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

Civil Case 430 of 2006

CYLINDER MASTERS LIMITED ……..…….PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD. ……...…DEFENDANT

RULING

The application for my determination is the one dated 2nd August, 2006 and it is made under Order 39 Rules 1, 2, 3, 4, 5 and 9 of the Civil Procedure Rules. The application essentially seeks an order of temporary injunction to restrain the Defendant, whether by itself, officers, directors, servants and/or its agents from selling advertising for sale, transferring and/or dealing with L.R. No.9509/29 Mountain View Estate, off Thika road, Nairobi in any manner whatsoever pending the hearing and determination of this suit.

It is the contention of the Applicant that the Respondent intends to sell the suit property at a massive undervalue. And it has made entire payments to the Defendant towards the settlement of the loan and overdraft facility due and owing to the Defendant. It is also the contention of the Applicant that the amount claimed by the Defendant relates to illegal interests, commissions, bank charges and penalty charges which have already been settled by the Plaintiff and which sums the Plaintiff has requested the Defendant to account for but to no avail.

It is further contended by the Plaintiff that it would suffer irreparable loss and damage that is incapable of being compensated by damages, should the illegal, unlawful and unprocedural sale of its property be allowed to proceed. And that the Defendant intends to rely on its exercise of the statutory power of sale, which is invalid, null and void owing to its non-attestation, hence the Plaintiff has been discharged from the obligations thereunder.

According to **Mr. Koceyo** Advocate the charge document is invalid for its failure to comply with Section 59 of Indian Transfer of Property Act, since the charge was only executed by the Plaintiff and not signed by two witnesses as required by law. He also submitted that the attempt by the Defendant to sell the suit property for Kshs.6 million is unlawful. At the time of the grant of the loan, the property was valued at Kshs.12 million. In the estimation of the Plaintiff, the sale is for extraneous reasons, as there is no reasons why the Defendant wants to sell the property half its price.

The application was opposed by **Mr. Saende** Advocate, who relied on the contents of the replying affidavit sworn on 9th August, 2006. He submitted that there is evidence to show that the Plaintiff was granted financial facility by the Defendant. As regards the issue of the charge document being defective, he submitted that the issue was never raised at the time the Plaintiff was enjoying massive financial facilities from the Defendant. And cannot now be used to defeat the facilities it was enjoying all this time.

I will now try to consider the issues raised by the Applicant in support of its application for an injunction. The law as I understand, is that an injunction is an equitable remedy, which would not be granted when the matters pertaining to the conduct of the Plaintiff is wanting. The Applicant says that the rate of interest charged was excessive, illegal, unlawful and unconscionable. And that the Defendant failed to give sufficient and satisfactory answers to its plea to compute the same properly.

The question is whether the interest rate is such that it radically and completely changed the amount payable by the Defendant. It all boils down to the amount due and owing between the parties. My take is that a chargee will not usually be stopped from exercising its statutory power of sale simply because the amount due and owing is in dispute or because the chargor objects to way or manner in which the intended sale is being arranged. It is the case of the Defendant that the interest charged is provided for in the essential agreements signed by the parties. And in my view if the interest rate is covered by the contractual document signed by the parties then the court has no powers to change the bargaining powers of the parties. The court can only intervene in extreme position where the chargee is shown to have used its muscle to inflict maximum pain or suffering into the chargor.

It is only where fraud or where the interest is unconscionable that the court would come to the aid of the chargor. The chargor must exhibit exemplary good conduct, so that he is not accused of coming to court with unclean hands. There is no dispute that the Defendant is by law allowed to charge interest as agreed between the parties. If there is a change then the contractual document usually provides for the manner and mode of change. I have no evidence to show the Defendant departed from the contractual relation.

In **HCCC No.570/1998 Pelican Investment Ltd. & another v National Bank of Kenya Ltd.** Justice Onyango Otieno held**:**

"**I am not satisfied that the applicant has advanced a prima facie case with a probability of success, for even if I were to find that interest charged was unconscionable, still it would in the end be no more than a dispute as to the amount due which in law as I have stated is not a proper ground for granting injunction. As I had found that no evidence was advanced to satisfy me that no statutory was served, the Respondent's power of sale has arisen".**

There is no dispute that the Applicant was granted substantial financial facility by the Defendant. The Applicant used and enjoyed that financial power for its beneficial use. The Plaintiff accepted the letter of offer, which stipulated the terms and condition of the financial accommodation. This was followed by the charge document which the Plaintiff now alleges is defective. In my view notwithstanding its defects, the charge is central to the relationship between the parties. If the Plaintiff did not offer any security for extension of the overdraft and loan, then the issue of the charge would not have arisen. And party cannot take benefits from a document and then claim since it conferred some interest, which I have not fulfilled, then it must be declared as invalid.

It must be properly understood by the parties like the Plaintiff that an injunction is an equitable remedy. And he who seek equity must first do equity to the opposite party. I think it is inequitable to derive substantial financial accommodation through a charge and attack the same when the situation is unfavourable. Under all circumstances, a Plaintiff seeking an equitable remedy must approach the court with clean hands in order to benefit from the discretionary powers of the court.

There is ample evidence to show that through letters dated 2nd February, 2001, 14th November, 2001 and 20th November, 2002, the Defendant offered the Plaintiff overdraft and term loan facilities for a combined sum of Kshs.32,350,000/=. The said letters was accepted and executed by the Plaintiff's directors and/or agents in agreements with the contents therein. It is also clear that the Defendant was not a party to the transfer of the suit property to the Plaintiff as a security for obtaining a facility from it.

By its letter dated 12th March, 2004 the Plaintiff sought the restructuring of the overdraft facilities and also requested the interest charged be reconsidered. That position is radically different from the position taken by the Plaintiff that the bank charged interest which were unlawful, illegal and unconscionable. That kind of departure from the true position shows that the Plaintiff has come with unclean and dirty

hands.

In my view the Plaintiff has engaged in a deliberate attempt to conceal and misrepresent the true facts and position, between the parties in order to gain some advantage. The documents exhibited by the Defendant shows that the Plaintiff is indebted to the Defendant and has severally sought and obtained accommodation in order to settle the matter amicably. In all probability there is no indication that the Plaintiff repaid the monies extended to it by the Defendant. I have no evidence to show that the Plaintiff settled or repaid its debt to the Defendant. Under such circumstances, it is not entitled to an injunction for no prima facie case has been established. On damages I am satisfied the bank is a reputable financial institution, which can comfortably compensate for any eventual damages or injury. The amount now due and owing is over 30 million, hence the balance of convenience tilts in favour of the Defendant.

In the premises the application dated 2nd August, 2006 is dismissed with costs to the Defendant.

Dated and delivered at Nairobi this 24th day of April, 2007.

M. A. WARSAME

JUDGE

Court: Ruling delivered in the presence of Mr. Amadi for the Plaintiff/Applicant

No appearance for the Respondent.

M. A. WARSAME

JUDGE