



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

Civil Case 427 of 2007

**BALOZI HOUSING CO-OPERATIVE SOCIETY.....
PLAINTIFF**

VERSUS

**COMPANY FOR HABITAT AND HOUSING IN AFRICA (SHELTER
AFRIQUE)..DEFENDANT**

RULING

I have before me an application by the plaintiff seeking one primary order of the court: An order of temporary injunction restraining the defendant from interfering with rights of possession, evicting, advertising for sale, disposing of, selling by public auction or otherwise leasing, letting or otherwise interfering with ownership of Title to and or interest in 75 titles listed in the Chamber Summons (hereinafter “**the suit premises**”) pending the hearing and determination of this suit.

There is also a prayer for accounts as between the plaintiff and the defendant.

The application is expressed to be brought under Order XXXIX Rules 1, 2, 3 and 9, Order XIX of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, Sections 52 and 59 of I.T.P.A. and all other enabling provisions of the Law. Some 19 grounds are set out on the face of the application. The main ones are as follows:-

1. That it was a term of the loan agreement at Clause 8.1. that the interest rate to be charged had been agreed at 5% over and above the prevailing Treasury bill rate. However, in breach of the condition of the agreement and in disregard of the interpretation agreed between the parties, the defendant has charged and continues to charge interest rates contrary to the agreement and the amount being demanded is not contractual.
2. That it was a further term of the loan agreement at Clause 8.2 that if any amount payable is not paid when due, penalty shall accrue thereon at a rate equal for each day in the period to 2.5% p.a. of the outstanding amount payable quarterly. However, in breach of the said condition and in disregard of the interpretation agreed between the parties, the defendant has charged and continues to charge penalty of 2.5% per quarter instead of per annum. The total over charge as at 30.6.2007 was KShs.9.2 million and the defendant continues to mount more illegal charges.
3. That the purported statutory notice dated 26.11.2004 is invalid null and void abinitio and cannot operate as a mandatory statutory notice.

4. That the defendant's action of demanding a disputed sum of KShs.34 million and threatening to advertise the plaintiff's properties is highly oppressive, fraudulent, malicious and made in bad faith as the defendant is currently holding 33 titles belonging to the plaintiff. This is against their purported and disputed claim for KShs.34 million yet the titles held are worth over KShs.126 million being the value of the plot and house developments thereon.

5. That the defendant has unlawfully used the threat of sale of the suit properties to demand sums not due or owing thereby fettering and or clogging its Equity of Redemption.

6. That the defendant is likely to advertise the plaintiff's properties for sale thus causing grave and substantial loss and damage to the plaintiff, its members and the plaintiff will lose any potential financiers and further stands to lose its assets and will suffer irreparable loss and damage unless orders to restrain the defendant are made.

There is an affidavit sworn by one Menelik Kwamla Makonnen the plaintiff's chairman in support of the application.

The application is opposed and there is a replying affidavit sworn by one Ositadinma Okinkwo the defendant's Director of Operations. In the affidavit it is deponed inter alia that at the request of the plaintiff the defendant advanced to the plaintiff KShs.125 million under a Loan Agreement dated 6.7.2001. The principal was due 24 months from that date and was to be repaid in semi annual installments on 6.7.2003 and 6.1.2004. It is also deponed that the interest was due from the date of disbursement and was to be paid in semi annual installments at the rate of 18.5% p.a. in the first interest repayment period and thereafter could be varied at the defendant's discretion quarterly by a margin of 5% p.a. over the most recent 91 day Treasury Bill rate issued and published by the Central Bank of Kenya. The plaintiff was to be notified of any such variations. It is further deponed that the plaintiff failed to complete its project and service the said loan on due dates leading to a demand for payment of KShs.79,082,118.85 on 15.9.2004. That demand prompted the plaintiff to request for time to raise the said sum and despite indulgence extended to the plaintiff, the plaintiff failed to honour its obligations and the defendant served a statutory notice of sale. It is further deponed that, in response to the statutory notice of sale the plaintiff made proposal's for the repayment of the loan which proposals were unacceptable to the defendant and instructions were given for the sale of the suit properties. It is also deponed that at some stage the plaintiff enlisted the assistance of the Ministry of Housing which culminated in a tri-partite meeting that resulted in an agreement with respect to the payment of sums then due of KShs.58,612,138.39 as at June, 2006. The agreement was disregarded by the plaintiff according to the defendant. It is further deponed that the plaintiff made subsequent proposals that it failed to meet. In the said affidavit the defendant contended that the statutory notice served was valid and legal. In the premises, the defendant is of the view that no case had been made out for the grant of the orders sought.

Counsel for the parties agreed to and did file written submissions in support of the positions taken by their clients in their affidavits.

