



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 456 of 2006

PROF. DAVID MUSYIMI NDETEI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

R U L I N G

This is an application (by chamber summons dated 11th August, 2006) for temporary injunction in respect of the suit property, **L.R. No. 1504/13, Athi River**, pending hearing and determination of the suit. It is essentially brought under Order 39, rule 2 of the Civil Procedure Rules. The application is brought upon the main grounds:-

- 1. That the statutory notice was not duly served under the law and that therefore the process of realization of the security initiated by the Defendant is flawed and cannot be lawfully sustained.**
- 2. That the Defendant never served the Plaintiff with due notice of intention to alter the agreed rate of interest as required by clause 4 (i) and (ii) of the charge instrument.**
- 3. That the Plaintiff has satisfied the requirements for the grant of the orders sought.**

There is a supporting affidavit sworn by the Plaintiff to which various documents are annexed. A supplementary affidavit sworn by him is also filed. The Plaintiff's suit is for a permanent injunction to restrain the Defendant from advertising for sale, selling, alienating or otherwise interfering or dealing with the suit property. Various declarations and an order for refund of KShs. 3,141,786/53 plus interest are also sought.

The Defendant has opposed the application as per the grounds of objection dated 30th August, 2006. Those grounds are:-

- 1. That the Plaintiff, who is seeking an equitable relief, has come to court with unclean hands.**
- 2. That the Plaintiff was duly served with a valid statutory notice, which service he duly acknowledged, and the Defendant's statutory power of sale as thus accrued.**
- 3. That the Plaintiff has admitted default, and his indebtedness to the Defendant, and cannot restrain the Defendant from exercising its statutory power of sale.**
- 4. That the allegation that the Defendant owes money to the Plaintiff has no basis in law.**
- 5. That the Plaintiff has not established any of the principles necessary for the grant of temporary**

injunction.

There is a replying affidavit sworn by one JOSEPH KANIA who describes himself as manager, legal services, of the Defendant. Two documents are annexed thereto.

I have considered the submissions of the learned counsels appearing, including the many authorities cited. There were submissions on some matters that are not pleaded, and others that are not strictly necessary in order to decide the application. I shall not consider those. The principles to be applied in applications for temporary injunctions are as set out in the well-known case of **GIELLA VS. CASSMAN BROWN & CO. LTD, [1973] E.A. 358**. They are:

- 1. An applicant must show a *prima facie* case with a probability of success.**
- 2. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injuries which would not adequately be compensated by an award of damages.**
- 3. If the court is in doubt, it will decide the application on a balance of convenience.**

Prima facie case

Has the Plaintiff shown a *prima facie* case with a probability of success?

The Plaintiff's case is:-

1. That he was not duly served with statutory notice and that therefore the Defendant's statutory power of sale has not accrued.
2. That the Defendant levied certain increments in bank charges and ledger fees without prior ministerial approval as required by section 44 of the Banking Act, Cap. 488.
3. That the Defendant has overcharged his loan account by KShs. 3,141,786/53 by levying increased rates of interest without prior notice to the Plaintiff as required by the charge instrument and also contrary to the Central Bank of Kenya (Amendment) Act, 2000 while that law remained in the statute book between 1st January, 2001 and 31st July, 2005.
4. That the Defendant charged interest on interest which was not provided for in the charge instrument, there by imposing upon the Plaintiff an illegal penalty.

Service of Statutory Notice

The Plaintiff has sworn in paragraph 11 of the supporting affidavit that he was never personally served with statutory notice. The Defendant's answer is that the Plaintiff was duly served with a valid statutory notice, and that he acknowledged such service. It is deponed in paragraph 10 of the replying affidavit that the service was by registered post, and reference is made to annexure 'H' exhibited at paragraph 12 of the Plaintiff's supporting affidavit. That annexure comprises two documents. One of them is a letter dated 8th June, 2004, which is captioned '**STATUTORY NOTICE**'. The other one is a hand-written page showing various names and addresses, one of which reads '**595 David M. Ndeti Box 48423 NBI**'. This latter document is titled '**HOUSING FINANCE BOX 30088-00100 NBI**'.

The document also has a rubber stamp which reads '**NAIROBI KENYA 10 JUNE 2004**'.

Section 102 (2) of the Transfer of Property Act, 1882, of India provides modes of service of, *inter alia*, statutory notice. None of those modes is personal service. One of them, however, at paragraph (d) of that sub-section, is sending the notice by post in a registered letter addressed to the mortgagor by name at his last known postal address. If such letter is not returned through the post office undelivered, such service

will be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

The Defendant has not exhibited any certificate of registered post or any other acceptable evidence to the effect that indeed the statutory notice was sent by registered post to the Plaintiff at his last known postal address, and that the same was never returned through the post undelivered. I venture to state that an affidavit of service would go a long way to remove any doubt as to service upon the mortgagor of the all-important statutory notice. There is also no evidence of the Plaintiff's alleged acknowledgement. On this issue of service, therefore, I am satisfied that the Plaintiff has established a *prima facie* case with a probability of success.

