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

Civil Suit 563 of 2006

PAUL HUDSON KAMAU…………………………..……………...…PLAINTIFF

VERSUS

HOUSING FINANCE CO. (K) LIMITED………………...……… DEFENDANT

R U L I N G

The Plaintiff has moved this court by Chamber Summons application dated 17th October, 2006. The application is expressed to be brought under Order XXXIX rule 1, 2 and 3 of the Civil Procedure Rules and section 74 of the Registered Land Act and section 3A of the Civil Procedure Act. He seeks prayer (c) which states:

(c) That an injunction do issue restraining the Defendant, their agents and/or servants from selling the Plaintiff's property L.R. No. Nairobi/Block 72/2265 Uhuru Gardens pending the determination of this suit.

The application is based on 3 grounds namely:

(i) That the Defendant has unjustifiably purported to execute its power of sale over the Plaintiff's property situated in Uhuru Gardens, Nairobi.

(ii) That the Applicant was never served with the mandatory ninety (90) days Statutory Notice.

(iii) That the Defendant has fragrantly breached section 44 of the Banking Act with impunity and purports to enforce the contract despite the breach.

The application is supported by an affidavit sworn by the Plaintiff on 17th October, 2006 which I have considered. The applicant also swore a supplementary affidavit dated 16th July 2008 in response to the replying affidavit; I have also considered its contents and annexures thereto.

This application is opposed. The Legal Services Manager of the Defendant company, Joseph Kania, has sworn a replying affidavit and a supplementary affidavit dated 5th September, 2007 and 3rd October, 2008 respectively. I have considered both.

I have also considered submissions by Mr. Ndegwa for the Applicant and Mr. Kanyuko for the Respondent.

A party seeking an injunction must satisfy the test set out in the case of Giella vs. Cassman Brown & Co. Ltd, 1973 EA 358 where it was held:

"*(iv) an applicant must show a prima facie case with a probability of success;*

(v) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(vi) when the court is in doubt, it will decide the application on the balance of convenience."

The facts of this case are that the Plaintiff obtained a loan of Kshs.1 million from the Defendant Company. The completion date for the loan was 2009. The Plaintiff secured the loan with a charge over his residential house. The Plaintiff seeks to injunct the Defendant from selling this home claiming to be on schedule with the loan repayment. He has annexed a report from Interest Rates Advisory Centre (IRAC) showing that on re-calculation of amounts paid and on application of the proper interest chargeable, the Plaintiff owes Kshs.166,739.54/=.

It is contended that the huge balance now claimed by the Defendant has arisen from the illegal interest charges imposed without sanction of section 39(1) of Central Bank of Kenya Act and in contravention of section 44 of the Banking Act.

I have been asked not to consider the report from Interest Rates Advisory Centre on grounds that this report is a nullity and that the Defendant disputes it. Section 48 of the Evidence Act provides:

"*48. (1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identify or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions."*

(2) Such persons are called experts."

Interest Rates Advisory Centre was a report prepared by an accountant who is skilled in that area. That kind of skill is recognized under section 48 of the Evidence Act both as an art and science. It is a skill acquired through knowledge in a specialized field of science. It is a skill that can be helpful to a court in determination of questions of fact, for instance in this case, the issue whether the Defendant imposed the correct interest rate on the Plaintiff's balance.

The Defendant has not provided a Statement of the Plaintiff's loan Account. It was important for it to supply the statement more so when the Plaintiff challenged the application of interest rates vis-à-vis the legal provisions of the Banking Act. Section 44 of the Banking Act requires banking institutions to obtain sanction of the Minister before increasing its interest rates. That section provides:

"*44. No financial institution shall increase its rate of Banking or other charges except with the prior approval of the Minister."*

Mr. Kanyuko relies on the case of National Bank of Kenya vs. Cador Investment and Anor. Milimani HCCC No. 2105 of 2000 for the preposition that the residual power of the Minister and Central Bank of Kenya to issue controls or regulate interest rates charged by banks and other financial institutions was removed when section 39, 40 and 41 of the Central Bank of Kenya Act, were repealed. I agree with the *recidendi* of the cited case. The repeal of these sections was in 1997 which means that it was in force up to 1997. Between 1993 and 1997, the burden lies with the Defendant to show that it complied with the provisions of section 39 of Central Bank Act and section 44 of the Banking Act. The Defendants have made no attempts to explain whether it complied with these statutory provisions. For that reason the Plaintiff has demonstrated that it has a *prima facie* case that the Defendant failed to comply with these provisions between 1993 and 1997.

Going back to the issue of Interest Rates Advisory Centre, the report is admissible in evidence under section 48 of the Evidence Act as shown and should be tested at the trial. The Plaintiff has annexed statements of his account as supplied by the Defendant over a period of time, as annexures 2 to 5. I have considered those statements. The statements show that the Plaintiff has consistently paid the loan and despite the payments, the Defendant is demanding an arrears outstanding amount of Kshs.2,464,148.80, as of 30th June 2005.

The loan, as per annexure 1(a) and (b) of the Plaintiff's annexure was taken in 1993. Considering the Interest Rates Advisory Centre report and the facts of this case, I am satisfied that the Plaintiff has shown that he has a *prima facie* case with a probability of success. There is *prima facie* evidence that the Defendant may have contravened statutory provisions and further that it may not have calculated the interest properly. *Prima facie* these events may have led to an increase instead of a decrease in the Plaintiff's loan balance as evident from the loan statements.

In Halsbury's Laws of England Vol. 32, 4th Edn. paragraph 725, it sets out the circumstances in which a mortgagee may be restrained from exercising his statutory power of sale 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 Applicant has demonstrated he took a loan of Kshs.1 million in 1993 and that he has been repaying the same for the last 12 years only for the Respondent to demand further payments. The amount claimed to be owing is more than double the sum advanced. The Applicant has demonstrated that interest charged may not have been in accordance to the terms of the contract and of the applicable law. I am satisfied that the Plaintiff has a *prima facie* case with a high probability of success.

On whether damages will be an adequate remedy, it has been said once and again that merely because damages can be an adequate remedy does not mean that an interlocutory injunction cannot issue. Ringera, J. as he then was in Waithaka v. Industrial and Commercial Development Corporation [2001] KLR 374 held:

"*It is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to hold that one cannot violate another citizen's rights only at the pain of damages."*

I am persuaded by this holding. An injunction should issue even where damages can be an adequate remedy where the Respondent is shown to be high handed or oppressive in its dealing with the Applicant. In this case, I do find that the Defendant was oppressive for reasons advanced above.

Even if I were to consider this case on a balance of convenience, I would still find that convenience tilts in favour of the Plaintiff.

In conclusion, I will allow the Plaintiff's application dated 17th October, 2006 in the following terms:

1. That an injunction do issue restraining the Defendant, their agents and/or servants from selling the Plaintiff's property L.R. No. Nairobi/Block 72/2265 Uhuru Gardens pending the determination of this suit.

2. The Plaintiff should deposit with this court within 30 days from now the sum of Kshs.166,739/54 which he has admitted is the amount owing to the Defendant.

3. The Plaintiff to continue paying the agreed monthly repayment of Kshs.19,445/- until further orders of this court or on application.

4. This suit should be set down for hearing on priority.

Dated at Nairobi this 5th day of December, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Ndegwa for the Applicant

Mr. Kanyuko for the Respondent

LESIIT, J.

JUDGE