



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 497 of 2006**

**IN THE MATTER OF: THE RIGHT TO REDEMPTION IN RESPECT**

**OF LAND REFERNCE NUMBER 12836/6**

**BETWEEN**

**GEOFFREY ORAO OBURA.....PLAINTIFF/APPLICANT**

**AND**

**HOUSING FINANCE COMPANY**

**OF KENYA LIMITED.....DEFENDANT/RESPONDENT**

**R U L I N G**

Geoffrey Orao Obura the Applicant herein has come to this court by way of a Chamber Summons under Order XXXIX of the Civil Procedure Rules seeking an order of a temporary injunction against the Housing Finance Company of Kenya Ltd the respondent herein in the following terms

**“ a temporary injunction be issued against the defendant to restrain the defendant his agents employees or whomsoever from in any manner selling or offering for sale the plaintiff’s property comprised in title No LR 12386/6 NAIROBI and/or interfering with the plaintiff’s possession of the property –pending determination of this suit”**

The Applicant’s suit which was initiated against the respondent on the 6<sup>th</sup> September 2006 is an originating summons in which the applicant who claims to be chargor entitled to redeem the charge registered as No. IR 51773/5 at the registry of titles in Nairobi seeks determination of the following questions:

- (a) Whether the Notional Rent Agreement dated 5<sup>th</sup> August 2005 is binding upon the plaintiff and the Defendant.
- (b) Whether the Plaintiff is entitled to an order, upon payment by the Plaintiff to the Defendant of the sum of KShs. 3,721,257/90 set out in the redemption notice dated 13<sup>th</sup> April 2006, that the Defendant do execute a proper discharge of charge of the charged property, L.R. No. 12386/6, Nairobi.
- (c) Whether the Defendant’s failure to execute a discharge of charge is a clog on the Plaintiff’s right

of redemption thereby justifying such further orders from this Honourable Court.

- (d) Whether the Plaintiff is entitled to such further or other relief as may be necessary to secure the expeditious execution of any of the aforesaid orders sought.
- (e) Whether the Plaintiff is entitled to an order restraining the Defendant from selling, disposing or transferring L.R. No. 12386/6, Nairobi.
- (f) Costs of and incidental to this suit.

In support of the application under consideration, the applicant has relied on his affidavit which was sworn on 1<sup>st</sup> September 2006 in support of the originating summons. The Applicant also relies on his affidavit sworn on 13<sup>th</sup> September 2006 as well as a further affidavit sworn by the Applicant on 25<sup>th</sup> September 2006.

From these affidavits it emerges that the Applicant charged his property LR No. 12386/6 NAIROBI (hereinafter referred to as suit property) in 1993 to the respondent to secure a loan of KShs. 5 million. As at 30<sup>th</sup> September 2003 the applicant's mortgage account was in arrears to the tune of KShs 6,654,948/47. Following discussion between the applicant and the respondent's officers, it was agreed that further consultations would be taken with a view to the respondent recalculating the interest and extending a rebate on the outstanding amount so that it is reduced to a figure not exceeding KShs 6 million. Pending the recalculation and the rebate the parties signed a notional rent agreement based on the amount due according to the books which was KShs. 8,931,001/85. Thereafter the Applicant made various payments on the account.

