



REPUBLIC OF KENYA

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

Civil Case 187 of 2006

EZEKIEL OSUGO AGWENYI.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT

RULING

The application dated 11.4.2006 seeks one primary order and that is a temporary injunction restraining the defendant its servants, agents, employees assigns or whosoever from selling by public auction or otherwise transferring alienating or in any other manner disposing of **L.R.NO.NAIROBI/BLOCK 82/2557** Greenfields Estate hereinafter called the “**suit property.**” The brief facts as I understand them leading to the application are as follows.

The plaintiff bought the suit property from a Company called Timber Merchants Limited in the year 1991 for Kshs.850,000.00. He raised the initial deposit and was offered a loan of KShs.400,000.00 by the defendant who secured the repayment thereof by charging the suit property. The defendant states that the said sum was disbursed directly to M/S Timber Merchants Limited. The plaintiff on his part contends that only KShs.344,742.00 was actually disbursed to the said company. He further contends that although he made a few late payments he serviced the loan as diligently as he could. The defendant however, contends that the plaintiff was not consistent in the repayments and the account fell in arrears which persisted despite indulgence extended to the plaintiff. The default resulted in the defendant seeking to exercise its statutory power of sale thus provoking this application.

From the affidavit evidence filed and the submissions addressed to me by counsel the plaintiff makes the following primary complaints:

- 1) **That the defendant wrongfully loaded his account with penalty charges.**
- 2) **That the defendant wrongfully unilaterally varied its charges in contravention of the provisions of the Banking Act and the Central Bank Act.**
- 3) **That had the defendant not done (1) and (2) above, the account would reflect an overpayment of KShs.696,131.97.**
- 4) **That the defendant acted in an oppressive, unconscionable, punitive manner and totally violated the Agreement.**
- 5) **That the charge was not explained to him and he was not advised to seek independent legal counsel.**

6) That the defendant failed to credit the account with a sum of KShs.55,258.00 being the difference between the loan offer of KShs.400,000/= and the sum that went towards the purchase price of KShs.344,742.00.

The defendant's response to those complaints is that in terms of the charge the plaintiff was bound to pay the principal sum advanced together with interest and other charges. In the defendant's view "**other charges**" levied by the defendant against the plaintiff were within the ambit of the provisions of the charge and are therefore not wrongful, oppressive unconscionable punitive or contrary to any law. It is also the defendant's contention that the defendant was not consistent in the repayment of the loan and persisted in the default the effect of which was to accumulate a huge debt which the plaintiff was unable to repay. The defendant further contends that the plaintiff was notified of changes in interest rates which changes were contractual. In the event the calculations relied upon by the plaintiff are erroneous and misleading.

Regarding the sums actually disbursed, the defendant maintains that the entire sum of KShs.400,000/= was disbursed but not Kshs.344,742.00 as alleged by the plaintiff. With regard to the complaint that the plaintiff should have been advised to have separate legal counsel, the defendant contends that that was not necessary as the plaintiff understood the terms of the charge and executed a certificate to that effect. In the premises, the defendant is of the view that the plaintiff has not met the conditions for the grant of an interlocutory injunction and is merely disputing the sums due.

To buttress their respective positions, counsel relied upon various cases and legal treatises. I will refer to some of them where necessary.

I have considered the application, the affidavits, the submissions of counsel and the authorities cited.

Having done so, I take the following view of the matter. The principles applicable for the grant of an interlocutory injunction are well settled. The same were set out in the precedent setting case of **Giella – vs – Cassman Brown and Co. Ltd & Another [1973] E.A. 358**. First the applicant must establish a prima facie case with a probability of success at the trial but if the court is in doubt, it should decide the application on a balance of convenience. Secondly normally an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. It must also be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted, where it is shown that the applicant's conduct with respect to matters pertinent to the suit does not meet the approval of a court of equity.

