REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 383 of 2004

HARRIS SAMUEL WAINAINA…….....
…….PLAINTIFF

VERSUS

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

R U L I N G

This suit was instituted by way of a Plaint dated 13th July 2004. Primarily, the plaintiff claims that he has overpaid the loan by as much as KShs. 1,033,188/=. He therefore demands a refund of that sum, as he believes that the only reason why the defendant was still demanding more money from him, was because the defendant had, allegedly, debited his account with unlawful charges, such as "**penalty interest**", "**interest on arrears**" and "**default charges**."

The records show that the plaintiff did not seek any interim injunctive reliefs until 31st March 2006, which was after the defendant issued a notification of sale dated 27th March 2006. By that notification of sale, M/s Garam Auctioneers, who had been instructed by the defendant to sell the suit property, notified the plaintiff that his property would be sold by public auction on 30th May 2006. Alarmed by that development, the plaintiff moved the court by his application dated 31st March 2006, seeking an injunction.

It is significant that this case first came up for trial on 21st September 2005. It was however adjourned for the reason that Mr. Ahmednasir, advocate for the Defendant had travelled to the United Kingdom for the Commonwealth Lawyers Conference. He had expected to travel back to Kenya in time for the trial, but he encountered problems with his return ticket, resulting in a delayed arrival back.

Although the plaintiff did indicate to the court that he was ready to proceed with the trial, and that he had two witnesses, the plaintiff was also ready to accommodate the defendant, by consenting to an adjournment.

The court then adjourned the case indefinitely, on condition that the defendant paid the Court Adjournment Fees, as well as the plaintiff's costs for the day. The Defendant was also directed to file and serve its List of documents within 30 days. And finally, the parties were directed to file an agreed list of issues within 60 days.

A perusal of the court file reveals that the defendant has, todate, not filed its list of documents.

Also, the plaintiff has sworn an affidavit, stating, inter alia, that it is he who has had to pay the Court Adjournment Fees.

Notwithstanding the defendant's failure to comply with the orders which the court made on 21st September 2005, the said party went ahead to instruct an auctioneer to realise the securities. Of course, there was no court order barring the defendant from taking steps to realise the securities, as the plaintiff had not previously sought any injunction. Therefore, viewed from that perspective, the defendant was entitled to instruct an auctioneer to realise the securities.

But then, it is noteworthy that the delay in the trial was occasioned by an adjournment which was sought for by the defendant. It is to be recalled that on 21st September 2005 the plaintiff was ready to proceed with the trial, but then decided to indulge counsel for the defendant: it sure looks callous that the defendant should repay such indulgence by putting up the properties for sale.

What makes the whole issue look even worse is the fact that on 13th February 2006, the plaintiff had already attended at the court registry, and had this case set down for hearing on 3rd October 2006. Before fixing the trial date, the plaintiff's advocate had written to the advocates for the defendant on 7th February 2006, inviting them to attend at the registry.

Prior to that, there was an earlier invitation dated 21st January 2006, from the plaintiff's advocates to the defendant's advocates. However, the court registry declined to fix dates (on 4th February 2006), as the Court Adjournment Fees had not yet been paid.

All the foregoing, paint the defendant and their advocates in poor light.

Be that as it may, the application before me is founded upon the plaintiff's contention that he does not owe any money to the defendant. Instead, he believes that it is the defendant which owes him money. His belief is founded upon recalculations by the Interest Rates Advisory Centre, which show that he had already overpaid the loan, to the tune of KShs. 1,033,188/=.

On the other hand, the defendant's case is that the plaintiff still owes it KShs. 2,604,997/=, as at 30th April 2006.

Of course, the defendant's figures are inclusive of the charges which the plaintiff deems to be unlawful.

Therefore, at the centre of this case, the issue for determination is as to accounts, including the legality of some debits reflected in the plaintiff's statement of accounts. For that reason, the plaintiff believes that the defendant was stealing a march against him, by taking steps to sell off the property when the issue was yet to be determined.

I agree with the plaintiff that the issue as to whether or not the debt has been over-paid is to be determined at the trial. However, it is not only the defendant who would be guilty of pre-judging the outcome of the case, by taking steps to realise the securities. In my considered view, the plaintiff was also pre-judging the issue, by stopping the remittance of monthly instalments whereas the court had not yet made a determination on the issues concerned. I believe that it must be borne in mind that calculations by any auditors, accountants or "**interest rates experts**" are at best, opinion evidence. Such evidence is supposed to be presented to court, for use in the adjudication of the issues that were in contention between parties. Therefore, the fact that a borrower is in possession of a report from an expert should not imply that the borrower could then rely on it, and decide to stop making remittances. If he does so, he would be pre-judging the matters in issue.

In this case, the plaintiff has raised important issues. However, that alone cannot be a sufficient foundation for an interim injunction. In the case of **MRAO LTD V FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS, [2003] KLR 125,** at p. 138; HON BOSIRE J.A. held as follows:-

"**But as I earlier endeavoured to show, and I cited ample authority for it, a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

In this case, the plaintiff has exhibited the recalculations by the Interest Rates Advisory Centre. But, on its part, the defendant has argued that the charges whose legality have been questioned by the Interest Rates Advisory Centre, were all legitimate and lawful.

In the light of the positions taken by the parties herein, each of them will have to explain themselves in detail, before the trial court, which will thereafter adjudicate on the issues.

Meanwhile, I note that in **ORION EAST AFRICA LTD V HOUSING FINANCE CO. OF KENYA LTD, HCCC NO. 914/01, the HON ONYANGO OTIENO J.** (as he then was) said:

"**When any loan account goes into arrears, penalty interest is normally chargeable and in this case ……. this account went into arrears and cannot be said to have been properly serviced. Penalty interest was therefore called for and I cannot see any valid complaint at all."**

In this case too, the statement of account shows that the plaintiff was not remitting the monthly instalments as and when he was supposed to. Therefore, there is every possibility that the trial court may find no valid complaint against the "**penalty interest**" levied on the account. However, I fully appreciate that the final adjudication on the issue will be subject to further evidence.

Meanwhile, I note that in **JOSEPH OKOTH WAUDI V NATIONAL BANK OF KENYA [2006] @ KLR**, the Court of Appeal said:

"**We are satisfied that as default in the servicing of the mortgage has been proved, it cannot be rightly said that the respondent had no basis upon which to exercise its statutory power of sale under the charge or that the learned judge of the superior court exercised his discretion improperly."**

Here too, there has been default. Why therefore should an injunction issue as sought by the plaintiff?

There would appear to be no legal basis for the grant of an injunction. Therefore, the only way of ensuring that the properties are secured upto the time the suit is heard and determined is by paying off all the arrears todate. I therefore decline the interim injunction, with costs.

Dated and Delivered at Nairobi this 14th day of July 2006.

FRED A. OCHIENG

JUDGE