In April 2005 the Applicant was informed by a Ms Beatrice Kamiri an officer of the respondent that the amount then outstanding was KShs. 5,121,151/90. As a condition for the extension of the notional rent agreement the Applicant was required to pay a substantial amount. The applicant paid KShs. 1 million to the Respondent after which another notional rent agreement was executed by the parties in August 2005 which indicated the outstanding loan amount as KShs. 4,121,251/90. In January 2006 the Applicant was advised by the Respondent's officers that the notional rent agreement had lapsed. The Applicant thereafter paid KShs. 200,000 and made a request for further extension of the notional rent agreement. On 27<sup>th</sup> February.2006 the Applicant received a letter from the Respondent dated 20<sup>th</sup> February 2006 to which was attached a statement of account. The Applicant was shocked to note that the Respondent had reneged on the notional rent agreement signed in August 2005 which indicated the loan balance as KShs 4,121,251/90 instead the statement of account was indicating the amount outstanding as at August 2005 as KShs 7,989,192/90. The Applicant wrote to the Respondent indicating that the outstanding balance as at 31<sup>st</sup> August 2005 was KShs. 4,121,252/90 and that having paid a sum of KShs. 200,000 on 21<sup>st</sup> January 2006 the balance outstanding was only KShs. 3,921,252. The Applicant paid a further sum of KShs 200,000 and indicated his commitment to paying the balance of KShs. 3,721,257/90 by the end of the year. On 13<sup>th</sup> April .2006 the Applicant served the Respondent with a redemption notice in accordance with Clause 13 of the charged document. However, the respondent insisted that the outstanding sum as at 31<sup>st</sup> May 2006 was KShs. 7,815,374/45.

On 16<sup>th</sup> June 2006 the Respondent served the Applicant with a statutory notice of its intention to realize the security. The Respondent having refused to accept the sum of KShs.,3,721,271/90 the Applicant is apprehensive that unless restrained the Respondent may proceed to auction the suit property as a result of which the Applicant will suffer irreparable loss and damage. The Applicant has therefore deposited the sum of KShs. 3,721,271/90 into court and seeks an order of interlocutory injunction against the Respondent.

The application is opposed by the Respondent. In a replying affidavit sworn by Geoffrey Kimaita the Respondent's manager recovers, the Respondent admits that it entered into a notional rent agreement with the Applicant on 24<sup>th</sup> February 2006. The Respondent denies that the Applicant was informed by Beatrice Kamiri that the outstanding amount on the Applicant's mortgage account was KShs.

5,121,151/90 but that the outstanding amount was actually Kshs. 8,838,132/90 as at 30<sup>th</sup> April 2005. It was explained that the figure of Kshs. 4,121,251/90 was inserted in the notional rent agreement in error and that the correct loan balance was communicated to the Applicant by letter dated 20<sup>th</sup> February.2006 and reiterated in subsequent letters. The Respondent maintained that the outstanding sum on the Applicant's mortgage account as at 29<sup>th</sup> June 2006 was KShs 7,738,104/40 and that this is the amount that the applicant should deposit in court in order for the court to restrain the respondent from exercising its statutory power of sale.

Mr. Ngatia who appeared for the Applicant submitted that the Applicant has established a prima facie case in which legal issues have been raised. These include the issue as to whether a compromise agreement was entered into by the parties and if so whether the Respondent can resile from such an agreement. He argued further that there was an issue as to whether the Respondent having made the Applicant to believe that the outstanding amount as at August 2005 was Ksh. 4,121,151/90, a statutory estoppel under Section 120 of the Evidence Act arises and the Respondent is estopped from denying this amount. Mr Ngatia stressed that the Applicant's suit is not about a dispute as to account but relates to the compromise entered into by the notional rent agreement and the estoppel that arises from the circumstances. He urged the court that the Applicant having deposited into court the outstanding sum of Kshs. 3,721,257/90 the court should grant the order of interlocutory injunction to preserve the suit property pending the hearing and final determination of the Applicant's suit.

In response to Mr Ngatia's argument Mr Issa who appeared for the Respondent submitted that the first notional rent agreement signed by the Applicant and the Respondent in the year 2004 confirmed that there was an outstanding loan balance amounting to Kshs. 8,931,001/85 plus arrears of KShs. 7,464,204/70. That notional rent agreement was the one renewed in the year 2005. He maintained that the figure indicated in the renewed notional rent agreement for 2005 was erroneous and the Applicant was advised by the Respondent that the loan balance as at 30<sup>th</sup> January 2006 was KShs.7,909,442/90. Mr Issa maintained that the Respondent will at the hearing of the suit adduce evidence to show that there was a mistake on the document signed by the parties.

Relying on the case of *Mrao Limited vs. First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 Mr Issa submitted that the Applicant could only be granted an interlocutory injunction if he deposits what the Respondent claims, which is KShs. 7,709,449/90 and not what the Applicant admits to be outstanding which is what the Applicant had deposited in court.

