



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Case 279 of 2005**

**SAMMY THUO KANGEA.....1<sup>ST</sup> PLAINTIFF**

**NANCY NYAMBURA KANGEA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. OF KENYA LTD.....DEFENDANT**

**RULING**

This is an application made by the plaintiffs under **Order XXXIX rules 1, 2, 3 & 9** of the **Civil Procedure Rules** seeking the orders of this court to restrain the defendant by itself its agents or servants from selling whether by public auction or by private treaty alienating, advertising for sale or in any manner whatsoever interfering with the plaintiffs' ownership, rights, possession and or enjoyment of their parcel number *Nakuru Municipality/Block 15/513*. The grounds in support of the application are stated on the face of the application. The said grounds are basically three. The plaintiffs complain that they had not been issued with the requisite statutory notice before the defendant advertised the said property for sale. The plaintiffs complained that the defendant did not abide by the terms of the said charge instrument in that the plaintiffs were paid an amount lesser than what was agreed. They are further aggrieved that the defendant had unilaterally varied the terms of the charge agreement by increasing the rate of interest and levying uncontracted charges on the mortgage account held by the plaintiffs. They were finally aggrieved that because of the illegal charges the loan amount had been inflated by the defendant to the extent that the plaintiffs have been frustrated in exercising their equity of redemption. The application is supported by the annexed affidavit of Sammy Thuo Kangea the 1<sup>st</sup> plaintiff.

The application is opposed. Joseph Kania, the legal services manager for the defendant has sworn a lengthy affidavit in opposition to the said application. He has deponed that the plaintiffs were issued with the requisite statutory notice. He further deponed that the interest rate charged on the plaintiffs' account was varied in accordance with the charge instrument. He swore that the plaintiffs had defaulted in repaying the said loan and at the 31<sup>st</sup> of October 2005 the amount outstanding in respect of the said loan advanced was Kshs 5,009,298/80. He deponed that the plaintiffs had failed to make material disclosure to the court and were therefore not deserving of the orders of injunction sought. He deponed that this court should dismiss the plaintiffs application with costs.

At the hearing of the application, Mr. Karanja learned counsel for the plaintiffs submitted that the defendant had advanced the plaintiffs a sum lesser than was agreed in the charge instrument. He submitted that the charge instrument did not provide for a date when the said loan was to be repaid. He submitted that the defendant was therefore required to issue two notices to the plaintiffs as provided by **Sections 65(2) and 74** of the **Registered Land Act**. He argued that the defendant had therefore

prematurely attempted to sell the plaintiffs property. He further submitted that the defendant had unlawfully varied the rates of interest contrary to the charge instrument. He argued that no notice or variation of interest was registered as required by **Section 71** of the **Registered Land Act**. He submitted that the charges which were imposed by the defendant on the plaintiffs' loan account was illegal and was meant to fetter the plaintiffs' equity of redemption. He submitted that the plaintiffs had continued to pay the monthly repayments due in respect of the said loan account and had only been frustrated by the plaintiffs' decision to vary interest rates to their detriment. He submitted that the plaintiffs had established a prima facie case to enable this court grant them the orders of injunction sought. Mr. Karanja referred this court to several decided cases in support of the plaintiffs' application. He urged this court to allow the application with costs.

Mr. Issa, learned counsel for the defendant opposed the application. He submitted that the grounds argued by the plaintiffs in this application were not supported by the averments in the plaint filed by the plaintiffs. He submitted that the plaintiffs did not plead in their plaint that they were not served with the requisite statutory notice. He argued that the plaintiffs had not denied that they owed the defendant a sum of over Kshs 5 million. He submitted that the plaintiffs had been served with the statutory notice as provided for by **Section 74** of **The Registered Land Act**. He took issue with the plaintiffs' contention that the said notice issued was not in accordance with the law. He submitted that the interest rate which was charged on the plaintiffs' mortgage account was in accordance with the charge instrument and particularly clause 6 of the said charge instrument which allowed for the variation of interest provided the plaintiffs were notified. He submitted that each time the interest rate was varied, the plaintiffs were notified. He argued that there was no legal requirement that the said variation notice be registered as submitted by the plaintiffs. He further submitted that the issue of penalties and other charges was expressly provided by the charge instrument and in any event, the said charges were customary and were an accepted practice in the banking industry. He argued that this court should disallow the application because the plaintiffs had not disclosed material facts to this court. He submitted that where a litigant is not candid, the court should not grant such a litigant the orders sought. He urged this court to dismiss the plaintiffs application with costs.

