REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 392 of 2006

PETER KIMANI KIRARA ……..……..…….....…… PLAINTIFF

VERSUS

HOUSING FINANCE LIMITED ….....…...…… DEFENDANT

RULING

The plaintiff has brought this application, seeking an interim injunction to restrain the defendant from selling-off the suit property L. R. NO. NAIROBI/BLOCK 111/1197, KOMAROCK ESTATE, NAIROBI.

Basically, the plaintiff believes that he does not owe the defendant any money at all, because by his calculations, his loan account ought to be in credit. Anything which the defendant was claiming has been attributed, by the plaintiff, to excessive, oppressive and illegal charges.

It is common ground that the plaintiff borrowed the sum of Kshs.298,340/- from the defendant on 29th November 1990. That loan was secured through a legal charge which was registered against the title to the suit property. It is also common ground that the repayment period was 25 years; and that the monthly instalment was Kshs.4,704/-.

The plaintiff's calculations show that over the 25 year period, he would be expected to pay a total of Kshs.1.,4 million. Yet as at the time he filed this suit, on 21st July 2006, the plaintiff had already paid Kshs.1,814,856/-.

In the circumstances, the plaintiff believes that there was no justification for the defendant demanding a further payment of Kshs.1.403,773/65, as per the Notification of Sale dated 28th March 2006.

The plaintiff says that he did procure the services of the Interest Rates Advisory Centre in re-calculating the sums which the defendant was claiming from him. In their report, the said Interest Rates Advisory Centre (IRAC) boldly asserted that the plaintiff's account ought to be in credit.

The difference between the sums claimed by the defendant and the re-calculations by IRAC is attributed, by the said IRAC, to alleged unlawful debits which the defendant had made to the plaintiff's account. For instance, the IRAC report has limited the interest rates to that which they saw as being in conformity with the provisions of Section 39 of the Central Bank of Kenya Act, and also Section 44 of the Banking Act.

To my mind, IRAC cannot be deemed to be a body of persons who were clothed with requisite authority to interpret statutory provisions. Also I do not think that they can purport to make any definite findings, such as;

"Section 39 of The Central Bank of Kenya (Amendment) Act 2000 is good law at the very worst from the date of the High Court's decision on 24th January 2002, or earlier if the commencement date of 1st January 2001 is applied."

In my understanding, it is judicial officers who have been mandated by law, to interpret statutory provisions, and their impact, if any, to any circumstances as may be presented before the courts.

Of course, every person is entitled to their own opinion. That would imply that even IRAC is entitled to their own opinion. But, just as much as advocates can express their opinion on the facts as well as the law, such opinions remain exactly that.

After the opinions have been expressed, if it is within the context of legal proceedings, it is thereafter the responsibility of the judge or magistrate to pass a verdict.

So, if advocates only give submissions, which they hope would help persuade the court to arrive at an appropriate decision on the case before it, I doubt that a Certified Public Accountant, who is advised by such an advocate would have any authority to make conclusive remarks as regards the applicability or otherwise of any statutory provisions, to the facts of any case.

By so saying, I must not be misunderstood to be suggesting that the IRAC report was useless, in every respect. All I am saying, for now, is that their report, insofar as it purports to make conclusions on issues such as whether or not the defendant had charged unlawful interest, has ventured in to a territory within which the Certified Public Accountant has not authority.

I believe that IRAC would do well by first getting a court of law to make pronouncements on issues of law. Thereafter, it would be open to them to cite the said decision, as the basis for their conclusions.

At present, the plaintiff believes that IRAC is correct in stating that the mortgage account was debited with unlawful interest. On the other hand, the defendant believes that their lawyers were right to have advised them that such interest as had been debited to the plaintiff's account was lawful.

Those diametrically opposing views were held on the strength of legal advise from advocates acting for the two parties herein. Until those views are tested at a trial, this court would be wrong to prefer one point of view to the other.

It is entirely possible that after the trial court will have received evidence from both parties, it may hold that the defendant had debited some unlawful interest. On the other hand, it is equally possible that the defendant could persuade the trial court that they were entitled to charge interest in the manner they had done.

Accordingly, the report by IRAC cannot, at this interlocutory stage, be said to have tilted the case in favour of the plaintiff. In other words, it cannot be the basis upon which the court could hold that the plaintiff had proved a prima facie case with a probability of success.

In the case of PROF. DAVID MUSYIMI NDETEI –VS- DAIMA BANK LIMITED, MILIMANI HCCC NO. 2198/2000, the decision to have the defendant make a refund to the plaintiff was arrived at after a full trial. It is at that stage that the learned judge made an express finding to the effect that;

"the defendant having been confronted with the provisions of section 39 Cap 491 failed to sufficiently rebut the evidence thereof."