The principles upon which an application for an interlocutory injunction can be granted have been restated in the case of *Mrao Limited vs. First American Bank of Kenya Ltd and 2 others* (supra). These are:

**“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience, (*EA Industries v Trufoods* [1972] EA 420).”**

In the *Mrao Ltd* case (supra) Kwach JA quoting Halsbury's Laws of England Vol. 32 4<sup>th</sup> Ed. Paragraph 725 expressed the view that applications by a mortgagor for temporary injunction restraining a mortgagee from exercising its statutory power of sale ought not to be treated like any other application for an injunction in an ordinary suit but:

**“mortgagee 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 mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive.”**

In the case of **Joseph Okoth Waudi vs. National Bank of Kenya Civil Appeal No. 77 of 2004**

**(Mombasa)** which was cited by Mr. Issa the Court of Appeal accepted the quotation from Halsburys Laws of England Vol. 32 4<sup>th</sup> Ed. Paragraph 725 to be the trite law.

Coming back to the case before us I am mindful of the fact that this is an interlocutory application and therefore I have to be cautious not to make any conclusive findings of facts on disputed issues that may form the subject of the main trial. Fortunately, most of the facts are not in dispute. For instance the Applicant does not deny that there is an amount due and owing in respect of the mortgage. It is also not disputed that the parties signed a notional rent agreement in the year 2005 with regard to payment of the outstanding sum.

The parties are however not agreed on the amount which is owing. This is not due to a disagreement on the accounts but is due to a misunderstanding regarding the figure shown on the notional rent agreement signed in 2005. While it is agreed that the notional rent agreement indicates the amount outstanding as KShs.4,121,251/90, the Respondent maintains that that figure was a mistake. Thus the dispute is not about accounts but relates to the compromise entered into by the parties through the notional rent agreement. That is, whether the parties were *ad idem* on the amount owing and whether the notional rent agreement is binding. It is common ground that as a result of this disagreement the Respondent has refused to accept the sum of Kshs. 3,721,259/90 offered by the Applicant as the outstanding balance. The Respondent has further refused to allow the Applicant to exercise his right of redemption, instead the Respondent is threatening to exercise his statutory power of sale unless the Applicant pays the sum of KShs. 7,709,449/90 which the Respondent maintains is the balance owing.

From the undisputed facts laid before me I come to the conclusion that the applicant has not only raised issues with regard to the effect of the notional rent agreement signed by the parties in the year 2005 but has also shown that there is a real likelihood of the Applicant's right of redemption being infringed since the Respondent has clearly indicated its intention to

realize the security unless the Applicant pays the sum of KShs. 7,709,449/90. The applicant has thus established a prima facie case with a probability of success. I have further no doubt that if the suit property is sold the Applicant will suffer irreparable loss, as damages may not be adequate compensation for loss of the suit property.

I have considered the authorities regarding the requirement for deposit of the outstanding sum in respect of the mortgage before the mortgagee can be restrained from exercising its statutory power of sale. In this case however, the Applicant's case rests on the disparity concerning the amount alleged to be outstanding. Noting that the difference is almost double, a demand for the deposit of the entire sum would cause unnecessary hardship to the Applicant.

The upshot of the above is that I find it necessary to preserve the suit property and do therefore make the following orders:

- (i) An order of injunction do issue restraining the Respondent its agent or servant from selling or offering for sale the suit property and/or interfering with the Applicant's possession of the suit property pending the hearing and determination of this suit.
- (ii) The sum of Kshs. 3,721,259/90 which was deposited by the Applicant into court shall remain in court until further orders.
- (iii) The Applicant shall take appropriate action to ensure that his suit is heard and determined within 12 months from the date hereof failing which the interlocutory injunction shall stand discharged unless otherwise extended by the court or consent of the parties.
- (iv). The costs of the application shall be in the cause.

**Dated and signed and delivered at Nairobi this 14<sup>th</sup> day of March 2007.**

**H. M. OKWENGU**

**JUDGE**