Plaintiffs have repaid the mortgage plus interest thereon more than five (5) times over and above the principal sum advanced to them by the Defendant.

f) The Plaintiffs stand to suffer substantial loss and damage if the Defendant proceeds to auction the suit property.

The application is further supported by the affidavit sworn by the 2nd Plaintiff in the case together with annexures thereto which I have considered. The gist of the affidavit is that the 1st Plaintiff secured a mortgage loan of kshs.257,262/- obtained from the Defendant with the family property (hereinafter referred to as the suit property) on 5th January, 1990. The deponent avers that clause 5(iii) of the charge which required the Respondent to give notice of intention to vary rate of interest before effecting the change was flouted. The deponent also avers that Section 39 of the Central Bank of Kenya Act which controls interest rates applicable and which was in force until 31st July 2005 was breached. It is also averred that no statutory notice was served upon the Plaintiffs as required under Section 74 of the Registered Land Act. It is also averred that section 44 of the Banking (Amendment) Act, 2006 was flouted as the Respondent did not notify the Plaintiffs when the loan account became non-performing or of the statutory limit payable under the Act.

The application is opposed. The Respondent filed a relying affidavit dated 24th September, 2008 sworn by June Njoroge the Assistant Manager – Legal Services of the Defendant. The gist of the affidavit is that the Plaintiffs are in default in repayment of Kshs.1,026,075.10 as at 30th June, 2007 as per Redemption Statement of even date annexed as JN1. The deponent annexed three letters from the 1st Plaintiff to the Respondent in which the Respondent claims the Plaintiff admitted the debt. They were 'JN2' together with a copy of a bankers cheque for payment of the debt dated 20th May, 2008. The deponent also annexed a statutory notice allegedly sent to the Plaintiffs on 31st October, 2006.

Mrs. Aloo appeared in this case for the Applicants while Mr. Mungai represented the Defendants/Respondents. In her submissions, Mrs. Aloo urged the court to find that the Applicants had made a case for accounts to be taken in the matter for purposes of confirming whether the Plaintiff had fully paid the amount in question five times over as the Applicants allege in the supporting affidavit. Mrs. Aloo also urged the court to find that Kshs.200,000/= paid by the Applicants on the 20th May, 2008 was not paid as part payment of the debt or as an acknowledgement of debt owed but was made in good faith as the Applicants awaited for the reconciliation of the accounts. Regarding the issue of the rate of interest, Mrs. Aloo submitted that despite both parties having engaged in correspondences over a long period of time, at no time did the Defendant/Respondent either inform the Plaintiff that the loan had become non-performing as required under section 44 of the Banking Amendment Act (2006) nor that it had varied the interest rates.

Mr. Mungai on his part urged the court to find that the Plaintiffs were indebted to the Defendant and that the payment of 200,000 was in acknowledgment of the debt owed. Mr. Mungai submitted that in any event damages would suffice and the Defendant being a financial institution was capable of compensating the Plaintiff if at the end of the day the Plaintiff succeeded in its case.

I have considered the authorities relied upon especially by the Respondent's Advocate. The issues before the court are very simple.

The first issue raised concerns the interest rates. It is the Applicants contention that the Respondent charged the interest rate on the loan contrary to clause 5(iii) of the Charge. Paragraph 3 of the supporting affidavit sets out clause 5(iii) of the charge as follows:

"*Clause 5 (iii) - In the event of the Charge requiring a variation of the rate of interest under the provisions of sub-clause (ii) of this Clause the Chargee will notify the Chargor 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 Chargor.*"

The Respondent has not responded to this issue neither has it controverted the Applicant's contention that the terms of clause 5(iii) were as stated in the affidavit. The legal position then is that allegations of facts

not specifically controverted in the pleading of the opposite party will be regarded as admitted.

