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

Civil Case 247 of 2006

MURIITHI M'MBUI

**JULIA KAGWENE MURIITHI …….…..
……PLAINTIFFS**

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

R U L I N G

The plaintiff seek order that pending the determination of this suit an injunction be issued in respect of the suit property L.R. NO. 2/451 Kileleshwa Nairobi. The same is brought under Order 39 Rule 2.

The 1st plaintiff has sworn the affidavit in support in which he deponed as follows; on or about 21st November 1990 both plaintiffs, who are husband and wife, obtained mortgage finance from the defendant, of kshs 1, 080, 000; the plaintiff met the monthly repayments as regular as possible and when there was default the defendant applied uncontractual default interest and penalty charges, and as a consequence the account balance grew astronomically; as result of that increase in the balance in the plaintiff's account, parties entered into two other agreement, whereby it was agreed that the plaintiffs would make monthly payments of kshs 20, 000/- and in the meanwhile interest application on their account was frozen.

Plaintiff further deponed that they negotiated with the defendant on possible rescheduling of the loan, part payment or transfer of the loan to a family member, and this was done purely on good faith and on understanding that the defendant would not attempt to sell the charged property.

That contrary to that belief, the defendant served a statutory notice of sale of the charged property and shortly thereafter, people began to visit the suit property following the advertisement put by the defendant in its own auction market.

The plaintiff deponed that the action of advertising the suit property, by the defendant was a fetter or clog on plaintiff's mortgagor's equity of redemption, that, that equity of redemption which should remain intact over the entire three months notice was violated and clogged.

Plaintiff faulted the statutory notice for failing to state the provision of law it in served under and of being served upon the plaintiff by registered post rather than personal service.

Plaintiff deponed that after receiving advise from interest Rates Advisory Centre Limited, he is of the

view that the defendant has contravened section 44 of the Banking Act by levying illegal charges which has led to overcharging of the plaintiff's account by shs 3, 756, 148. 38 as at 31st December 2005, by defendant.

The plaintiff in its supplementary affidavit deponed that, by a clause in the mortgage instrument, the defendant was obligated to obtain consent of the plaintiff, before applying a rate of interest, higher than the rate of interest specified by the Central Bank of Kenya, to the loan balance.

Plaintiff therefore concluded that he had established a prima facie case with a very high probability of success.

Plaintiff's counsel in submissions stated that the defendant's application of interest in contravention to the mortgage instrument was fraudulent and that accordingly due to that fraud an injunction can be issued. Counsel relied on MULLA The Transfer of Property Act, page 792 which states:

"**A mortgagor, however, may obtain an injunction to restrain a sale if the mortgagee is acting in a fraudulent and improper manner contrary to the terms of the mortgage deed**."

That position was also supported in the case HCCC NO 7855 of 1999 KINGSWAY MOTORS LTD – V – TRUST BANK LTD as per Justice Mbaluto when he stated

"**A mortgagor, however, may obtain an injunction to restrain a sale if the morgagee is acting in a fraudulent ……manner**…."

The plaintiff's application was opposed by the defendant. The affidavit in reply provided that; all the charges levied on plaintiff's mortgage account were contractual, that the plaintiffs were served with previous statutory demands; that at interlocutory stage plaintiff could not depone to advise given by an expert.

In submissions defence counsel stated that the plaintiff was undeserving of equitable relief because plaintiff had come to the court of equity with dirty hands. That the plaintiff had admitted being indebted to the defendant severally. That the plaintiff was in breach of the contract, that is the mortgage deed and accordingly the plaintiff could not seek protection of the court whilst in such breach. In support of this argument defence relied on the case ALGHUSSEIN ESTABLISHMENT – V – ETON COLLEGE [1991] 1 ALLER 267, that:

"**Unless the language of the contract constrains the court to hold otherwise the law of England never permits a party to take advantage of his own default or wrong."**

On the conduct of the plaintiff which defence argued disentitled plaintiff to prayers sought, defence relied on the case MAITHYA – V – HOUSING FINANCE CO. KENYA [2003] 1 E.A., 133, where the court stated:

"**I did also make reference to the conduct of the applicant. I find that this ought to be a consideration or a factor which I should bear in mind in exercising my judicial discretion in granting or not granting the injunction sought**."

HCCC NO. 414 OF 2004 FRANCIS J.K. ICHATHA – V – HOUSING FINANCE CO. LTD OF KENYA LTD, the court held:

"**A plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong for the plaintiff seeks this court to protect him from the consequences of his own default**."

Defence submitted that the basis of argument by the plaintiff, upon which plaintiff states that his equity of redemption has been fettered was not recognised in law.

Defence counsel repeated that the entity IRAC, the advise they gave the plaintiff, could not be relied upon at interlocutory stage, and that submissions or evidence of an accountant or a banking expert is not recognised by the evidence Act.

It is important to remember that what is before me is an interlocutory application and accordingly the findings I make should not usurp the discretion of the trial judge.

The plaintiff has to satisfy the grounds of granting an injunction enunciated in the case GIELLA – V – CASSMAN BROWN & COL LTD [1973] EA 358, that is; the plaintiff must show a prima facie case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury. If the court is in doubt, it will decide the application on a balance of convenience.

I doubt whether the fact that the defendant advertised for sale the suit property in its premises can be termed as being a fetter or a clog to the plaintiff's equity of redemption. If indeed, it was the court's finding, that the defendant's power of sale cannot be restrained, the fact that the property has been advertised, with the prospect of getting more people to bid at the sale, can only be beneficial to both plaintiff and defendant in that probably a higher price would be realised.

