REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 261 of 2006

DANIEL KAMAU MUGAMBI…….....
……..PLAINTIFF
VERSUS
HOUSING FINANCE COMPANY OF KENYA LTD…….....…
DEFENDANT

R U L I N G

By an application dated 19th May 2006, the Plaintiff sought an injunction to restrain the defendant from selling-off the suit property, L.R. No. NAIROBI/BLOCK 82/2512, GREENFIELDS ESTATE, NAIROBI. It is the wish of the plaintiff that the said injunction, if granted, should remain in force until the suit was heard and determined.

When prosecuting the application, the plaintiff submitted that the defendant had flouted the provisions of Section 44 of the Banking Act. He also said that the defendant had failed to serve him with a statutory notice.

It is the plaintiff's case that he had borrowed a total of KShs. 500,000/= between 6th November 1992 and 18th October 2003. Thereafter, the plaintiff says that he paid to the defendant, the sum of over KShs. 835,000/=. Notwithstanding the said repayments, the defendant was still demanding more money from the plaintiff. In the circumstances, the plaintiff feels that he has paid-off the principal amount of the loan. His view is that if it were not for the interest which the defendant had debited outside the armbit of Section 44 of the Banking Act, as well as outside the contact between the two parties herein, there would be no arrears.

In an endeavour to solve the issue, the plaintiff says that he personally visited the defendant's Advances Department, with a view to holding discussions with the defendant's officers. However, his talks with the defendant failed to yield fruit, so said the plaintiff.

Meanwhile, the defendant had taken steps to realise the security even though only fourteen years had passed by, out of the twenty years during which he was allowed to clear the loans.

As an indicator that the sums debited to his account were not in keeping with the terms of the contract document between the two parties herein, the plaintiff exhibited a document dated 1st November 2002, through which the defendant is said to have offered to refund, to the plaintiff, part of the arrears. That offer is said to be an indicator to the fact that the defendant had conceded that the plaintiff's account had been debited with undeserving interest charges.

Following the said concession, the plaintiff says that the defendant ought to have given a refund, but the same was never effected.

The other issue which was taken up by the plaintiff was that the defendant flouted the provisions of Section 39(1) of the Central Bank of Kenya Act, which prohibits the charging of interest to the tune that exceeds the principal sum. In other words, the plaintiff's contention is that the total sum charged as interest should never exceed the principal sum which was given as a loan or as a financial facility, to a chargor.

In that regard, the plaintiff exhibited copies of documents which are said to demonstrate the great public interest on the issue of high interest rates. On the basis of the said documents, the plaintiff asked the court to take judicial notice of the said issue.

The plaintiff has taken the matter so seriously that he wrote to the Minister for Finance on 15th May 2006. The letter was written through the law firm representing the plaintiff. However, as at the time the plaintiff instituted these proceedings, there had been no response from the Minister.

Next, the plaintiff submitted that although the issue before the court was contractual, the same was subject to the laws of the land, especially the Banking Act. In particular, the plaintiff highlights Section 44 of the Banking Act as imposing a requirement on all banking institutions who may wish to vary their rates of interest, to seek and obtain the approval of the Minister. In that respect, the plaintiff pointed out the fact that on 12th May 2006, the Minister brought into effect Legal Notice Number 34 of 2006 through which he states that before interest rates can be changed, the Minister must give his approval.

As far as the plaintiff was concerned, the reason why the Minister published the Legal Notice was so as to give effect to the provisions of Section 44 of the Banking Act.

When the court asked the plaintiff's advocates, if by his submission he meant that prior to 12th May 2006, Section 44 of the Banking Act was not yet in force, his response was to the effect that the Minister's action was that of a policy-maker who had been activated so as to uphold the rule of law as per Section 44 of the Banking Act.

