



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

Civil Case 101 of 2006

JOSEPH MULI KOLI
PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LTD.
DEFENDANT

R U L I N G

The applicant seeks interlocutory injunctive relief to restrain the defendant, its agents and servants from selling by public auction, the applicant's property known as **L.R. NO.NRB/BIK 134/882** pending the hearing and determination of this suit. The application is supported by an affidavit sworn by the applicant.

The respondent seeks to sell the suit property in the exercise of its statutory power of sale under a charge created over the suit property in or about August 1998 to secure a loan of Kshs.1,220,000.00 advanced to the applicant by it.

The applicant's case is that after the loan was disbursed, he commenced and continued repayment of the same but with difficulties and before the commencement of this suit he had paid about Kshs.730,000/= to the defendant. The suit property was advertised for sale on 6.2.2006 to recover a sum of Kshs.7,124,563.50. The advertised sale however, did not take place as the applicant negotiated a cancellation of the same with the defendant. Pursuant to the negotiations the applicant paid to the defendant Kshs.398,000/= and proposed to pay the balance monthly at the rate of between Kshs.40,000.00 and Kshs.50,000.00. However, even before the applicant could comply with the proposal the suit property was again advertised for sale on 13.2.2006. In the meantime the applicant issued to the defendant a post dated cheque for Kshs.100,000 to be deposited on 28.2.2006 and lodged the present application. The applicant argues that he did not default in the agreement that led to the 1st cancellation of the sale of the suit property and is prepared to continue making the monthly repayments as agreed. During the negotiations, the applicant swears, he complained about overly exaggerated demands of the defendant in the form of unexplained charges on his account. The applicant contends that the defendant promised to reconsider the unexplained charges and rescheduling repayment of the loan.

Injunctive relief is accordingly sought in order to allow the applicant to continue paying legitimate outstanding sums as he proposed to the defendant just before the suit property was readvertised. The applicant further seeks the said relief because the property is a prime property with additional development and if sold he will suffer irreparably.

The application is opposed by the defendant. It is argued on behalf of the defendant that the applicant

has not shown a prima facie case with a probability of success. The affidavit evidence presented by the defendant discloses that from inception in 1998 the applicant made his 1st payment of Kshs.27,092.00 on 29.8.2002 yet he was required to pay the said sum monthly for the said period. Thereafter the applicant made erratic payments and ignored the defendant's demand for payments in terms of the charge. The default provoked the issuance of a Statutory Notice of Sale by the defendant which prompted the applicant to seek indulgence from the defendant in the month of January 2006 leading to the suspension of the auction of the suit property which auction had been scheduled for 6.2.2006. The applicant did not honour his promise to pay contained in his letter dated 24.1.2006 resulting in the second advertising of the suit property. The defendant's legal officer swears that the cheque for Kshs.100,000/= predated 28.2.2006 was never received by the defendant and the proposal for monthly repayments made by the applicant was never kept. According to the defendant the applicant has not done equity and is not entitled to equity; his application is frivolous, vexatious and lacks merit. With regard to alleged irreparable loss the defendant argues that the applicant knew that in the event of default the suit property would be sold and in any event the applicant would be adequately compensated by an award of damages even if he were to succeed at the trial.

