REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 21 of 2007

JAMES KABATHI MWANGI (T/a TANGERINE AUTO HARDWARE)……..PLAINTIFF

V E R S U S

KENYA COMEMRCIAL BANK LTD …….....…….DEFENDANT

R U L I N G

There has been some delay in the preparation and delivery of this ruling. The same was occasioned by my rather abrupt transfer to another division of this court. The delay is regretted.

I have before me an application by chamber summons dated 17th January, 2007 filed by the Plaintiff. It seeks, essentially under Order 39, rules 1, 2, 3 and 9 of the Civil Procedure Rules (the Rules), a temporary injunction to preserve the Plaintiff's three parcels of land charged to the Defendant pending hearing and determination of the suit. The application is made upon the grounds, *inter alia:-*

1. That no amount is legally owing to the Defendant from the Plaintiff.

2. That the Defendant's statutory power of sale has not arisen.

3. That the Plaintiff stands to suffer irreparable loss if his properties are sold by the Defendant in alleged exercise of its statutory power of sale.

4. That the Defendant has failed to furnish the Plaintiff statements of account reflecting certain deposits made by him that would have substantially reduced or paid off the outstanding amount.

5. That over the years the Defendant has levied against the Plaintiff exorbitant, oppressive, illegal, usurious, fraudulent and uncontracted interests and other charges and penalties which account for the exaggerated sum now demanded by the Defendant.

There is a supporting affidavit sworn by the Plaintiff. I have read the same. To it are annexed various documents.

The Defendant has opposed the application as set out in the replying affidavit filed on 2nd February, 2007. It is sworn by one SIMON T. N. GATHIARI; he describes himself as a credit analyst of the Defendant. The grounds of opposition emerging from the replying affidavit are, *inter alia:-*

1. That the Plaintiff has acknowledged being indebted to the Defendant through numerous repayment

proposals, and has even sought "**debt forgiveness".**

2. That the Defendant had the necessary contractual right to vary, at its sole discretion, the rate of interest charged without notice to the Plaintiff.

3. That in any event, the Plaintiff has never before raised the issue of exorbitant interest, and the claim is an afterthought.

4. That the Defendant reserved its right to set-off or combine all or any accounts of the Plaintiff as well as its right to consolidate all securities held by it for all the Plaintiff's liabilities.

5. That it is not true that the Defendant has kept the Plaintiff in the dark regarding the status of his accounts.

6. That the Plaintiff's claim for account is time-barred and cannot be entertained.

7. That the dispute that the Plaintiff has brought to court is one as to the amount now due from him and it cannot be a basis for grant of an order to bar the Defendant from exercising its statutory power of sale.

I have considered the submissions of the learned counsels appearing, including the cases cited. This being an application for temporary injunction, the Plaintiff must demonstrate that he has a *prima facie* case with a probability of success. He must also show that he stands to suffer irreparable loss unless the order sought is granted. If the court is unable to decide the application upon those two principles, it will decide the matter on a balance of convenience. These principles are now well-settled and do not require to be backed by authority.

The Plaintiff's main case, both in the plaint and the application, is that the Defendant has been charging upon his two accounts illegal interests, penalties and other charges in contravention of section 39 of the Central Bank of Kenya Act and section 44 of the Banking Act; that as a result of those illegal interests, penalties and other charges, the Defendant's demand for KShs. 3,554,096/95 is tainted; that the accounts have been analyzed by an independent financial adviser, the Interest Rates Advisory Centre (IRAC), which has found that in fact no sum is due from the Plaintiff to the Defendant; and that therefore the threatened sale of his properties in alleged exercise of its statutory power of sale will be illegal.

The Defendant's answer is that it has charged interest and levied other charges as provided for in the contract between the parties, and that in any event, the Plaintiff has acknowledged his indebtedness to the Defendant.

I have seen the documents annexed to both the supporting and replying affidavits. It is true that the Plaintiff acknowledged in writing his indebtedness to the Defendant in various letters. But all these letters were written prior to the analysis done by the IRAC in the latter part of the year 2006. It will be noted that the Plaintiff sought the advice of the IRAC in desperation after it dawned on him that his indebtedness to the Defendant seemed never to diminish but rather increased despite all his efforts to pay. The Defendant has not so far questioned the analysis by the IRAC. Should the analysis of the IRAC turn out to be true, the Plaintiff will have overpaid the Defendant by over KShs. 3 million. On the other hand, should the calculations by the Defendant turn out to be correct, it still holds the Plaintiff's securities and it can then realize them.

The Plaintiff has raised a serious issue regarding contravention by the Defendant of express statutory provisions. That issue cannot be adjudicated at this interlocutory stage upon affidavit evidence. It will require fully tested oral evidence, and that will be available only at the trial of the action.

To my mind, the dispute that the Plaintiff has brought to court is not simply one of how much he still owes to the Defendant. His case is that he has fully paid his indebtedness to the Defendant, and that the latter's calculations show a debit balance only because it has levied interests, penalties and other charges

that are in breach of express statutory provisions. His case is not merely one of accounts. The question he is posing is this: "**If I have fully paid my indebtedness to the Defendant, why should my properties be sold in alleged exercise of the Defendant's statutory power of sale?"**

After considering the material now before the court, I am satisfied that the Plaintiff has demonstrated a *prima facie* case with a probability of success. But has he also demonstrated that he stands to suffer irreparable loss unless the order sought is granted? Ordinarily, a person who offers his property as security for an advance of money will have converted the property to a commodity for sale, because the lender will have the statutory power to sell the property in the event of default. Therefore, any loss that may be suffered because of such sale should be capable of being made good by an award of appropriate damages. However, in my view, where the sale will be in exercise of a statutory power of sale that has not accrued because the lender is in breach of some express statutory provisions, or because the amount advanced and all accrued interest have been fully paid, why should the borrower's property be sold merely because he can be compensated for it by a monetary award? In those circumstances, where the loss has been occasioned by exercise of a power of sale that has not accrued, it may well amount to irreparable loss. In the present case, I am satisfied that the Plaintiff stands to suffer irreparable loss unless the temporary injunction sought is granted.

In the event, I will grant the application by chamber summons dated 17th January, 2007. The interim temporary injunction granted on 19th January, 2007 is hereby confirmed pending hearing and determination of the suit. Costs of the application shall be in the cause. There will be orders accordingly.

DATED AT NAIROBI THIS 18TH DAY OF SEPTEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 21st DAY OF SEPTEMBER, 2007