I have considered the rival arguments which were made by the parties to this application. I have also considered the decided cases that were referred to me by learned counsel for the plaintiffs and learned counsel for the defendants. I have also read the pleadings that were filed by the parties in support of their respective case in this application. The issue for determination by this court is whether the plaintiffs have established a case so as to entitle this court to grant them the orders of injunction sought. The principles to be considered by this court in deciding whether or not to grant the orders of injunction sought are well settled. The Court of Appeal in **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society [2001]1E.A. 86** held at page 89 that,

***“the sequence of granting interlocutory injunction is firstly that an applicant must show a prima facie case with a probability of success if this discretionary remedy will inure in his favour. Secondly that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella –vs- Cassman Brown and Co. Ltd 1973 E.A. 358 at page 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”***

In this case, the plaintiffs have argued that the defendant had attempted to sell the suit property without issuing the requisite notices as provided by the law. The plaintiffs submitted that the defendant ought to have issued notices under **Sections 65 (2)** and **74** of the **Registered Land Act**. They submitted that the defendants were first required to issue a one month's notice as provided by **Section 65(2)** of **The Registered Land Act** before issuing another three month's notice as provided for under **Section 74** of the **Registered Land Act**. The defendant replied to the submission made by the plaintiffs by stating that the requisite statutory notice was issued on the 13<sup>th</sup> of September 2004. The defendant annexed the said statutory notice as annexure “JK1” in the replying affidavit sworn by Joseph Kania. I have perused the said notice and note that it was sent to the plaintiffs by registered post as provided by the law. In the said notice, the plaintiffs were put on notice that the defendant would exercise its statutory power of sale to

realize the security charged should the plaintiffs fail to settle the loan amount that was then outstanding. The plaintiffs have not denied that they received the said statutory notice.

Having evaluated the arguments which were made before me on the issue of statutory notice, I do hold that there is no merit in the plaintiffs contention that the defendant had failed to issue the statutory notice as required by the law. There is no legal requirement that the defendant should have issued two notices to the plaintiffs under **Section 74** of the **Registered Land Act**. The only legal requirement is that the defendant should have issued the plaintiffs with a three months statutory notice before exercising its statutory power of sale. Furthermore even after the expiry of the three months notice, the auctioneer who would be instructed by the defendant to sell the suit property by public auction is required to comply with the provisions of **The Auctioneers Act** as to notice. The defendant cannot in law sell the said charged property by private treaty without seeking the leave of the court. I therefore find no merit in the submission by the plaintiffs that they were not served with a statutory notice.

The plaintiffs have argued that they were advanced a lesser sum than what was agreed in the charge document. They submitted that the defendant breached the terms of the charge document by failing to pay them the balance of the sum which was agreed in the charge instrument. The defendant argues that the plaintiffs were paid the entire sum as was stated in the charge instrument. I have considered the arguments made on this point. I find it interesting that the plaintiffs have sought to raise the issue that they were advanced a sum lesser than what was stated in the charge instrument ten years after the event.

In my opinion, the said issue of the sum advanced has been raised as a red herring by the plaintiffs to divert this court's attention from the actual fact that they have failed to service the loan which was advanced to them by the defendant. Although the plaintiffs state that they have been paying the monthly instalments due as provided for by the charge instrument, the statement of accounts which was prepared by the Interest Rates Advisory centre (IRAC) on instructions of the plaintiffs and marked annexure "STK IX" shows that the plaintiffs have erratically repaid the said loan advanced to them to the extent that they are now hopelessly in arrears. The plaintiffs have conceded that they have not repaid the mortgage instalments as they had agreed to in the charge instrument. They are therefore not disputing that they have defaulted in repaying the loan that was advanced to them by the defendant.