The annexed statement of the Applicants loan account evidently demonstrates that interest charged on the loan varied from month to month. The Applicant's contention that no notice of the variation was served on them before the variation was effected as provided under clause 5(iii) of the charge is uncontroverted. Indeed I do find that due to the varying rate of interest charged on the loan right from the inception of the loan, the repayments made on the loan were always below the sum charged for interest. On the issue of failure by the Respondent to notify the Applicants of the variation of interest I find that the Respondent's conduct in failing to comply with the provisions of the contract entered by the parties was deliberate. The effect of non compliance to the clear provisions of the contract led to the Applicants making monthly payments which did not result in the reduction of the Applicant's indebtedness to the Respondent. The Applicants contention that they were unaware of this result, which the Respondent did not controvert, meant that the loan balance continued to rise without notice to the Applicants and for no fault of the Applicants. For this reason, I have no hesitation to declare that the Respondents conduct in the transaction was oppressive. See Muiruri vs. Bank of Baroda Limited [2001] KLR 183

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, 4th Edn. paragraph 725 as follows:

"*When mortgage may be restrained from exercising power of sale.*

*The mortgage 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 mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive."(emphasis added)*

The Applicants have demonstrated that they took a mortgage loan of Kshs.257,262/= on 5th January, 1990. They have demonstrated that from inception, they repaid the loan promptly and monthly without fail.

The second issue raised regards Section 44A of the Banking (Amendment) Act, 2006 (hereinafter referred to as the Act). The Plaintiffs are claiming that section 44 A of the Banking Act of 2006 has been flouted by the Defendant institution. The breach of this section is alleged on two fronts. The first is that as provided under that section, the Defendant did not inform the Plaintiff when the loan became non-performing. Secondly, the Defendant did not inform the Plaintiff the statutory limit of the loan payable under the Act. These two points were ignored by the Defendant who made no submissions in reply thereto.

Section 44A (1), (3) and (6) of the Act stipulate:

"*44A (1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).*

*(3) 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 subsection (1) shall be determined with respect to the time the loan last became non-performing.*

*(6) 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."*

The Act came into operation on 1st May, 2007 vide Legal Notice No. 52 of 20th April, 2007. The Act introduced provisions non-existent `before in which two concepts were introduced which affected all mortgage contracts entered both before and after the Act came into operation at different levels. Under section 44A(1) the Act introduced the concept of non-performing loans and limited financial institutions in what they may recover from a debtor in respect of a non perfuming loan. Sub section (3) gives

guidance on how to determine the period of time the loan became non-performing. Subsection (6) applies to loans that were in existence before the Act came into effect. This subsection helps determine the amount an institution can recover from a debtor whose loan became non-performing before the Act came into force. That subsection applies to the Applicant's case.

From the annexed Statement of Loan Account, the Applicant's loan with the Defendant became non-performing on several occasions. For instance, between October, 2001 and July 2002 no payments were made. In August 2002 a lumpsum of 50,000/= was paid and several other sums were paid between that date and November, 2002. There are several payment lapses between November, 2002 and 2006. In April and December 2006, one deposit each was made into the loan account. There are few scattered payments after December, 2006 up to April 2007, after which the loan became non-performing until the date this suit was filed in August, 2008. By April 2007 the Act had come into effect and the Respondent out to have afforded to the Applicants their right under the Act.

The Respondent has not denied that it made no effort to advice the Applicants when their loan became non-performing and secondly it made no effort to advice the Applicants how much outstanding interest was owing from date the loan became non-performing.

The intention of Section 44A of the Act, as earlier stated, is to limit the amount a financial institution can recover from its debtors from the date the Act came into operation. By keeping the Applicants in the dark, and by failing to inform the Applicants as required under the mandatory provisions under these sections, the Respondent was ensuring that it recovered more from the Applicants than the law permitted. The Defendant's/Respondent's conduct was oppressive and contrary to clear mandatory provisions of the law.

On account of my above findings, in regard to clause 5(iii) of the contract between the two parties and section 44A of the Act, I am satisfied that, first the Respondent's right to exercise statutory power of sale had not crystallized at the time the suit property was advertised for sale and secondly the Applicants have established a prima facie case with a probability of success at the trial.

In conclusion the Applicant's Chamber Summons dated 4th August, 2008 be and is hereby allowed in the following terms:

1. That pending the hearing and determination of the suit herein, an interlocutory injunction order be and is hereby issued restraining the Defendant either by itself, or its agents and or servants from selling, transferring, alienating or howsoever interfering with the suit property being Nairobi/Block III/693 Komarock Estate, Nairobi.

2. The Respondent shall meet the Applicants' cost of this application.

Dated at Nairobi this 28th day of November, 2008.

**LESIIT, J.**

**JUDGE**

*Read, signed and delivered, in the presence of:*

Mr. Kariuki holding brief Mrs. Aloo for the Applicants

Mr. Mungai for the Respondent

**LESIIT, J.**

**JUDGE**