Bank Charges and Ledge Fees

The Plaintiff has pleaded that the Defendant levied certain increments in bank charges and ledger fees without statutory approval as required by section 44 of the Banking Act, Cap 488. That section provides:-

“44. No institution shall increase its rate of banking or rather charges except with the prior approval of the Minister.”

The Defendant has not yet filed defence. But it has not denied in the replying affidavit that it levied increments in bank charges and ledger fees upon the Plaintiff's loan account. Indeed, it is deponed in paragraph 6 of the replying affidavit that all charges applied on the Plaintiff's account were in accord with established banking practice and customs and trade usage among financial institutions in this country, and that the Defendant was entitled to charge penalties in the event of default by the Plaintiff. No approval of the Minister as required by section 44 quoted above of the Banking Act has been exhibited by the Defendant. On this issue I am also satisfied that the Plaintiff has established a *prima facie* case with a probability of success.

Increased Rates of Interest without Notice

The Plaintiff has pleaded that the Defendant has overcharged his loan account by KShs. 3,141,786/53 by levying increased rates of interest without prior notice as required by the charge instrument, *inter alia*. The Defendant has admitted charging increased rates of interest, but after due notice to the Plaintiff as provided in the charge instrument. Such notice dated 20th December, 1999 is exhibited at paragraph 5 of the replying affidavit. The increased rate of interest was to take effect on 1st January, 2000. Clause 4 (ii) of the charge instrument (which is exhibited at paragraph 3 of the supporting affidavit) provides as follows:-

“(ii) The Company may from time to time serve on the Borrower not less than one month's notice requiring payment of interest at such increased or reduced rate as shall, in the decision of the Directors of the Company, fairly represent the rate of interest commonly chargeable in Kenya, having regard to the value for the time being of the Premises, the amount then owing to the Company and to any other circumstances which they consider to be relevant, and the decision of the Directors of the company in this behalf shall not be questioned on any account whatsoever”.

It is apparent from the notice dated 20th December, 1999 that less than one month's notice was given. This was contrary to the express provision quoted above. No other notice has been exhibited by the Defendant. In the circumstances, I am satisfied, on this issue of whether the Defendant levied increased rates of interest without due notice as provided in the charge instrument, that the Plaintiff has established a *prima facie* case with a probability of success.

Interest on Interest

The Plaintiff has pleaded that the Defendant charged him interest on interest without provision for the same in the charge instrument. The Defendant has admitted that indeed it charged interest on interest, but that it was entitled to do so under Clause 3 (ii) of the charge. That Clause provides in the material part:-

“(ii) Interest for each month shall be calculated on the balance outstanding on the Borrower’s account (whether principal or interest) on the last day of the preceding month and shall be debited to the Borrower’s account on the first day of each month....”

It is apparent from this Clause that the Defendant was entitled to charge interest on any outstanding interest. On this issue, therefore, the Plaintiff has not established a *prima facie* case with a probability of success.

From all that I have discussed and held above, I am satisfied on the whole that the Plaintiff has established a *prima facie* case with a probability of success.

Irreparable Loss

Does the Plaintiff stand to suffer irreparable loss, that is, loss that cannot be adequately compensated by an award of damages? With the material placed before the court, I am unable to determine if the Plaintiff stands to suffer irreparable loss unless the temporary injunction sought is granted. So, I must decide the application on a balance of convenience.

Balance of Convenience

I have already found, *prima facie*, that there is no proper evidence that the statutory notice was duly served upon the Plaintiff. In this event, the Defendant’s statutory power of sale had not accrued under the law. I have also found, *prima facie*, that the Defendant illegally levied increased rates of interest without due notice as provided for in the contract between the parties. The Plaintiff has pleaded that he lost over KShs. 3 million on account of this illegal increased interest. It also appears, *prima facie*, that the Defendant levied increments in bank charges and ledger fees without prior ministerial approval as required by statute. The dispute therefore is not merely over accounts. It is whether the Defendant’s statutory power of sale has accrued, and whether the Defendant has acted contrary to the contract between the parties and the law. In these circumstances, for the Plaintiff to lose his security where, *prima facie*, the Defendant’s statutory power of sale has not accrued and where also, *prima facie*, the Defendant has acted contrary to contract and the law, he will have been dealt an unjust blow. The balance of convenience, therefore, tilts in favour of granting the temporary injunction sought.

In the grounds of opposition, the point was taken that the Plaintiff has come to court with unclean hands. No particulars are given in the replying affidavit, and the point was not canvassed during arguments. I will leave it at that.

In the circumstances, I will allow this application and grant prayer no. 3 thereof as sought, subject to the condition that the Plaintiff files by 29th January, 2007 at 3.00 p.m. an appropriate undertaking as to damages. Costs of the application shall be in the cause.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF JANUARY, 2007.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 26TH DAY OF JANUARY, 2007.