In the matter at hand the pith and marrow of the plaintiff's case is his contention that he has overpaid the defendant by KShs.696,131.97 and the reasons his loan account reflects a debit balance of a large sum are the wrongful loading of the account by penalty charges, uncontracted charges, unilateral upward variations of interest rates and the failure to credit the account with a sum of KShs.55,258.00 right from inception. Has the defendant adequately responded to these complaints? I remind myself that I am not hearing the case and I should not make any conclusive findings lest I put the trial judge in a bind. Starting with the sum disbursed, the defendant is content with a mere statement that the entire sum of KShs.400,000.00 was disbursed. In support of this position a letter dated 12.9.1991 is exhibited as "**JM2**" to the replying affidavit of Janet Mwaluma sworn on 24.5.2006. That letter was addressed to the vendor M/s Timber Merchants Ltd. The letter advised the vendor that the loan proceeds had been paid directly to its account. A letter of the same date was addressed to the plaintiff. The letter advised the plaintiff that the loan proceeds had been disbursed. The easy presumption is that the defendant was talking about the entire sum of KShs.400,000.00. Yet the plaintiff has shown that he paid the vendor about KShs.500,258.00 directly and the balance to be paid towards purchase price from the loan proceeds was not KShs.400,000/= but about KShs.350,000/=. On a prima facie basis therefore there is a reasonable doubt as to whether the entire loan sum of KShs.400,000/= or a sum less by about KShs.50,000/= was disbursed. Only a trial can resolve this conflict. In my view this sum is not insignificant in view of the fact that the interest charged was on the entire loan sum which included the said sum and is an element of the loan account to date.

With respect to the alleged wrongful/illegal debits and penalty charges, the affidavit evidence is quite inadequate. I say so because; the plaintiff to buttress his argument relies on a recalculation made by a firm called Interest Rate Advisory Centre using statements of account furnished by the plaintiff. The firm did not have ordinary books of the plaintiff's account as the same were in the custody of the defendant. The firm's findings may not therefore be conclusive. The defendant on its part has exhibited "JM3" to the replying affidavit of Janet Mwaluma in which are copies of statements of account covering the period between 1.1.2003 to 31.2.2005. There is no explanation regarding the period before 1.1.2003. Indeed unlike the plaintiff, the defendant has filed no single statement for the period between September, 1991 and December, 2002. In the premises, I cannot make a conclusive finding as to the interest rates applied by the defendant for that period. That has to await the trial.

With respect to failure by the defendant to notify the plaintiff of changes in the interest rates the defendant has exhibited "JM6" which comprise letters from the defendant to the plaintiff. The letters are dated 31.12.1991, 30.9.92, 31.5.1993, 1.12.1993 and 15.12.1994. There is therefore no evidence of notices served upon the plaintiff with respect to changes in interest rates for the years 1995 to 2006. As the plaintiff has denied being served with the notices, it was incumbent upon the defendant to furnish evidence of the same. Having failed to do so, I am of the view that the plaintiff has shown on a prima facie basis that the upward variations in the interest rates made by the defendant may have been contrary to Clause 5(a) of the Charge.

In my view the plaintiff's complaints do not merely relate to the issue of damages or a dispute on amount due. It would be inequitable to ask the plaintiff to pay sums that are not payable especially as the plaintiff maintains that if the defendant had managed his loan account prudently, the account would be in credit. Having come to that conclusion, it is not necessary to consider whether Ministerial approval was required before effecting variation in interest. In any event Section 52 of the Banking Act fortifies my above finding. The Section reads as follows:

"52 (1) For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act shall affect or invalidate in any way any contractual obligation between an institution and any other person."

With respect to other illegal debits alleged by the plaintiff the same were not sufficiently identified by the plaintiff and I decline to express any view thereon save to state that they would be relevant subject to the terms of the charge.

With regard to the complaint that there was inequality of bargaining power as between the plaintiff and the defendant again I will express no view at this stage as the same can only be resolved on further evidence at the trial.

In the end from my consideration of the application, I find that the plaintiff has made out a prima facie case with a probability of success at the trial. As regards whether the plaintiff would suffer irreparable loss and injury unless the injunction sought is granted, I am of the view that he would. From material placed before me, the plaintiff was advanced between KShs.350,000/= and KShs.400,000.00. He had on his own paid about KShs.500,000/= for the purchase of the suit property. The plaintiff claims to have subsequently paid to the defendant sums in excess of KShs.1,700,000.00. In my view loss of a home in exercise of a statutory power of sale for sums believed not just fully paid but excessively over paid would amount to irreparable loss and injury. Even if the injury were compensatable by an award of damages, it should be remembered that the second condition for the grant of an injunction stated in Giella –vs– Cassman Brown & Another (Supra) was not cast in stone. As it has been held before by various Judges of this court by the use of the word "normally" the court recognized that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. **(See Lucy Njoki Waithaka – vs – Industrial and Commercial Development Corporation – Nairobi HCCC No.321 of 2001 (UR).**

The facts of this case incline me to preserve the status quo pending trial. I accordingly allow the application in terms of prayer (b) thereof. The order is made on the condition that the plaintiff files an

undertaking as to damages. The undertaking to be filed within 7 days of today.

Costs shall be in the cause.

DATED and DELIVERED at NAIROBI this 20TH day of SEPTEMBER, 2006.

F. AZANGALALA

JUDGE

20/9/2006

Read in the presence of:-