REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 336 of 2003

ISHMAEL KAGUNYI THANDE…….....……..PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD….....…….DEFENDANT

R U L I N G

This is an application by the plaintiff, who seeks a "**temporary injunction**" to restrain the defendant from advertising for sale, disposing or selling his property L.R. No. DAGORETI/RIRUTA/S.437, NAIROBI. The plaintiff also wishes to have the said temporary injunction restrain the defendant from completing any transfer or conveyance of any sale; the leasing, letting or other interference with his said property, which will henceforth be cited as the "**suit property**."

When canvassing the application, Mr. Simiyu, advocate for the plaintiff, notified the court that he would not pursue prayer (4), as the doctrine of Lis Pendens does not apply to the Registered Land Act. Accordingly, the application is only limited to prayer(3), whose particulars have been set out above.

Basically, the plaintiff points out that on 7.12.92 the defendant gave him a loan of Kshs. 1,500,000/=. The said loan was repayable over ten years, by way of monthly instalments of Kshs. 26,069/=. The rate of interest is said to have been set at 20%.

As security for that loan, the plaintiff executed a charge over the suit property.

Later, in 1994, the plaintiff sought the enhancement of the financial facility, by Kshs. 1,350,000/=. The defendant accepted the plaintiff's request, thus bringing the total loan amount to Kshs. 2,850,000/=. The plaintiff says that the repayment period remained ten years.

It was the plaintiff's contention that he would have paid off the laon amount together with all lawfully charged interest, by paying a total of Kshs. 3,478,602/10.

By his calculations, the plaintiff had paid Kshs. 4,924,209/85. Therefore, he believes that he had literally overpaid the loan. Yet, the defendant was still demanding a lot more money from him. He believes that the defendant's demands are illegitimate, as they are founded on such debits as "**default interest**"; "**interest on arrears**"; "**penalty interest**", or "**default charges**"; all of which the defendant had levied. As far as the plaintiff is concerned, all such charges were illegal, as they had not been provided for in the charge document.

The plaintiff submitted that clause 9 of the charge document only empowered the defendant to exercise its

statutory power of sale, in the event that the plaintiff defaulted in the payment of monthly instalments. It is said that that clause did not enable the defendant to debit any of the categories of interest cited above. Therefore, by charging such interest, the defendant is faulted for unilaterally and arbitrarily re-writing the mortgage contract, thus imposing a higher financial obligation on the plaintiff.

The plaintiff refuses to buy the defendant's contention that the various categories of interest were charged by the defendant on account of trade usage in the banking industry. It is the plaintiff's case that the terms of the contract were express, and that they provided for what happens on default. The said terms were complete and exhaustive, so that they need not be supplemented by trade usage and custom.

As the said trade usage and customs were being unilaterally used by one party, to the detriment of the other party, the plaintiff submits that the express terms of the contract override the implied terms.

Another issue raised by the plaintiff is that the defendant levied interest at rates which were well in excess of the ceiling imposed by statute. By Gazette Notice No. 1617 of 1990, the Governor of the Central Bank of Kenya put a ceiling on the interest which any financial institution could levy on loans for more than three years. The ceiling is said to have been 19% per annum, calculated on a reducing balance.

Notwithstanding that ceiling, the plaintiff says that the defendant was charging interest at rates which were as high as 29%. Therefore, the plaintiff submits that the interest sums over and above 19% were illegal and un-enforceable.

But in any event, even if the bank could charge interest at rates over 19% p.a, the plaintiff says that that could only be done if the defendant had given a 30 days' notice, prior to any changes in the rates then applicable. In this case, the defendant was said to have been giving very much shorter notices. Therefore, any changes to the interest rates were not binding, for the defendant had acted outside the terms of the contract.

Another issue that was taken up by the plaintiff was that the defendant failed to give him an eight months moratorium on interest, despite it being a term of the contract. He complained that he was supposed to have had the moratorium so as to enable him finish the construction of the project, but the defendant's records show that no such moratorium was given.

When responding to the application, the defendant first drew attention to the terms of the charge document.

I note from clause 5 (i) of the charge that interest was to be charged from the date when the loan was advanced. The said clause provides as follows:

"**5. It is hereby agreed that interest payable by the Chargor to the Chargee hereunder shall be calculated as follows:-**

(i) Until and including the final advance the interest shall be calculated on the whole of the money advanced to or becoming owing by the Chargor before the final advance date as from the day on which it was advanced or became owing."

Clearly, the charge document, pursuant to which the defendant was seeking to exercise its statutory power of sale, stipulates that the interest would be payable from the day on which the loan is advanced. That position is at variance with the plaintiff's position, in which he talks of an 8 months moratorium.

