REPUBLIC OF KENYA

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

Civil Case 79 of 2007

GIVAN OKALLO INGARI ……..…..……1ST PLAINTIFF

MILLICENT NYANYA INGARI ….....……..……2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED…….DEFENDANT

RULING

The application is the one dated 12th February, 2007. It is an application under *Order 39 Rule 2* of the Civil Procedure Rules. The main prayer of the application is;

"That pending the hearing and determination of this suit herein, an interlocutory injunction order do issue to restrain the defendant either by itself, its agents and/or servants from selling, interfering, alienating or otherwise howsoever dealing with L.R. No.79/120 BURU BURU ESTATE, PHASE V, NAIROBI.

It is alleged that on or about the 21st February, 2005, the defendant served the plaintiffs with a statutory notice of sale of the suit property by way of registered post. Thereafter, the parties entered into protracted negotiations which culminated in an agreement entered between the parties on 28th October, 2005 thereby effectively extinguishing and sterilizing the statutory notice served on 21st February, 2005. However on 26th January, 2007 the defendant served a 14 days notice of sale requiring the plaintiffs to pay the defendant a sum of Kshs.2,523,247/- said to be due and owing by the plaintiffs to the defendants as at 31st January, 2007. According to the plaintiffs the notice of sale is illegal, null and void for two reasons namely;

(1) The statutory notice of 21st February, 2005 which formed the basis for it was extinguished by the agreement entered on 28th October, 2005.

(2) Neither a fresh statutory notice of sale under section 74 Registered Land Act nor fresh notification of sale under Rule 15 of the Auctioneers Rules has been served on the plaintiffs herein.

It is also contended that the plaintiffs who initially borrowed Kshs.697,500/= have so far paid Kshs.3,011,684/25 towards servicing the mortgage loan which is about 5 times the original borrowing, yet the balance continues escalating. And that the huge balance on account has arisen from the illegal and uncontractual penalty, interest and default charges which the defendant has imposed on the plaintiff's account as a consequence whereof rather than the mortgage debt reducing with every payment, it is further alleged that the illegal and uncontractual penalty interest and default charges constitute a fetter or clog to the plaintiff's equity of redemption who find themselves unable to redeem their property despite

the good faith efforts made.

The defendant filed a replying affidavit through **Mr. Joseph Kania**, the Manager legal services of the defendant. He depones that contrary to the erroneous information given by the plaintiffs to their Advocates, the default charges applied on the plaintiff's account were properly levied in accordance with the implied terms of the charge, the prevailing customs and trade usage in mortgage, banking and financial industry as the plaintiffs were in default in the payment of the mortgage facility. The defendant denies that the said charges were uncontractual or illegal as alleged. He also states that he has been informed by **Ms Irene Otieno** that she did not admit that the default and penalty charges were illegal but on the contrary, she informed the plaintiffs that the same were payable as the plaintiffs were in default. According to **Mr. Kania**, in the circumstances and in accordance with the terms of the agreement dated 28th October, 2005 the defendant was properly exercising its statutory power of sale and there was no requirement under the agreement or in law for the issuance of a fresh statutory notice, hence the statutory notice of February 2005 was not extinguished.

The main complaint of the plaintiffs in seeking an order of injunction is that the loan account has not been legally and properly handled by the defendant. The plaintiffs contend that their loan account has been debited with illegal and penal interests which should not have been charged, making the loan to grow in a manner making it difficult for them to redeem the charged property. It is pertinent to note that in paragraph 8 of the supporting affidavit, the 1st plaintiff states;

"**That during a recent meeting with Ms Irene Otieno, an assistant account Receivership Manager, she freely admitted that the default and penalty interest charges loaded on our account were illegal and uncontractual but she informed us that she had absolutely no power to delete or alter the said entries".**

The defendant in answer to that contention in paragraph 6 of the replying affidavit states;

"**That I am informed by Ms Irene Otieno that she did not admit that the default and penalty charges were illegal but on the contrary, she informed the plaintiffs that the same were payable as the plaintiffs were in default".**

The case of the plaintiffs is that their loan account was debited with illegal and uncontractual default and penalty interest charges making the loan beyond their reach. This information was partly gathered from documentary evidence supplied by the defendant's own agents or servants. In particular the deponent of the supporting affidavit says that he was informed by **Ms Irene Otieno**, an employee of the defendant that all is not well with the events carried out on their account. The deponent also states that he had been informed by **Ms Irene Otieno** that some other borrowers were given a rebate owing to faulty entries in their accounts arising from an erratic computer software system used by the defendant.

There is no evidence to show that **Ms Irene Otieno** is not an employee of the defendant to make her controvert the allegations attributed to her. In my understanding what the plaintiffs are saying is that their loan account was imposed with illegal charges contrary to the instrument of charge and the relevant banking laws right from the inception of the account. In essence the account was rooted in illegal interest, hence the plaintiffs equity of redemption has been clogged and/or fettered by the illegal interest, penalty and other charges imposed by the defendant.