Similarly, the learned trial judge held that the plaintiff had adduced evidence to prove that;

"section 44 of the Banking Act (Cap 488) did not allow an institution to increase its banking charges."

In this case, the plaintiff will still need to lead evidence to that effect. He will also need to satisfy the court that the defendant was indeed one of the specified financial institutions, to which the said statutory provisions applied.

On the other hand, as the plaintiff indicated, in the case of HARILAL & CO. & ANOTHER –VS- THE STANDARD BANK LIMITED [1967] E.A. 512, trade usage and custom must not only be properly pleaded, but must also be proved.

In my understanding, the only way of proving an alleged trade usage or custom, is by leading evidence to that effect. I say so because of the following words of Sir Charles Newbold P., which are to be found at page 516 of the HARILAL & CO. case;

"A trade usage may be described as a particular course of dealing between parties who are in a business relationship, which course of dealing is so generally known to all persons who normally enter into that relationship that they must be presumed to have intended to adopt that course of dealing and to have it incorporated into their contractual relationship unless by agreement it is expressly or impliedly excluded.

…

A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well-known and has been acted on generally by persons affected by it."

Therefore, although the plaintiff herein has criticized the defendant for failing to prove the alleged trade usage and custom, I find that at this stage of the proceedings, it may not have been possible for the defendant to tender conclusive proof in that regard.

To my mind, this application turns on the issue of notices which the defendant was required to serve upon the plaintiff prior any variation in the rate of interest.

Pursuant to clause 5 of the charge instrument, the defendant was entitled to charge interest at the rate shown in the Schedule, until and unless it had first served the plaintiff with a notice to increase or reduce the said rate.

The Schedule indicated that the interest would be charged at 18%. And the plaintiff stated that he was not served with a proper notice, for the variation of that rate of interest.

In response, the defendant has provided a total of eight notices, dating from 31st May 1993 upto 1st October 2003. In the first of the said notices, the defendant did not specify the rate of interest which had been prevailing prior to the said notice, dated 31st May 1993. All that was indicated is that the interest rate was going up to 21.00% per annum.

However, if it is borne in mind that the instalment sum cited in the schedule was Kshs.4,529/- per month, it must imply that the defendant had already changed the interest rate before 31st May 1993, because as at that date the plaintiff was being told that the repayment instalment was increasing from Kshs.4,775/- to Kshs.6,170/-. In other words, as at that date, the monthly repayment had already increased from Kshs.4,529/- to Kshs.4,775/-.

To my mind, the defendant would have to discharge the burden of proving that it ever became entitled to increase the rate of interest from 18% per annum. As at present, the court has not yet been provided with any material to show that the plaintiff was given an appropriate notice.

Similarly, the defendant will need to prove that after the notice dated 31st May 1993, when the interest

rate was increased to 21.00%, it did issue another notice of its intention to increase the rate to 26.00%. I say so because as at present, the next notice (in chronological sequence) is the one dated 15th December 1994; and it was notifying the plaintiff that the interest rate was to be reduced from 26.00% to 22.00%. The question therefore is; "where is the notice of increment to 26.00% per annum?".

And in any event, as the plaintiff denies receiving any notices for variation of the rate of interest, the defendant would have to demonstrate that it effected due service.

In the event that the defendant were unable to provide proof that it did serve the plaintiff with the requisite notices, for the variation of the interest rates, there would arise a fundamental question regarding whether or not the arrears reflected in the defendant's records were accurate. That would lead to the question as to whether or not the alleged arrears had subsisted for a period that was long enough to warrant the issuance of a statutory notice.

It is my considered opinion that those issues are as complicated as they are disputed. I would therefore adopt the following words of the Hon. Ringera J. (as he then was), in LUCY NJOKI WAITHAKA –VS- INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION, MILIMANI HCCC NO. 321 OF 2001;

"The court should also be alive to the fact that at the interlocutory stage it would be improper to decide with finality the rival facts if they are complicated and disputed."

As the said facts await determination at the trial, it would be in the interests of justice to preserve the subject matter of the suit herein. Accordingly, an injunction shall issue herein to restrain the defendant from selling the suit property whether by private treaty or by public auction; and also from alienating the said property in any manner whatsoever, until this suit is heard and determined. However, the plaintiff is required to execute and file in court, within the next SEVEN (7) DAYS, an undertaking to pay to the defendant such damages as the defendant may suffer, if ultimately the court were to find that the interim injunction herein had prejudiced the defendant, whereas it ought not to have been issued.

The costs of the application are awarded to the plaintiff.

Dated and Delivered at Nairobi this 18th day of January 2007.

FRED A. OCHIENG

JUDGE