Another issue which was raised by the plaintiff was about the change or variation of the rates of interest. It was his case that the interest rates varied from 16% to 26%. Therefore, in the plaintiff's opinion, such a practice violates the principles of freedom of contract, as one party was empowered to vary the terms of the contract, to the detriment of the other party. For that reason, the plaintiff submitted that the party who made the variations ought not to be allowed to rely on the variations, so as to put the other party at a disadvantage.

Another issue which was raised by the applicant was in relation to the statutory notice. According to the applicant, he had never been served with a statutory notice, as there was no proof that the purported statutory notice had been received by him.

It is the plaintiff's case that the provisions of Section 74 of the Registered Land Act were subject to the Civil Procedure Rules. Therefore, in the plaintiff's understanding, the statutory notice ought to have been served on him personally. The plaintiff submitted that there was no justifiable reason in this case why the chargee should have deviated from the procedure for personal service.

In the light of those submissions, the plaintiff felt that he had demonstrated the fact that he has an arguable case, which he would wish to canvass at the main trial. In the meantime, as the suit property was the plaintiff's dwelling house, he held the view that that fact tilted the balance of convenience in his favour, as no measure of damages could adequately compensate him, in the event that the property was sold off. That fact was compared with the position of the defendant, who was still holding the property as security, and who therefore, in the plaintiff's understanding, would not be inconvenienced by an injunction order.

For those reasons, the plaintiff asked the court to issue the injunction order so as to preserve the suit property until the case was heard and determined.

In answer to the application, the defendant began by submitting that the plaintiff had failed to prove any prima facie case. It was said that the plaintiff had failed to lead any evidence on his case, as pleaded in the plaint.

It was said that in the plaint, the only two issues that were pleaded were non-service of a statutory notice, and an imposition of illegal interest charges. For that reason, the defendant emphasised that the plaint did not mention the provisions of Section 44 of the Banking Act.

Having perused the Plaint, I verified that there was no mention therein of Section 44 of the Banking Act. However, I also note that at paragraph 8 of the Plaint, it is pleaded as follows:-

"**The plaintiff avers that he has been faithfully paying the loan but the defendant has continued to levy illegal interest charges making the loan to escalate."**

To my mind, although that paragraph does not specifically cite Section 44 of the Banking Act, it could be wide enough to incorporate the said statutory provisions.

Furthermore, it is to be noted that in the grounds cited on the face of the application for injunction, the plaintiff expressly stated that, in his understanding, the defendant had flouted the regulations of Section 44 of the Banking Act, to the detriment of the plaintiff.

The same issue is also taken up in paragraph 19 of the plaintiff's affidavit. Therefore, I believe that the defendant has not been taken by surprise when the plaintiff asserted that the defendant had flouted Section 44 of the Banking Act.

If the plaintiff were to adduce evidence to prove that the defendant had charged such interest as was in violation of statute, such interest would be unlawful, irregular or illegal. In effect, by proving a violation of Section 44 of the Banking Act, the plaintiff could prove the pleading at paragraph 8 of the plaint. He would certainly not have departed from his pleadings, as asserted by the defendant. Nor would he have gone outside the issues raised in the Plaint.

For those reasons, I decline the defendant's invitation to the court, to limit itself, so as to exclude any consideration to the submissions which the plaintiff made, touching on Section 44 of the Banking Act.

Moving on from that issue, I now wish to give consideration to the alleged non-service of the statutory notice. First, it is to be noted that the plaintiff did not assert that no statutory notice was issued. He could not have done so because an appropriate statutory notice was exhibited by the defendant, and the same is dated 4th September 2004.

The plaintiff's contention was that the defendant had not served him personally, with the said statutory notice.

To my mind, there is absolutely no merit in the contention that a statutory notice had to be served on the chargor personally. By virtue of the provisions of Section 153 of the Registered Land Act, personal service is only one mode of effecting service. There are four other modes of service, including dispatch by registered post.