If however, I do understand plaintiff's case correctly, the plaintiff argued that the defendant has breached the mortgage deed in calculation of the amount due in that it did not follow provisions, therein, to get plaintiff's consent when amount in excess of the rate of interest specified by central bank is charged.

The mortgage deed, the particular portion relied upon by the plaintiff is as follows:

"….**AND PROVIDED FURTHER that such interest shall in no event without the consent of the mortgagor be charged at a rate exceeding the rate of interest specified by the Central Bank of Kenya AND PROVIDED that in the case of any such moneys being also secured to the mortgagee under an agreement or instrument reserving a higher rate of interest than as aforesaid nothing herein contained shall affect the right of the mortgagee to recover such higher rate of interest or (as the case may be) the difference between such higher rate and the rate charged by financial institution in Kenya**."

In respect of this clause plaintiff argues that its insertion in the mortgage instrument is an indication that the mortgagee undertakes to be bound by statutory legal maximum provision on the interest rate that are applicable under the Central Bank of Kenya Act [Cap 491]. Indeed that was the advise given to the plaintiff by Mr Onono of IRAC when he found that the interest rates did, at some time exceed, the specified rates as per section 39of cap 491.

Defence response to this is that section 39 was deleted and indeed that is correct, it was deleted by Act 8 of 2004.

I choose not to be persuaded by either parties argument.

The mortgage instrument does not mention section 39, and since it does not it is not open to anyone to impose the terms of section 39 on the parties. However the aforesaid clause did recognise that although there was leeway for defendant to change the rate of interest rate, such charge, if it was to exceed something referred to as Central Bank specified rate, had to obtain the consent of the mortgagor. Now, I am of the view that that is an important issue, which will need to be determined by the trial court in interpreting that clause. That is to determine what is that specified rate of interest.

The plaintiffs other argument was that the defendant breached section 44 of the Banking Act. That section provides:

"**No institution shall increase its rate of banking or to other charges except with the prior approval**

of the minister."

A finding on this section was made in the case of PROF DAVID MUSYIMI NDETEI – V – DAIMA BANK LTD HCCC NO. 2198 OF 2000 as follows:

"**The evidence of that witness was that once an institution set its charges at the beginning of its business it can then only, thereafter increase those charges with approval of the Central Bank. The defendant then ought to have provided evidence of that approval by Central Bank of its charges. Its failure to so prove draws an inference against it, that obviously there wasn't any approval from the Central Bank and accordingly the charges debited in the plaintiff's account were not approved**."

The defendant in our case responded to plaintiff's argument by saying that all the charges debited in the plaintiff's account were contractually provided for. The question that arises from this response is can one contract out of, statutory provision. That is yet another issue that the trial court will have to grapple with.

Defence argued that the plaintiff was not entitled to equitable reliefs for, having admitted being indebted to the defendant and being in breach of the mortgage deed, hence it followed plaintiff had '**dirty hands'**. I have gone through the plaintiff's correspondence some dating back to 1992 and I find that the plaintiff would make offers to bring up to date, the loan account without specifically admitting a certain amount. With regard to the '**Notional Rent Agreement'** the parties entered into I am of the view that it is not applicable here because what the defendant now seeks to enforce, by the threatened sale of the suit property, is the terms of the mortgage deed, not the other agreement.

Defence argument that plaintiff could not rely on advise given by Mr Onono of IRA, at interlocutory stage is not correct. Order 18 Rule 3 of the Civil Procedure Act provides that at interlocutory stage affidavit evidence could rely on information and belief showing the source and the ground thereof.

Defence further argued that the opinion of an accountant or a bank expert was not recognised by the Evidence Act Cap 80. I beg to differ. Section 48 of the Evidence Act provides:

"**When the court to form an opinion upon a point of foreign law, or of science or art, or as to identify or genuineness of the handwriting or finger or other impressions, opinion upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identify or genuineness of handwriting or finger or other impressions**."

The court's finding is that the work of an accountant in both art and science. Art in the Concise Oxford English Dictionary is defined as:

"**Skill at doing a specified thing**,"

The way an accountant will record information is itself an '**art'** in that he is skilled to do a specified thing.

His work is also a science because the work of inspection and interpretation of those accounts is a science. The word science is defined in the concise Oxford English Dictionary as

"**Systematically organized body of knowledge on any subject: knowledge**,"

The opinion of an accountant such as Mr Onono, does indeed fall within the ambits of section 48 of the Evidence Act, and can be received in evidence.

I have examined the evidence presented before me and I find that the allegation that the defendant has breached the mortgage deed is not frivolous nor is the allegation that the defendant has debited charges on the plaintiff's account in contravention of section 44 Banking Act. These issues are themselves of serious consequence, and I am of the view that they sufficiently show a prima facie case with probability of

success. Having so found it is only right that the plaintiff be granted an injunction pending the determination of this suit.

The court grants the plaintiffs the following orders: -

(1) That pending the hearing and determination of this suit an interlocutory injunction order is hereby issued to restrain the defendant either by itself, its agent and/or savants from advertising for sale or interfering alienating or otherwise howsoever dealing with L.R. NO. 2/451

(2) /KILELESHWA NAIROBI.

(3) The plaintiffs are awarded costs of the chamber summons dated 11th May 2006.

MARY KASANGO

JUDGE

Dated and delivered this 19th July 2006.

MARY KASANGO

JUDGE