REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 612 of 2005

SARABJIT SINGH SEHMI & ANOTHER……..…….....……. PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED……DEFENDANT

RULING

The application dated 19.10.2005 seeks one primary order and that is an interlocutory injunction to restrain the defendant from advertising for sale, offering for sale, selling by public auction or private treaty or in any other manner disposing of or alienating the property known as Nairobi/Block 90/245 hereinafter called the "**suit property".** The brief facts leading to the application are as follows:

The plaintiffs borrowed money from the defendant and secured the repayment thereof by charging the suit property to the defendant. The plaintiffs defaulted and the defendant sought to exercise its statutory power of sale. Hence this application.

From the affidavit evidence and the submissions addressed to me the plaintiffs make three primary complaints. The first one is that the defendant's statutory power of sale had not crystallized as they had not been served with the mandatory statutory notice of sale in terms of the provisions of Section 74(1) of the Registered Land Act. The second major complaint is that the defendant has continued to charge interest and other charges on the plaintiff's mortgage account that are too high uncontractual, unconscionable and against public policy. The third main complaint is that contrary to express provisions of the law the defendant is not acting in good faith nor does it have the interest of the plaintiffs in purporting to exercise its statutory power of sale.

The plaintiffs' counsel contended that their statutory notices of sale (which are annexed to the defendant's affidavit as "JK-1" were not received by the plaintiffs. In counsel's view the names used in the purported evidence of postage are not the plaintiffs'.

On behalf of the defendant it was contended that the defendant had discharged its onus by exhibiting two copies of statutory notices addressed to the plaintiffs and further had shown the mode of service. It was also contended on behalf of the defendant that as further evidence of service of the statutory notices of sale the plaintiffs had variously visited the defendant for discussions on repayment schedules after receipt of the notices.

I have perused the exhibited notices. The notices are in my view valid notices. They required the plaintiffs to pay the mortgage debt within 3 months of the date of service thereof. I have also perused the mode of service of the said notices. The plaintiffs do not deny the address used on the postage. The

notice dated 21.02.2003 was posted to Mr. and Mrs. Serjit. The ones of 30.6.2004 were addressed to Sarabjit S. Sehmi andArvinder K. Sehmi. In the supplementary affidavit sworn by the 1st plaintiff on 14.11.2005 receipt of the said notices is denied. There is no allegation that a wrong address was used. No challenge is made against the names used in the Certificates of posting. The defendant did not use all the plaintiffs names in addressing the notices but on my part I am satisfied that the defendant complied with the requirements of Section 74(1) of the Registered Land Act. It is illustrative that before the expiry of the notice of 21.2.2003 the 1st plaintiff wrote the letter dated 15.4.2003 and before the notice dated 3.6.2004 expired the Notional Rent Agreement was executed.

Having found on a prima facie basis that valid statutory notices of sale were served under S.74 of the Registered Land Act the decisions in **Ochieng and Another –vs- Ochieng and others (1995 – 98)2 EA 260** and **Trust Bank Ltd –vs- Eros Chemists Ltd [2000[2 EA 550** do not assist the plaintiffs' case. In the former case the Court of Appeal found that the bank had failed to prove posting of the notices of sale and in the latter case the Court of Appeal found that a valid statutory notice had not been served.

I turn now to the complaint regarding interest and other charges levied by the defendant on the Plaintiffs' mortgage account. The complaint is that the same are manifestly too high uncontractual, unconscionable and against public policy. The plaintiffs contend that the agreed interest was 26% p.a. This rate according to the plaintiffs could only be increased with the sanction of the Central Bank of Kenya. In the alternative the defendant would only increase the rate of interest with the agreement of the plaintiffs or if the same was in an instrument reserving such higher rate of interest. It is also the plaintiffs' contention that the defendant has charged interest on interest, penal interest and other non-contracted charges.

The Charge is annexed to the plaintiffs' supporting affidavit as '**SSS1'**. By Clause 1 thereof the plaintiffs contracted to pay to the defendant on demand,

"actual or contingent liability and also all moneys which may have become payable by the Chargor to the Chargee in respect of expenses properly incurred in relation to this security together with commission and other costs charges and expenses and together with interest at the rate of twenty six per centum per annum (26%) or at such rates calculated and payable in such manner as the Chargee shall in the Chargee's sole discretion from time to time decide

PROVIDED ALWAYS

(a) That the Chargee shall not be required to advise the Chargor prior to any change in the rate of interest…..

(b) That the Chargee reserves the right to charge the rate of interest without prior notice being given to the Chargor subject to the regulations of and/or directions and/or instructions from time to time from the Central Bank of Kenya permitting Financial Institutions or Banks under the Banking Act to charge interest at rate or rates higher than the aforesaid rate in which event such higher rate of interest shall be charged and shall become payable notwithstanding anything to the contrary herein.

(c) That notwithstanding sub-clause (b) above in case of any such money being also secured to the Chargee under an agreement or instrument reserving a higher rate of interest than as aforesaid nothing herein contained shall affect the right of the Chargee to recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate payable hereunder"

It is clear at once that Clause 1 of the Charge allows the defendant to charge "such rates (of interest) as the Chargee shall in the Chargee's sole discretion from time to time decide."