The plaintiff had told the court that the provision for the moratorium was to be found at clause 7 of the defendant's "**Loan Conditions."**

When I perused the said Loan Conditions, I found that it stipulated as follows:

"**7 INTEREST ON ADVANCE BY INSTALMENTS**

You will be required to pay interest only on advances from the day they are advanced until the house is completed or eight months from the date of the first advance whichever is earlier. A statement will be issued showing the amount payable on the first month following the advance, showing the interest calculations and requiring you to pay interest monthly in advance. Subsequently you will be required to pay monthly instalments of principal and interest as shown on the offer."

To my mind, nothing could be clearer. That clause does not say that the borrower would have 8 months moratorium on interest. It says that the borrower would pay **interest only on advances from the day they are advanced** – or **eight months from the date of first advance whichever is earlier.**

The provision makes it clear that the borrower would be given a statement "**showing the amount payable on the first month following the advance, showing the interest calculations and requiring you to pay interest monthly in advance."**

To my mind, when the defendant provided a statement showing the interest payable in the first month after the advance, it was only complying with the above terms. Had the defendant failed to provide the statement, it would have been in breach of the Loan Conditions.

Clause 16 of the Loan Conditions further buttresses that position, for it says that interest would be charged "**from the day the advance is released……."**

I therefore do not think that the plaintiff can complain about the defendant's failure to give him an 8 months moratorium.

As regards the Gazette Notice No. 1617 of 1990, it is clear that the Governor to the Central Bank of Kenya did place a ceiling on the rates of interest. In the case of loans or advances for a term exceeding three (3) years, the maximum rate of interest was 19% per annum calculated on a reducing balance method, with monthly rests.

On the other hand, the parties herein provided, at paragraph 6 (i) of the Charge document that until the chargee gave notice of variation of interest, the same would be charged at the rate shown in the schedule. And, in the schedule the rate of interest is said to be 21% p.a., although it is indicated as being variable.

It appears that the contractual provision on interest rates is at variance with the gazette notice. But, several questions then arise, as follows:

(i) Was the gazette notice still in force as at 11th March 1993, when the Charge was executed?

(ii) If the said gazette notice was still in force, did it apply to the defendant? That notice was stated to be applicable to "***specified banks and specified financial institutions***." Was the defendant one of those specified institutions or banks?

The plaintiff says that the gazette notice was in force as at 1993, but the defendant says it was not. In the circumstances, I must leave that issue to be determined by the trial court, after the parties will have led further evidence on the point. Also, the parties would have to show that the defendant was or was not one of the specified banks or institutions. Until evidence is led in that regard, I cannot pre-empt the issue.

One issue that causes me tremendous concern is of interest rates. The plaintiff has complained about the inadequacy of the notices given by the defendant before it increased the interest rates. One example was also given of an inadequate notice before the defendant decreased the rate of interest from 29% to 25%.

In response to those complaints, especially the one which was given prior to the reduction in the interest rates, the defendant submitted that the same was not binding on the parties. Although the defendant did not concede, expressly, that all notices which did not give at least 30 days notice, were not binding, I do hold that that is so. In effect, the said notices which were not in conformity with the terms of the contract

between the parties were voidable at the instance of the plaintiff. Their validity having now been challenged , the said notices, in all probability, would not be binding on the parties.

That being the case, there will arise a serious issue for recalculation, in order that the parties herein can determine the correct accounts. However, that would be no more than an issue of mathematical calculation, regardless of how monumental the exercise may turn out to be.

In **FRANCIS J. K. ICHATHA V. HOUSING FINANCE COMPANY of KENYA LTD, CIVIL APPLICATION NO. 108/05,** the Court of Appeal dealt with an application for injunction pending an intended appeal. The court noted as follows, at page 4 of their ruling:

"**Nevertheless, we are satisfied that the intended appeal raises arguable questions of law particularly on the legality of "*Penalty Interest/Interest on arrears*", imposed and on the variation of the interest rates.**

However, the applicant's case in the superior court was not that he was not in arrears of the loan or indebted to the respondent at the time the statutory notice was issued. Rather, his case was, if we have correctly understood it, that the levying of penalty interest/interest on arrears and the application of high interest rates of upto 26% p.a. erroneously inflated his indebtedness thereby frustrating his efforts to redeem his property.

The dispute is essentially on the quantum of the arrears and the loan at the time the statutory notice was issued. The applicant recognised that the dispute was of "*Mathematical nature.*." Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale."

For those reasons, the Court of Appeal declined to grant an injunction pending appeal.

The facts of that case largely mirror those in the matter before me. But, it causes me to ask myself whether a bank could be allowed to sell-off a security even if it appeared to have loaded the borrower's account with questionable debits.

