REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 202 of 2006

JAMES NGARA GAITHO …….....….PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED..1ST DEFENDANT

KINYANJUI WANJUU T/A DOLPHIN AUCTIONEERS.....2ND DEFENDANT

RULING

The application for my decision is the one dated 13th April, 2006. It is an application for injunction under Order XXXIX Rules 1, 2, 3 of the Civil Procedure Rules and Section 65 and 74 of the Registered Land Act Cap 300 laws of Kenya. The main prayers in the application are:

(1) That the defendants whether by themselves or their servants or agents or Advocates or Auctioneers or any of them or otherwise be restrained by injunction until hearing and determination of this action or further orders of this Honourable Court, from the following acts or any of them, that is to say from advertising for sale, selling by public auction or private treaty or otherwise howsoever alienating, conveying, transferring or in any other manner whatsoever interfering with the plaintiff's property known as L.R. No.Dagoretti/Uthiru/557 situated in the City of Nairobi.

(2) All further Registration or change of registration in the ownership, leasing, sub-leasing, allotment, user, occupation or possession or in any kind of right title or interests in all that parcel of land known as L.R. No. Dagoretti/Uthiru/557 with any land registry, Government Department and all other registration authorities be and is hereby prohibited until further orders of this Honourable court.

The case of the plaintiff/applicant is that the defendants have threatened to sell the suit property by public auction on 5th May, 2006 to recover an alleged debt amounting to Shs.5,616,487. It is alleged that the said debt is excessive and not properly due under the terms of the contract of lending. And that the actual outstanding debt as per the re-calculation conducted by Interest Rates Advisory Centre is Kshs.356,248/91 only and the plaintiff is ready and willing to pay the said sum to the 1st defendant, consequently the intended sale is illegal and contrary to the provisions of the law.

It is also the contention of the applicant that the 1st defendant has been charging exorbitant, oppressive, illegal and unconscionable interest rates and other charges and penalties to the plaintiff's account contrary to the terms of the charge document and the contract of lending, thereby clogging the plaintiff's equitable

right to redeem the suit property. It is also alleged that the defendant has unreasonably blocked or rejected the plaintiff's proposals and/or efforts to repay the proper debt outstanding thereby making it difficult for the plaintiff to redeem the suit property.

The applicant further avers that the 1st defendant is not entitled to any of the monies it has demanded from the plaintiff, in that the same are excessive, oppressive, illegal and constitute a breach and variation of the lending agreement, the letter of offer and the charge document, therefore the statutory power of sale is not exercisable.

It is also the position of the plaintiff that the 1st defendant has unreasonably refused to furnish the plaintiff with proper and accurate statement of account and the justification for the excessive interest charges levied on the account.

The 1st defendant filed a replying affidavit by **Mr. Joseph Kania**, the Manager legal services of the defendant company, stating that the plaintiff has not diligently been servicing his mortgage account, making the outstanding sum to grow over the years due to the default of the plaintiff. And as a result of the said default, the 1st defendant lawfully and properly levied charges on the account to mitigate the risk factor associated with the plaintiff's default. He avers that all the charges levied on the plaintiff's account were in accordance with the terms of the charge and established Banking practice and procedures. In the premises the defendant states that the outstanding balance is not manifestly excessive as alleged by the plaintiff/applicant.

It is the contention of the 1st defendant that the plaintiff has over the years admitted his indebtedness and made proposals to settle the outstanding sums on the account, which promises have never been kept. It is also alleged that the report by Interest Rate Advisory Centre is only a preliminary report and has not factored in the risk factor owing to the plaintiff's own default in servicing the mortgage account. The report in any event confirms that the plaintiff has been in default and did not make any payments between August 1997 and April, 2004, a period of almost seven years. In the premises the allegations of impropriety are baseless and without any foundation.

Lastly it is the case of the 1st defendant that the plaintiff was properly served with a statutory notice through a letter dated 27th January, 2004 as evidenced by the certificate of posting of 5th February, 2004. And in any event the plaintiff has admitted his indebtedness and the only dispute is as to accounts, therefore the plaintiff has not established a prima facie case for the grant of an order of injunction sought in the suit.