The proviso (b) above would apply if there are regulations and/or directions and/or instructions from the Central Bank of Kenya permitting higher rates. However, the plaintiffs did not allege that the Central Bank had issued any regulations directions and or instructions since the interest rates were freed on 23.7.1991 by Gazette Notice No.3348. In my view if there are no minimum or maximum rates of interest

determined, and published by the Central Bank the question of approval of the Minister to any increase in interest rate does not arise. In **National Bank of Kenya Ltd –vs- Cador Investment and Another: HCCC No.2105 of 2000 (UR)** Emukule J analysed the relevant provisions of the Banking Act and the repealed provisions of Sections 39, 40 and 41 of the Central Bank of Kenya Act Chapter 491 Laws of Kenya. These repealed provisions had to be invoked to give effect to Section 44 of the Banking Act which vests the power to approve increase of banking rate or other charges on the Minister. The said Sections 39, 40 and 41 of the Central Bank of Kenya Act were repealed by the Central Bank of Kenya Amendment Act Number 9 of 1996. The charge on the plaintiffs' property was created on 22nd May, 1998. That was long after the repeal of Sections 39, 40 and 41 of the Central Bank of Kenya Act. As Emukule J held before me I am of the view that interest rates were no longer controlled at the time the applicants charged their property to the defendant.

Proviso (c) of Clause 1 of the charge cannot assist the plaintiffs either as the same is dependent on the existence of control of interest rates which as I have found did not exist at the time the charge was created. In the absence of control of interest rates Clause 1 of the charge quoted above allowed the defendant to charge such rate of interest as it deemed fit. The discretion was absolutely free. The Plaintiffs do not allege that the charge is invalid in any way. There is also no allegation of duress or undue influence. There is further no allegation of fraud against the defendant. The plaintiffs do not allege incapacity to contract with the defendant. No dishonesty or deceit is alleged on the part of the defendant at the time of the charge. In the premises I have found that the Plaintiffs have not shown on a prima facie basis that the interest charged by the defendant is manifestly too high uncontractual unconscionable or against public policy. To the contrary the rates of interest applied by the defendant were contractual.

With regard to the complaint made against "other charges" the same Clause 1 of the charge was wide enough to include the "other charges". The clause inter alia provides: "the Chargor to pay the Chargee in respect of expenses properly incurred in relation to this security together with commission and other costs charges and expenses" In my view the plaintiffs have not shown a prima facie case that the defendant charged other levies that were too high unconscionable uncontractual and against public policy.

The case of **David Musyimi Ndetei – vs- Daima Bank Limited: HCCC No.2198 of 2000 (UR)** does not assist the plaintiffs. In that case, it would appear that the Learned Judge found as a fact that the charge was created or the loan was advanced at the time when interest rates were controlled and increase of banking rate and other charges by the defendant required the Approval of the Minister.

With regard to the complaint that the defendant is not acting in good faith and does not have the interest of the plaintiffs in purporting to exercise its statutory power of sale, it was contended by the plaintiffs that the defendant had not served a Statutory Notice of Sale; it had levied interest upon interest it had increased interest rates without Central Bank of Kenya approval and it had levied other non contracted charges on the mortgage account. In those premises, according to the plaintiffs, the defendant had not acted in good faith and in the interest of the plaintiffs. I have already found against the plaintiffs on all those complaints. I am not satisfied that the plaintiffs have shown a prima facie case that the defendant is not acting in good faith and does not have the interest of the plaintiffs in its decision to exercise its Statutory Power of Sale.

The Plaintiffs have not persuaded me on their primary complaints. They have in the premises, not shown a prima facie case with a probability of success at the trial. Having taken that view of the matter it is strictly unnecessary for me to consider the other conditions for the grant of an interlocutory injunction set out in the case of **Giella -vs- Cassman Brown & Company Limited (1973) EA 358:** whether the plaintiffs could adequately be compensated in damages or the balance of convenience.

Finally an injunction being an equitable remedy the conduct of the plaintiffs is a primary consideration. Notwithstanding the complaints made by the plaintiffs their own documents show that they are heavily indebted to the defendant. There is the "**Notional Rent Agreement"** exhibited as "**SSS8,"** to the Plaintiffs' supporting affidavit. This document was executed on 25.8.2004. The plaintiffs clearly admitted indebtedness to the defendant in the sum of KShs.25,516,399/05 as at 31.8.2004. The

admission is unambiguous and unequivocal. Under this agreement the plaintiffs were to pay KShs.50,000/- monthly for 6 months with effect from 25.8.2004. In consideration thereof the defendant was to freeze the balance on the loan at the said sum of KShs.25,516,399/05 and discontinue their application of all interest therein. In default the Notional Rent Agreement would b e terminated at the discretion of the defendant. Only one payment of KShs.50,000/- was made pursuant to this agreement as can be discerned from the Statement of Account marked as "**SSS 4"** annexed to the plaintiffs' supporting affidavit. It was not candid of the plaintiffs to contend that notwithstanding the said agreement the defendant continued to charge exorbitant rates of interest and other illegal charges when they did not meet their part of the bargain.

It was further not candid of the plaintiffs after their unequivocal admission of indebtedness in the said sum to the defendant to turn round and allege that the said admitted sum contained sums that were not contractual unconscionable and unenforceable. The plaintiffs also admitted indebtedness to the defendant in their letter date 15.4.2003. This letter is annexed as "J.K 2" to the defendant's affidavit. It is obvious therefore that the plaintiffs are clearly in breach of the terms of the charge. They have denied service of the Statutory Notices of Sale, which have clearly been shown to have been served. The plaintiffs in my view have not come to court with clean hands. They have not done equity. They therefore do not deserve the equitable remedy of injunction. In **Maithya –vs- Housing Finance Company of Kenya and Another: [2003]1 EA 133,** Nyamu J held, inter alia that failure to service the loan or to pay the lender or pay into court what had been admitted took the applicant outside the realm of exercise of the court's jurisdiction. I agree with him. In the premises the conduct of the plaintiffs does not meet the approval of a Court of Equity. The application dated 19.10.2005 and filed on the same date against the defendant is therefore dismissed in its entity with costs.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MARCH, 2006.

F. AZANGALALA

JUDGE

9.3.2006