I have considered the application, the affidavits filed and the submissions made to me by the applicant and the Advocate for the defendant. Having done so, I take the following view of this matter. The principles applicable for the grant of an interlocutory injunction are now well settled. The same were set in the case of **Giella vs. Cassman Brown & Co. Ltd. and Another [1973] EA 358**. Firstly, the applicant must show 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 application at hand, the applicant does not dispute that the occasion for the exercise of the defendant's statutory power of sale has arisen. It is not disputed that there has been default on the repayment of the loan. It is also not disputed that the said power of sale is exercisable. The applicant does not dispute service of a valid Statutory Notice of Sale under the charge. Indeed, on being served with the same, he sought indulgence from the defendant. The defendant appears to have granted the applicant the indulgence and suspended auction of the suit property which had been scheduled for 6.2.2006 but the applicant does not seem to have honoured his promise to pay as proposed in his letter dated 24.1.2006. That letter is exhibited by the defendant as "JK5". The letter contains a clear admission of the applicant's indebtedness to the defendant. It also contains a proposal to settle the indebtedness in a specific manner. The applicant has not demonstrated by acceptable means such as a bank statement that he indeed kept his promise. The defendant denies receipt of a large payment of Kshs.100,000.00. To-date, the applicant has not exhibited evidence that the cheque issued for the said sum passed through his account in favour of the defendant. The defendant further deponed that between August 1998 and 29.8.2002 the applicant made a single payment of 27,092/=. That is a period of four (4) years. The applicant in the further affidavit filed on 27.4.2006 does not rebut that deposition. The defendant further deponed that the applicant after the single payment, subsequently made erratic payments and ignored the defendant's demands for payment in terms of the charge. The applicant in the said further affidavit does not address these grave charges made against him. He instead pleads that he is sincere in his commitment to continue paying the amount as last agreed upon. It appears to me that the applicant is appealing to sentiment. Sentiment is however not a consideration in determining this application. Only the law and hard evidence count.

With respect to the challenge made against overly exaggerated charges the same appears to be to be an afterthought. No such complaint was made in the applicant's letter of 24.1.2006 upon which the defendant suspended the auction which had been scheduled for 6.2.2006. There was also no such complaint in his letter of 24.2.2006 exhibited as "SKM6" to the supporting affidavit. In any event the challenge in my view is an omnibus one and given that the applicant for the initial 4 years after receiving the loan made no single payment and when he subsequently did make some payment the same were erratic, it is not difficult to appreciate that the charge debt continued to mount. In the further affidavit of

the applicant two specific complaints are made. The first one relates to what the applicant describes as very high rates of interest charged by the defendant. I cannot see any validity in this complaint as the applicant does not particularize what was “**very high**” about the interest rates charged. The second specific complaint is with regard to a debit of Kshs.44,002.35 to the loan account. The explanation given by the defendant in the applicant’s annexure “**JMK1**” particularly the letter dated 22.11.2001 is not altogether unreasonable. In any event even if the said debit was wrong, it would not result in any credit to the applicant. Further, such a complaint would in my view amount to a dispute over the sums due which cannot be a ground for restraining the defendant once its statutory power of sale has crystallised.

In the premises, I am have not been persuaded that the applicant has established a prima facie case with a probability of success at the trial. Having come to that conclusion, I need not consider the other conditions for the grant of an interlocutory injunction. However, even if I were to consider the application under the condition that an injunction ought not to issue where damages would be an adequate remedy, I would still reject this application as the applicant in offering his property as a security gave it a value and if sold damages would adequately compensate the applicant.

Further, even if I were to consider the application on the basis of balance of convenience, I would still reject the application as further delay in the realization of the security might diminish its value as a security for the repayment of the increasing indebtedness to the defendant. Balance of convenience accordingly tilts in favour of the defendant.

Finally, on the conduct of the applicant I am of the view prima facie that he is not deserving of the equitable relief of injunction. The applicant at the ex – parte stage of this application did not disclose his letter dated 24.1.06 in which he categorically admitted his indebtedness to the defendant and made a proposal to settle the same in a specific manner. He did not also disclose that he was in default. He insisted even at the hearing of this application that he had made a payment of Kshs.100,000.00 to the applicant vide a pre-dated cheque but was not candid enough to confirm whether or not the cheque had been paid by his bankers in my view an elementary process that would have been cleared by his own bank statement. The applicant did not do equity. He is not entitled to equity.

The upshot of my above consideration of the plaintiff’s application dated 10.3.2006 is that the same is without merit and is dismissed with costs to the defendant.

DATED and DELIVERED at NAIROBI this 18th SEPTEMBER, 2006.

18/9/06

F. AZANGALALA

JUDGE

Read in the presence of:- The Applicant in person and Mutahi for the Respondent.

18/9/06

F. AZANGALALA

JUDGE