First let me say that it is no business of the court to grant injunctions to restrain mortgagee/chargees from exercising their statutory power of sale solely on the ground that there is a dispute as to the amount due to the charge/mortgage. The alleged dispute is usually based on misrepresentation of the factors in display between the borrower and the bank. The dispute is usually on the amount payable when there is a default in the repayment of the facility extended to the borrower. The dispute arises from the fact that there is a default in the repayment schedule and once that happens the figures and amounts in the loan are adjusted to take into consideration the risk of the default and recovery period.

It is the contention of the plaintiff that a very small amount of Kshs.373,700/= had been advanced sometimes in 1989 and a charge was executed in favour of the plaintiff. The manner in which the interest was to be calculated was provided under the charge document. The complaint of the plaintiff is that the bank has been calculating interest on arrears and it has been charging something called default penalties on the account. It has also been charging interest on compounded basis instead of being simple interest. The bank is also accused of increasing the rate of interest without serving notice upon the plaintiff. The plaintiff contends that he was never served with a notice of intention to increase the interest rate. Equally the plaintiff complains that the charge document does not permit the bank to charge default penalties and also interest on arrears.

There is no dispute that the plaintiff received financial accommodation from the defendant bank. The

plaintiff admits that he is indebted to the defendant, though the amount in question is heavily contested by the parties. In short the plaintiff admits the debt but the point of departure is the amount due. The plaintiff claims that the amount due is excessive but that would be valid and sustainable if he was repaying the loan as per the agreed schedule. If the plaintiff defaulted and kept away from the bank without making any payment from August, 1997 to April, 2004 a period of almost 7 years, he cannot be heard to complain about the validity and correctness of the amount due and owing. The bank was obliged to load and factor in the risk from the non payment and for default in servicing the mortgage account. There is no dispute that the plaintiff did not make any payments between August, 1997 and April, 2004 making the debt to escalate beyond the reach of the plaintiff.

In my view debt has grown over the year especially between the period of 1997 and April, 2004, due to the default of the plaintiff in adhering to the repayment schedule, which was lawfully agreed between the parties. There is ample evidence to show that he was given several opportunities to redeem the charged property by virtue of the bank requiring him to pay a specific and agreed figure. But the plaintiff failed to make good his part of the bargain. The letter dated 4th February, 2005 shows that he was given an offer to settle the outstanding debt at Kshs.1,200,000/=. As far back as in January, 2004, the plaintiff was aware that the suit property would be sold/auctioned if he made no attempt to repay the loan. In a further letter to the bank, the plaintiff agreed to settle debt at Kshs.1,200,000/= as full and final settlement of the account outstanding but he now says that the outstanding is Kshs.356,248/=.

The true position is that the plaintiff was all along aware that he was in default and the consequence of such default is to sell the charged property without any recourse to him. He gave an offer or proposal even after the default but he failed to pay the agreed sum, within the stipulated time. In my view the plaintiff has not approached the court with clean hands. And this being a court of equity, it cannot allow him to take benefit from his own default and lack of bonafides. It is my position that a party seeking an equitable remedy of injunction must first do equity to the opposite party. The barometer in the grant of an injunction is whether the party seeking an injunction has come to court with clean hands. A party with unclean hands is not deserving of an equitable remedy of injunction.

The evidence on record shows that the plaintiff has been in constant default of his obligation to repay the loan advanced. The conduct of the plaintiff is a manifestation of an erratic conduct bent on perpetuating an inequitable situation. There is no evidence to show the bank had acted oppressively in exercising its statutory powers of sale. I am satisfied that a default in servicing of the loan facility has been proved. It cannot therefore, be rightly contended that the respondent had no basis upon which to exercise its statutory power of sale when there is a default in existence.

As a whole I am satisfied that there is no prima facie with a probability of success at the trial. The plaintiff has not established one single issue to say that he has probably shown an issue to entitle him a prima facie hope. The twin issues of damages and balance of convenience are in favour of the respondent for its considerable accommodation and patience to the case of the plaintiff.

In the premises I am satisfied that the applicant has not satisfied the principles in **Giella vs Cassman Brown & Co. [1973] E.A 358**. The application for injunction dated 13th April, 2006 is dismissed with costs to the 1st Defendant.

Dated and delivered at Nairobi this 15th day of May, 2007.

M. A. WARSAME

JUDGE