I have considered the application, the affidavits filed both for and in opposition to the application, the written and oral submissions made and the authorities relied upon. Having done so, I take the following view of the matter. I bear in mind that at this interlocutory stage the court does not and indeed is enjoined not to determine with conclusiveness the rights and obligations of the parties. At this stage, the applicant should show that it has a prima facie case with a probability of success at the trial. It must also show that it would suffer an irreparable injury which would not be adequately compensated by way of damages and where the court is in doubt the application is to be considered on a balance of convenience. Those principles were set out in the precedent setting case of **Giella – vs – Cassman Brown & Co. Ltd, [1973] E.A. 358**. I will consider the plaintiff's application on the basis of those principles.

The gist of the plaintiff's application revolves around the interest charged by the defendant. The plaintiff contends that under Clause 8.1 of the Loan Agreement the interest to be charged had been agreed at 5% over and above the prevailing Treasury bill rate. The defendant had however, according to the plaintiff applied an interest rate which was in breach of the said clause and continues to do so resulting in

payment by the plaintiff of sums in excess of the contractual amount and lawful interest.

In addition to the overcharge alleged it is the plaintiff's further contention that the defendant also incorrectly applied the penalty interest rate provided in Clause 8.2 of the said Loan Agreement. In its view, the penalty should accrue at a rate equal for each day in the period to 2.5% p.a. of the outstanding amount payable quarterly. According to the plaintiff, the defendant charged and continued to charge a penalty of 2.5% per quarter instead of per annum. The result of the overcharge as at 30.6.2007 was to load the plaintiff's loan account with a sum of KShs.9.2 million which was illegal.

I have carefully perused the Loan agreement and specifically Clause 8 on basic interest rate and penalty on late payments. The interpretation given to Clause 8.1 by the plaintiff does not appear to be supported by the plain language of the sub clause. It seems to me clear that the agreed basic rate of interest was 18.5% p.a. in the first interest repayment period.

That rate was however revisable or could be varied at the defendant's discretion "**quarterly by a margin of 5% p.a. over the most recent 91 day Treasury Bill rate issued and published by the Central Bank of Kenya on behalf of the Government of Kenya at the time of resetting.**" The defendant therefore had the discretion to vary the rate of interest pegged upon the most recent 91 day Treasury Bill.

There is, in my view, no dispute that the defendant did vary the interest rate. The variation was however not upwards of 18.5% p.a. However, was the defendant bound to vary the rate by a margin of 5% p.a. over the most recent 91 day Treasury Bill rate? If the defendant were to vary in accordance with that sub-clause, the rate applied would have been much lower than the rate actually applied by the defendant.

The plaintiff's interpretation of sub clause 8.2 of the Loan Agreement is that the charge of 2.5% was to be applied annually but the defendant instead charged the penalty rate quarterly. The plaintiff's interpretation of the sub clause is not altogether unreasonable. It would appear prima facie that the defendant applied an incorrect rate of interest on delayed payments.

The sums purportedly wrongly charged are not small. The plaintiff contends that it has paid a total of over 171 million against the loan of KShs.125 million granted. In the premises, I find and hold that the plaintiff is not merely complaining about the sum due. This is not therefore a dispute over the amount payable. The plaintiff is alleging breach of the Loan Agreement by the defendant. It has paid a substantial sum of the sum allegedly owed. In my view, it has shown a prima facie case with a probability of success at the trial.

I am also satisfied that damages will not be an adequate remedy. The suit properties have been allocated to the plaintiff's members who are not parties to these proceedings and who will be rendered homeless if the injunction is declined.

On balance of convenience, the same in my view tilts in favour of granting the injunction. The securities held by the defendant are worth over KShs.126 million. That value is far in excess of the sum claimed by the defendant of about KShs.35 million. There is therefore no question of the value of the securities deteriorating.

Before concluding this matter, I must add in passing that the plaintiff made several other allegations in its supporting affidavit which allegations were in equal measure denied by the defendant. All those allegations need not be adjudicated upon at this stage upon the affidavits. They will have to await the trial of the action.

The upshot of my consideration of the plaintiff's application is that the same is allowed in terms of prayer 3 thereof. This will be upon the condition that the plaintiff files by 4.30 p.m. on 20th November, 2007 an appropriate undertaking as to damages. Such undertaking to be under the plaintiff's seal.

This injunction is granted on the further condition that the plaintiff pays to the defendant KSh.400,000.00 at the end of each month w.e.f the 30th of November, 2007 pending the hearing of this suit. In default of compliance with any of the two conditions, this injunction will stand discharged.

Each party has liberty to apply.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Munyalo for the plaintiff and Thiga for the defendant.

F. AZANGALALA

JUDGE

15/11/07