REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 164 of 2005

FRANCOIS M. DDAIDDO…….....……..PLAINTIFF

VERSUS

BANK OF INDIA…….....…….DEFENDANT

RULING

The plaintiff was, between 1st December 1986 and 1998, employed by the defendant. During that period the defendant advanced him a House Loan of Sh. 1,371,600/= which was repayable over a period of 25 years from his salary. In 1998 the plaintiff says he opted for early retirement and his terminal benefits were determined at Sh. 1,938,079/= which was more than enough to clear the balance of the said loan. However the defendant paid him only Sh. 504,996/= but did not credit his loan account with the balance and instead it, on the 29th July 2005, advertised his property known as plot No. MN II/1921 on 18th August 2005 for sale. He filed this suit on 17th August 2005 along with an application for injunction on the basis of which he obtained an exparte injunction and restrained the sale. This ruling is on the inter-parte hearing of that application.

As usual the application is brought under the provisions of Order 39 Rules 1, 2, 3 and 9 of the Civil Procedure Rules. It seeks a temporary injunction to restrain the defendant from selling and or transferring plot No. MN/II/1921 until this suit is heard and determined. It is based on the ground that the defendant having taken a greater portion of the plaintiff's terminal benefits he does not owe any more money to the defendant. In support of the Application the plaintiff swore an affidavit on the 16th August 2005 and another one on the 22nd September 2005 in both of which he reiterates that point and added in the latter that he had not been served with the statutory notice.

Mr. Obura, counsel for the Applicant argued the application on the basis of the depositions in the plaintiff's said affidavits and added that the documents, in particular those marked as BI5 and BI7 annexed to the supplementary affidavit of Allan Mwachala of the defendant Bank, do not show the balance, if any, due from the defendant. They are also not clear as to how much was credited to the plaintiff's loan account out of Sh. 1,938,079/= due to the plaintiff as terminal benefits.

In opposition to the Application Allan Mwachala, an officer in the Advances Department of the defendant

bank, swore a replying affidavit on 26th August 2005 and a supplementary one on 6th September 2005. He refuted the plaintiff's retirement claim and stated that the plaintiff was, along with other employees of the defendant, dismissed for participating in an illegal strike on 3rd August 1998. The plaintiff's terminal benefits which amounted to Sh. 509,860/= (and not Sh. 1,938,079/= as claimed) were credited to his loan account leaving a balance Sh. 866,140/15. This amount did, over a period of seven years during which the plaintiff made no payment, rise, due to the application of interest, to Sh. 2,134,124/10 as at 10th June 2002.

Mrs. Tutui, counsel for the defendant, submitted that the plaintiff was, along with other employees of the defendant bank and other banks, dismissed for participating in an illegal strike. The Industrial Court, in its award on a dispute relating to the strike, held that the dismissal was proper save that the dismissed employees should be paid their terminal benefits. According to her it was after that dismissal that the plaintiff wrote to the bank asking for early retirement which was refused. She contended that the handwritten document annexed to the plaintiff's affidavit and touted as containing the details of the plaintiff's terminal benefits is not authentic.

Mrs. Tutui further submitted that though the plaintiff was not served with a statutory notice having failed to disclose to court material facts such as the Industrial Court award confirming his dismissal, and that he had since dismissal not paid any money to the defendant, on the authority of the High Court decision in **Seed & General Limited – Vs – Small Enterprises Finance Company Limited and Another Milimani Commercial Courts HCCC No. 1519 of 2000** he was not deserving of any notice of sale. Finally, she submitted that if the sale turns out to be unlawful the defendant bank is in a position to pay the plaintiff damages. She, in the circumstances, urged me to dismiss the application with costs.

In his rejoinder Mr. Obura said that the case of **Seed & General Limited (supra)** is distinguishable as the loan agreement and the charge document were exhibited in that case as opposed to this one.

I have always understood the law as requiring in mandatory terms that a chargee wishing to exercise his statutory power of sale under a charge registered under the Registration of Titles Act, the Government Lands Act or the Registered Land Act, to give the chargor the statutory notice of sale. Section 69A (a) of the Indian Transfer of Property Act which applies to the charge in this case confirms that view. It provides:

"**A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until –**

(a) notice requiring payment of the mortgage money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money or of part thereof, for three months after service."

In the circumstances I am unable to agree with Mrs. Tutui that a mortgagor or chargor who is guilty of material non-disclosure is not deserving of such notice, mandatory as it is. In my view short of an amendent of that section by Parliament the court has no choice but to demand its strict compliance. Leave alone failure to serve the notice if the notice served is not in strict compliance with the Act it is invalid and of no effect. In **Kanorero River Farm Limited & Others – Vs – National Bank of Kenya Limited, Civil Appeal No. 699 of 2001** in which the statutory notice of sale did not give the chargor the requisite 90 days from the date of service it was held to be invalid and of no effect. This being my view of the matter I am unable to agree with the late Justice Hewett's decision in the **Seed & General Limited case (supra).**

The fact that the defendant is in a position to pay damages does not in the circumstances fall for consideration. The court cannot allow an illegal act simply because the perpetrator of that act is financially able to pay damages. I did hold in **Joseph Mbugua Gichanga – Vs – Co-operative Bank of Kenya Limited, Mombasa HCCC No. 74 of 2000** that:

"… **where it is clear that the defendant's act is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party**

should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay …[damages]. Support for this view is to be found in the Court of Appeal decision in the case of *Aikman – Vs – Muchoki [1984] KLR 353*."

The defendant in this case having admittedly not served the plaintiff with a statutory notice of sale this application must succeed even on that score alone.

The plaintiff also complains of having been charged exorbitant interest. The defendant argues that it has charged interest in accordance with the charge document. That document has however not been exhibited. Mrs. Tutui says it was not necessary as the existence of the charge itself is not in dispute. That may very well be so but I have nothing to show me that interest is indeed charged as provided in the charge.

For these reasons I allow the plaintiff's application dated 16th August 2005 in terms of prayer 2 thereof with costs to the plaintiff.

DATED and delivered this 26th day of May 2006.

D. K. MARAGA

JUDGE