In **JOSEPH MURIITHI GICHOBI V. KENYA COMMERCIAL BANK LTD & ANOTHER, HCC NO. 25 of 1999 Mbaluto J. quoted the following passage from HALSBURY's LAWS OF ENGLAND, 4th Edition, Vol. 32, paragraph 725:**

"**The mortgagee will not be restrained from exercising his 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. He will be restrained, however, if the mortgagor pays the amount in court, that is the amount which the mortgagee claims is due to him, unless on the terms of the mortgage, the claim is excessive."**

The Hon. Mbaluto J. that went on to say:

"**The reverse of the principles stated above must, of course, be also true. If the claim by the mortgagee is excessive and has no legal foundation, it follows that the mortgagee can be injuncted."**

I would agree with that point of view, to the extent that before a court grants an injunction on the grounds that the mortgagee's claims are excessive, the court must have satisfied itself, from the evidence, about that fact. For instance, if the court finds that the interest charged was in excess of that which was governed by the contract, it would follow that the mortgagor was in breach of the contract. In those circumstances, it would be wrong to allow the mortgagor to benefit from its own breach, by proceeding to realise the security.

Nonetheless, it must be re-emphasised that ordinarily, the courts should not grant an injunction to restrain the mortgagee from realising the security, on the grounds of a dispute over the quantum of the amount

said to be due.

In this matter, there are several letters written by the plaintiff, from as early as 15th December 1995, acknowledging the fact that he was in arrears. He also severally put forward proposals for paying off the arrears, as well as for repaying the loan balances.

One such letter was written on 2nd March 1999, and it reads as follows:

"**ISMAEL K. THANDE**

P. O. Box 63634

NAIROBI

March 2nd 1999.

THE MANAGER

H.F.C.K.

REHANI HOUSE

NAIROBI

Dear Sir/Madam

RE: MORTGAGE A/C 104238

The above mortage is in arrears and having paid a total of Kshs. 1.6 million in 1998 and having failed to pay over the last couple of months due to some unforeseen circumstances, the arrears now stand at KShs. 850,000.00. It is with a lot of difficulty that I have opted to sell the property by private treaty even at a loss to close the Debt.

If it is acceptable to the Bank I have an offer to sell for Kshs. 3.6 million which could be a full and final settlement for the above Account. I have looked for a buyer for the last two months and this is the only offer so far.

Sincerely Yours

(signed)

ISMAEL K. THANDE

I have set out that letter in full, as it appears to me to be at the very core of the plaintiff's claim. It explains why the plaintiff's plaint prays, inter alia, for "**Damages for loss of bargain in respect of the Sale Agreement plus interest at 29% per annum**."

That claim is based on the plaintiff's contention that the defendant frustrated the plaintiff's efforts to sell the charged property by private treaty.

In my considered view, as the plaintiff himself had had the intention of selling off the suit property, in

1999, "**even at a loss**", there can be no basis for claiming that if the property was disposed of, by the defendant, that act would cause the plaintiff to suffer irreparable loss. The plaintiff himself wanted to sell it off; so why should the defendant be restrained from doing so?

The defendant says that the plaintiff has not been remitting any payments towards the payment of the loan. Thus, the debt continues to grow. In the circumstances, whether the plaintiff was right or wrong, I cannot fathom how an injunction to restrain the defendant would be beneficial to the plaintiff. If anything, I think that it would be in the best interests of both parties to sell off the property, soonest.

Thereafter, if the plaintiff proved his case, the defendant would have to compensate him. And, the plaintiff has not suggested that the defendant may be incapable of compensating him.

On the other hand, if the defendant were to be restrained, the debt would continue increasing, as the plaintiff was not servicing the loan. As at 31st May 2005, the loan balance stood at Kshs. 23,861,076/40. In effect, a sale of the suit property would not realise sufficient funds to clear the loan amount, assuming that the price for which the plaintiff had been willing to sell the property is a fair indicator as to the price it may fetch.

In conclusion, I am of the view that the plaintiff has not established a prima facie case with a probability of success. I say so because he is seeking general damages for the loss of bargain, following what he terms as the defendant frustrating his effort to dispose of the suit property. If he were so compensated, he would not suffer irreparable loss.

But, the plaintiff did not address the court on the twin issues as to the contemplated loss of bargain, and the prayer for a declaration that the interest charged at 29% from 20.12.99 was in breach of the contract between him and the defendant. The submissions before me dwelt on other issues, and thus could not give rise to a prima facie case with a probability of success.

Accordingly, I find no merit in the application dated 16th July 2005. It is therefore dismissed, with costs to the defendant.

Dated and Delivered at Nairobi this30th day of March 2006.

FRED A. OCHIENG

JUDGE