REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 538 OF 2006

CHARLES MUTISYA NYAMAI …….....…….PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD…..DEFENDANT

RULING

In the application dated 26th September, 2006, the applicant seeks that the defendants, its servants, agents or whomsoever be restrained and prohibited by an order of injunction from entering into, accessing, alienating, selling, transferring, interfering or in any other manner whatsoever altering, or dealing in the nature of the plaintiff's property known as **L.R. No.NBI/Block 97/423** pending the hearing and determination of this suit.

According to **Mr. Mbaluka** Advocate the main and principle ground for seeking an injunction is that the defendant had advertised the suit property for sale when the plaintiff had been dutifully and without fail been paying the requisite sums due and owing at any particular time. **Mr. Mbaluka** Advocate submitted that the issue in dispute is the apparent unconscionable, non contractual and illegal interest rates levied on the account. The plaintiff agreed to settle the sums due, while the defendant agreed to examine the interests levied on the account. The plaintiff then approached the centre for interest rate for analysis and examination of the loan account.

Mr. Mbaluka contends that while the process of examination was going on, the defendant advertised the suit property for sale. The plaintiff was at all times willing to pay a sum of Kshs.2.5 million in full and final settlement of the loan account. And as a sign of good faith the plaintiff paid a sum of Kshs. 2 million and the defendant accepted the money but refused to agree to negotiations.

It is the contention of the plaintiff that the defendant charged a punitive sum of Kshs.1.7 million on the loan account making it difficult for the plaintiff to redeem the security. **Mr. Mbaluka** Advocate urged this court to look at the conduct of the plaintiff in paying a sum of Kshs.2 million. He also urged me to consider the sentimental value the property attaches to the plaintiff and his family. In essence loosing the property through a public sale would result in irreparable loss to the plaintiff. In short the plaintiff seeks an order of injunction for the interest rate to be recalculated in order to ascertain the exact amount due and owing in the loan account.

Mr. Mungai learned counsel for the defendant was of the view that the plaintiff does not deserve to benefit from the discretionary powers of this court. The plaintiff has to meet certain conditions which must be fulfilled before the court can exercise its powers in his favour. **Mr. Mungai** Advocate submitted that the plaintiff does not have a prima facie case with any chance of success at the trial because;

(1) At the time this application was filed as per the plaintiff's own documents namely the recalculation report, the plaintiff was in default to the tune of Kshs.2,015,387/=. And that is why subsequent to the filing of this application, the applicant paid a sum of Kshs. 2 million on 26th January, 2007. According to **Mr. Mungai** Advocate, such a conduct is not an expression of good faith. The plaintiff paid the said sum, because he had no option other than to pay so as to save his property from public auction.

Secondly the statement, which the plaintiff relies, has been produced by a 3rd party who is a stranger to the contract. And according to the plaintiff's own statement as at 1st October 2006, the outstanding amount was Kshs.3,828,260/35. And that there is no document written by the plaintiff showing that he had written to the defendant disputing the calculation of the interest rate. Therefore there is no evidence to show that he had a dispute with the calculation of the defendant prior to the filing of the present suit.

In short **Mr. Mungai** Advocate submitted that the plaintiff has no case, therefore fails on the first test. And that there is no evidence that the plaintiff would suffer irreparable loss. It is the position of the defendant that an injunction cannot be granted where damages would be an adequate remedy. And since the value of the property is known, the bank would be in a position to compensate the plaintiff for any eventual loss suffered and/or incurred.

In reply **Mr. Mbaluka** Advocate reiterated that the plaintiff is seeking an equitable remedy which is at the discretion of the court. And since the plaintiff has exhibited a desire to redeem the property, then the court is empowered to give him a chance to do so. **Mr. Mbaluka** further contended that the plaintiff is not delaying or trying to defeat the process of redemption. And the fact that he paid what he thinks is the correct sum due and outstanding is a factor, which the court must take into consideration.

There are certain conditions which must be fulfilled by the applicant before the court can exercise its discretionary powers in his favour. The plaintiff must demonstrate a prima facie case with any chance of success at the trial. At the time this application was filed, as per the plaintiff's own documents namely the recalculation report, shows the plaintiff was in arrears to the sum of Kshs.2,015387/=. And in my view that is why subsequent to the filing of this application, the applicant paid a sum of Kshs.2 million on 26th January, 2007. Such a conduct is not an expression of good faith on the part of the plaintiff, since the attempt is meant to attract sympathy from the court.

In a letter dated 25th January, 2006, the applicant admitted the debt and asked to be allowed to repay the loan in a period of 15 years at the prevailing interest rate and a monthly repayment of Kshs.69,732/=. The plaintiff relied on a report made by Interest Rates Advisory Centre showing the difference in recalculation of Kshs.460,993/22. According to the Interest Rates Advisory Centre, the debt as alleged by the defendant was Kshs.3,715,436/85 as at 31st August, 2006, while according to its recalculation the amount outstanding was Kshs.3,254,443/63.

Mr. Muigai Advocate submitted that there is no evidence to show that the plaintiff had a dispute with the calculation of the defendant prior to the filing of the present suit. And that the plaintiff before filing the present suit admitted indebtedness and asked for rescheduling of the loan.

Mr. Mbaluka Advocate argued that the penalty interest and default charges are outside the purview of the charge document which is the contract governing the legal relationship between the parties. He contends that the charges are exorbitant and excessive while **Mr. Muigai** Advocate contends that there is no proof that the charges are unconscionable or were outside the contractual document. On my part I think it is the default on the part of the applicant which has given rise to the levying of the charges which the plaintiff now vehemently complains about. When any loan account goes into arrears, penalty charges are normally chargeable and since the plaintiff did not service his loan account properly and continuously, then the bank is entitled to take into consideration the risk factor associated with such default. In my view it is the default on the part of the applicant which has given rise to the levying of the charges which the plaintiff vigorously objects to its validity. The issue of levying interest is usually based on the risk associated with the default by the chargor. It is therefore my decision that there is no prima facie case to enable me exercise my discretion in favour of the applicant.

On damages, I am satisfied that the plaintiff would not suffer irreparable loss due to the sale of the suit property. The suit property is usually valued at the time of lending and at the time of sale, so that the loss of the property by sale is clearly contemplated by the parties even before the security is formalized, damages is therefore an adequate remedy.

The balance of convenience tilts in favour of the bank since there is substantial evidence to show that there is a default in the terms of the loan agreement by the party seeking an equitable remedy.

In conclusion, I am of the opinion that an injunction cannot issue in the nature and circumstances of this matter. I refuse to grant an order of injunction. **I therefore dismiss the application dated 26th September, 2006 with costs to the defendant/respondent**.

Dated and delivered at Nairobi this 26th day of June, 2007.

M. A. WARSAME

JUDGE