The answer of the defendant can be found in paragraph 5 of the replying affidavit of Mr. Kania who is the manager legal services. He depones;

"**that contrary to the erroneous information given to the plaintiffs by their Advocates, the default charges applied on the plaintiffs' account were properly levied in accordance with the implied terms of the charge, the prevailing customs and trade usage in the mortgage, Banking and financial industry as the plaintiffs were in default in the payment of the mortgage facility. The defendant denies that the said charges were uncontractual or illegal as alleged".**

The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs' indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry.

The question for me to determine is whether a party in breach of the express provisions of the contractual document can take refuge in other terms which are not contractual. My understanding of the plaintiffs' case is that, the defendant committed a patent and blatant breaches, which the court must investigate and determine, so that the rights and obligations of the parties are clearly known and defined. The only obstacle is that I lam not entitled at this stage to make definitive findings on fact, or law, especially where the positions taken is heavily contested. I have no intention of prejudicing the case of the parties, but it suffices to say that an express term of a contract cannot be subjugated or made subservient to an alleged implied terms or usage, which is not known to this court.

The issue of the implied terms would make this court would to surmise and read finer details of the intention of the parties in respect of the charge document. The intention of the defendant may not be the same as that of the plaintiffs. And it would be difficult if not impossible to define and deduce the implied terms of the charge document. I think that is a significant issue, which can only be determined at a full hearing.

There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided b y the contractual document and must be in accordance with the parties agreement. I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit acts of fundamental breach to the contractual document. That is what the defendant admitted in paragraph 5 of the replying affidavit. And that is what was alluded to in paragraph 7 and 8 of the supporting affidavit of the 1st plaintiffs.

The charges debited in the plaintiff's account were done without any legal basis and in my humble view made the account irredeemable. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the defendant made it difficult for the plaintiffs to perform their part of the bargain. The acts of the defendant, in my view amounts to muddling the waters that were for the benefit of all parties. This court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable.

The question is whether the defendant is entitled to debit or charge the various charges and varying rate of interest in the plaintiffs account without any legal basis. To my mind the legality of the charges debited or loaded into the plaintiffs account is a prima facie issue which must be determined by the court upon hearing of all the evidence by the parties. When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document.

In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs. And pending that determination, I think it is illegal to alienate, sell or dispose the central thread that joins the parties to this suit. The court must intervene to curb such prima acts of illegality committed by the

defendant and which does not stem from the contractual document.

The contention of the plaintiffs which is particularly admitted by the defendant is all the charges levied to the account of the plaintiffs is contrary to the express provisions of the charge document. And in my view that is why the loan has grown to astronomical figures which can be said to be beyond the redemption powers of the plaintiffs. It would be difficult to redeem a loan which is loaded with figures at the discretion of one party. The other party interested in the redemption exercise would definitely find impossible to measure to the discretionary powers or decisions of the party interested in the beneficial result. It is in the benefit of the plaintiffs for the defendant to load figures only provided by the contractual document. Equally it is not in the interest of the defendant to milk the plaintiffs dry and drain all blood from them. The court exists for the sole purpose of determining as who is entitled to what. In my view the defendant cannot be allowed to engage in acts or omissions, which are in contravention of the law. Equally the defendant cannot be allowed to breach the terms and conditions of the contractual document and at the same time use the statutory power of sale that emanates from the statute to defeat the rights of the plaintiffs.

I agree with **Mr. Kyalo** Advocate that the charge document in its entirety does not provide for default charges that was levied on the account of the applicants. The consequence of such a conduct is that it is an act outside the contractual agreement, hence there is no legal basis for doing so. The imposition of penal interest or default charges without the permission or knowledge of the applicants greatly impedes or inhibits the redemption rights of the applicants. I think it is pertinent to give a chance to the parties to contest their dispute at a full hearing, where evidence will assist the court to reach a proper verdict as to the rival positions.

To my mind the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. Prima facie the loan account would become irredeemable if charges outside the contractual agreement is loaded into the account. I am therefore satisfied that there is ample and uncontroverted evidence to show that the defendant was involved in activities that would make it difficult for the applicants to honour their obligations in the charge agreement.

On damages, I think it is in the interest of justice to preserve the suit property since the applicants have paid substantial part of the loan. It is not a cardinal principle of law that an injunction cannot issue where the defendant is able and willing to pay damages. A party with a prima facie case, on whether the statutory power of sale has arisen cannot be forced to take damages in lieu of an injunct6ion. In my view the ability to pay damages is not always a substitute for the grant of injunction. An injunction is granted because prima facie the plaintiff has disclosed a threat or an infringement on his rights, which needs protection or intervention of the court.

It is also my position that prima facie the defendant did not follow the central document which conferred obligations and liabilities on the parties. It cannot therefore be allowed to destroy the substratum of the relationship by selling the suit property because it has the power and muscle to repay any damages that may be eventually decreed. I think such a situation would be contrary to the principles of equity.

Lastly I am not in doubt but if I were, I think the balance of convenience tilts in favour of the preservation of the suit property.

In conclusion, I am satisfied that the plaintiffs have satisfied all the requirements for the grant of an injunction. I do so by allowing the application dated 12th February, 2007 with costs. I direct parties to finalize their pre-trials within the next 45 days and list down the suit for hearing on priority basis.

Dated and delivered at Nairobi this 6th day of July, 2007.

M. A. WARSAME

JUDGE