Further, their argument that their loan account was debited with illegal charges and penalties is not correct because the said penalties were provided for in the charge instrument. The plaintiffs were aware that if they fell in arrears in repaying the said loan due they would be penalized by their account being debited with the penalty charges. In any event, the High Court has in the cases of Maithya –vs- Housing Finance Co. of Kenya & Anor [2003] 1EA 133, Orion East Africa Ltd –vs- Housing Finance Co. of Kenya Ltd Nairobi HCCC No. 914 of 2001 (Milimani) (unreported) and Francis Ichatha –vs- Housing Finance Co. of Kenya Ltd Nairobi High Court Civil Case No. 414 of 2004 (Milimani) (unreported) held that the fact that the penalty interest and default charges were charged by the bank would not be sufficient ground to injunct a chargee from exercising its statutory power of sale as damages would be an appropriate remedy to compensate an aggrieved chargor if he proves that there was such illegal charging of the penalty interest and default charges.

As was held by the Court of Appeal in the recent case of Joseph Okoth Waudi –vs- National Bank of Kenya C.A. Civil Appeal No. 77 of 2004, (Mombasa) (unreported), where the appellant raised similar arguments as the plaintiffs in this case that he was levied punitive and outrageous interest rates which according to the appellant was unconscionable, the Court of Appeal noted at page 4 of its judgment,

*“It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on terms of the mortgage, the claim is excessive. See Halsbury’s Laws of England Vol. 32, 4<sup>th</sup> Edition page 725 and Lavuna & Others –vs- Civil Servants Housing Co. Ltd & Anor Civil Appeal Nairobi No. 14 of 1995 (unreported), Middle East Bank (K) Ltd –vs- Milligan Properties Ltd Civil Appeal No. 194 of 1998 (unreported).”*

In another recent Court of Appeal decision **Ng'ayo Traders Ltd vs**

**Savings & Loan (K) Ltd Civil Application No.NAI.165 of 2005 (U R.99/2005)**, It was held at page 6 that;

*“ Moreover, where there is a dispute as to the amount due under the charge, like in this case, the courts do not normally grant an injunction restraining a mortgagee from exercise his statutory (power) of sale solely on the ground that there is such a dispute (Shah vs Devji [1965] E.A 91). The justification is that, in a case like this one, the chargors statutory remedy for irregular exercise of power of sale is damages only against the chargee (See section 77 (3) of RLA). The rest of the grounds upon which the suit and application in the superior court are based allege breach of statutory procedures precedent to a lawful exercise of power of sale by the chargee. The procedural irregularity can however be cured by canceling the disputed sale by public auction and by exercising the power of sale afresh after complying with the statutory requirements. There is no law prohibiting the chargee from following that cause.”*

In the present case, the complaints raised by the appellants are similar to the complaints which were made by the appellant in the **Joseph Waudi Case** and **the Ng'ayo Traders Ltd Case** (*supra*). The said complaints raised are not prima facie issues which would entitle this court to grant the orders of injunction sought. The complaints raised do not establish that the plaintiffs have a prima facie case with the likelihood of success. If the plaintiffs establish that they were overcharged by the defendant they would be adequately compensated by an award of damages.

I therefore find no merit in the application for injunction filed by the plaintiffs. The plaintiffs application dated the 11<sup>th</sup> of November 2005 is therefore dismissed with costs. The sum of Kshs. 60,000/= deposited in court by the plaintiffs shall remain so deposited as security for costs pending the hearing and determination of the main suit.

**DATED at NAKURU this 31<sup>st</sup> day of March, 2006.**

**L. KIMARU**

**JUDGE**