

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 370 of 2006

NANCY JERUTO BOMETT APPLICANT

VERSUS

HOUSING FINANCE COMPANY LTDRESPONDENT

RULING

In this application dated 9th June, 2006, and filed under O.41 R.4 (6) of the Civil Procedure Rules, the Appellant/Applicant seeks a temporary injunction to restrain the Respondent from selling the suit property, pending the hearing and determination of this Appeal.

By a charge dated 1st August, 1990 the Applicant charged the suit property to the Respondent for a loan of Shs.378,000 repayable with interest at 16½% per annum in two hundred and sixteen monthly instalments of Shs.5,669/=.

According to the Applicant, the Respondent unilaterally and unlawfully increased the instalment payable to Shs.6168/= effective September, 1991. Thereafter, the Respondent unlawfully and unilaterally increased the interest rate from 16½% to 21% per annum effective 1st January, 1993, and charged 18% “penalty interest”, thereby bringing the total sum payable under the mortgage instrument to Shs.1,090,733/= as of 31st January, 2006.

Although the Applicant acknowledges that the mortgage instrument allows the Respondent to vary the interest rate, she argues that it cannot charge penalty interest, and other “penalty charges”. The Applicant claims that in imposing various penalty and other charges the Respondent is in breach of various provisions of the Central Bank of Kenya Act and the Banking Act. According to the Applicant’s advisors, the Interest Rates Advisory Centre Limited, the balance outstanding as of 30th June, 2005 should not exceed Shs.489,996.56 as per annexure NJB 10 in the Supporting Affidavit.

The Respondent, on the other hand, has submitted that all the charges imposed by it are in accordance with the mortgage instrument and the law; that the mortgage instrument allowed the Respondent levy “interest on interest” and “other” charges; and that the Report of the Interest Rates Advisory Centre Limited, relied upon by the Applicant, was only an “opinion” whose veracity “needed to be tested in a Court of law.”

The Respondent is correct in its submission that there are issues and allegations here whose veracity needs to be tested in the Court. That can only be done at the substantive hearing, and not at this stage. For now, I am satisfied that the Applicant has raised sufficient issues that need careful examination: whether the interest rate charged, together with “interest on interest”, and “other” charges were lawful, and in accordance with the mortgage instrument. The Respondent’s contention that the instrument permitted “interest on interest” charges, does not necessarily make it “legal”. I am satisfied, for now, that the Applicant has presented a prima facie case with a probability of success; that the suit property being her residential property, damages may not be an adequate compensation; and the balance of convenience tilts in her favour. The Respondent continues to hold security over the suit property, and will not suffer any prejudice in the event of its success at Appeal. **Accordingly, I will allow this application as prayed, except that costs shall be in the cause.**

Dated and delivered at Nairobi this 28th day of March, 2007

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ALNASHIR VISRAM

JUDGE