In this case, the defendant has exhibited not only the statutory notice but also a "**Certificate of Posting a Parcel**" which was issued by the Postal Corporation of Kenya. The said certificate confirms that the statutory notice was dispatched to the plaintiff, by way of registered post. Accordingly, I am satisfied that the defendant discharged its burden of proving that service was effected on the plaintiff.

Meanwhile, as regards the plaintiff's contention to the effect that the defendant had flouted the provisions of Section 44 of the Banking Act, by varying the rate of interest, without first obtaining the authorisation of the Minister for Finance, the defendant insists that it did comply with the terms of the contract, as well as with the statutory provisions.

First, the charge instrument stipulates the rate of interest would be 19%. However, it was also expressly provided that the rate of interest could be either increased or reduced, "**as the chargee shall determine."** Thus, not only was the rate of interest variable, but the charge instrument expressly stipulated that

"**the decision of the chargee in this behalf shall not be questioned on any account whatsoever.**

Meanwhile, in the Further Charge dated 18th October 1993, the rate of interest was specified as being at 21%. But that rate was also to be variable.

Thus from a contractual perspective, there is no doubt that the plaintiff did expressly consent to having the rate of interest varied by the chargee.

However, whilst the defendant submitted that the statements of account which were exhibited by the plaintiff showed that the interest was charged at 16% and 17%; that is not the position. A perusal of the said statements of account reveals that in 1998, the rate of interest was 26%; in 1999 the rate was 26%; in 2000 the rate was 24%; and in 1995 the rate was 26%.

In the light of those variations, did the defendant first need to obtain the authority of the Minister for Finance, before they could levy the increased interest? That is precisely the plaintiff's case.

He then cited the decision of **PROF. DAVID MUSYIMI NDETEI V DAIMA BANK LTD**, as authority, to back his submissions on that point. In that case, the HON. KASANGO J. addressed the issue thus;

"**The issues that I believe need the consideration of this court are as follows:-**

(i) whether the defendant was entitled to debit the various charges and varying interest in the plaintiff's account.

The answer to that I believe is in the negative. The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Act and the Banking Act were squarely on the defendant. It is only the defendant who could prove that the interest rates complied with Section 39 Cap. 491, when the restrictions were there, and it is only the defendant who could have proved that the Central Bank approved the increased charges according to Section 44 Cap. 488."

As the defendant failed to discharge the burden of proof, the learned judge held that the defendant had failed "**to prove the legality, of the charges debited in the plaintiff's account, having debited amounts not authorised by the plaintiff……."**

My comment about that authority is that it comprises a final judgement, after a full trial. Secondly, it is to be noted that the attention of the trial court does not appear to have been drawn to Section 52 of the Banking Act, which recognises the right of banks to agree with their borrowers on such interest rates as they may deem appropriate. I therefore have no idea what decision the learned trial judge in that case would have arrived at, had her attention been drawn to that statutory provision.

Furthermore, in the case of **DESAI & OTHERS V FINA BANK LTD [2004] 2 EA 46** at 51, the HON. EMUKULE J. came to the conclusion that Section 44 of the Banking Act did not appear to touch on interest rates.

In the light of that decision, the question as to whether or not the provisions of Section 44 of the Banking Act, limits the interest rates chargable by banks and other financial institutions, appears to be uncertain.

The plaintiff has produced before me the Legal Notice No. 34 of 12th May 2006. By that notice, the

Minister for Finance revisited the provisions of Section 44, by introducing "**The Banking (increase of rate of Banking and other charges) Regulations, 2006."** However, as the title to the said regulations suggests, the Minister did not specifically state that the regulations were also applicable to the interest rates changed by banks and other financial institutions.

Three days after the Minister issued the Legal Notice, the

plaintiff's lawyers, M/s S. W. Ndegwa & Co. Advocates, wrote to the Minister, on 15th May 2006. By the said letter, the advocates sought the Minister's intervention to stop the defendant from levying "**illegal**

Charges on the mortgage including penalties on arrears contrary to the provisions of the Banking Act.

It is noteworthy that the plaintiff's advocates did not, in that letter draw the attention of the Minister to the variations in the rates of interest, without the authority of the Minister. Might that suggest that the plaintiff too, is of the view that Section 44 of the Banking Act did not touch on interest rates? I do not know.

But as regards penalty interest, I believe that the issue is well settled. For instance, in **SAMMY THUO KANGEA & ANOTHER V HOUSING FINANCE CO. of KENYA LIMITED (NAKURU) HCCC No. 279 of 2005** (unreported), the HON. KIMARU J. expressed himself thus, at page 8 of his ruling;

"**In any event, the High Court has in the cases of *Maithya Vs Housing Finance Co. of Kenya & Anor [2003] 1 E.A. 133; Orion East Africa Ltd v Housing Finance Co. of Kenya Ltd, Nairobi HCCC No. 914 of 2001 (Milimani) (unreported); and Francis Ichatha v Housing Finance Co. of Kenya Ltd, Nairobi HCCC No. 414 of 2004 (Milimani),* held that the fact that the penalty interest and default charges which were charged by the bank would not be sufficient ground to injunct a chargee from exercising its statutory power of sale, as damages would be an adequate remedy to compensate an aggrieved chargor if he proves that there was such illegal charging of the penalty interest and default charges." *ousi***

And in the case of **FRANCIS J. K. ICHATHA V HOUSING FINANCE COMPANY of KENYA, CIVIL APPLICATION NO. 108/05,** the Court of Appeal unanimously held as follows:-

"**Indeed, Mr. Kahonge, the learned counsel for the applicant told us that there is no dispute that there was default and that the dispute is on the illegal charges, and that the arrears and the debt are admitted. The dispute is essentially on the quantum of the arrears and of the loan at the time the statutory notice was issued. The applicant recognised in the plaint that the dispute was of "mathematical nature." Thus, this is truly a dispute on accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale."**

To my mind, the findings cited above are reflective of the situation before me. The plaintiff has definitely been very irregular in his remittances of monthly payments. For instance, in 1999, the plaintiff only made two payments, totalling KShs. 25,000/=. As a result, the account was in arrears to the tune of KShs. 206,302, as at 1st January 2000. Then in 2000, the plaintiff made three payments totalling KShs. 100,000/=. As a result, the arrears as at 31st December 2000, was KShs.402,746/=.

In 2003, the plaintiff paid KShs.60,000/= only. Then in 2005, he paid the princely sum of KShs.12,000/=. And, as at May 2006, when this suit was filed, the plaintiff had made absolutely no payments for the year 2006.

From the foregoing, it is abundantly clear that the plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on the charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the plaintiff to make any presumptions. It is not for a

borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication on the issues that the borrower would know whether or not his beliefs had gained judicial recognition.

In **ORION EAST AFRICA LIMITED V HOUSING FINANCE CO. of KENYA LTD HCCC No 914 of 2001,** the HON. ONYANGO OTIENO J. (as he then was), expressed himself thus:-

"**When any loan account goes into arrears, penalty interest is normally chargeable, and in this case, even going by the letter of 27th May 1998, I have referred to hereinabove, 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 on that."**

For that reason, amongst others, the learned judge declined to grant an injunction. In similar vein, the HON. EMUKULE J. declined to grant an injunction to a plaintiff who was in default of his obligations under the charge instrument. That was in the case of

FRANCIS J. K. ICHATHA V HOUSING FINANCE CO. of KENYA LIMITED (above-cited), wherein the learned judge said:-

"**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. He who seeks equity must do equity. The plaintiff should not be protected or given advantage by virtue of his own refusal to make repayment to the Defendant/Respondent a debt of which he expressly undertook to pay."**

I am wholly in agreement with those views. Accordingly, I find no merit in the application dated 19th May 2006. The said application is therefore dismissed with costs.

Dated and Delivered at Nairobi, this 12th day of July 2006.

FRED A. OCHIENG

JUDGE