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

Civil Case 606 of 2005

ELIZABETH NJERI ……..PLAINTIFF

VERSUS

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

R U L I N G

The Plaintiff executed a mortgage instrument dated 16th November 1995, as security for a loan of KShs. 5.0 million. The said mortgage was registered against the property L.R. No. 1/11711 (original number 1/257/9) Nairobi, which property shall hereinafter be cited as "**the suit property."**

As at the time the Plaintiff borrowed that sum of KShs. 5.0 million, from the defendant, she was in the process of buying the suit property, for KShs. 7.5 million.

It is the plaintiff's case that as at the year 2004, she had paid to the defendant a total of KShs. 13,085,405/=.

Although the plaintiff concedes that she did occasionally default in remitting the contractual instalments, it is her case that whenever there was any default, she did negotiate with the defendant, and that at all material times the two parties were able to agree on the mode for the repayment of the arrears.

It was pointed out that there cannot be any doubt about the agreements between the parties, from time to time, on the issues of arrears, because otherwise there would be no explanation for the fact that it was not until 2005 when the defendant first took steps to realise the security. That being the case, as far as the plaintiff is concerned, and also if it is borne in mind that she had already paid over KShs. 13.0 million, the plaintiff contends that the defendant's demand for a further sum of KShs. 7.2 million, as at 27.5.05, was completely excessive and unjustified.

Being so persuaded, the plaintiff carried out a detailed examination of the records of her loan account. She then offered to pay a further sum of KShs. 2.0 million, to the defendant, in full and final settlement of the balance of the loan.

If the defendant had accepted the said payment, it would have brought the total amount paid by the plaintiff to KShs. 15.0 million. And, in her assessment, the plaintiff believes that the recovery of KShs. 15 million, on lending of KShs. 5.0 million, would be proper and adequate. Any demands for more money was seen as excessive, unconscionable and thus irrecoverable.

It is the plaintiff's case that every single time when she defaulted but thereafter negotiated with the defendant, the agreements arrived at between them, were as binding as the mortgage itself. That

contention is based on clause 12 (ii) of the mortgage instrument, which reads as follows:

"**It shall be lawful for the company from time to time at the request of the Borrower to accept payment of the moneys due or becoming due hereunder by such increased or reduced instalments as shall from time to time be agreed or to agree to suspend payment in reduction of principal or to give such further time for payment of moneys due or becoming due hereunder to grant such indulgences as may from time to time be agreed."**

Of course, if the parties herein did agree to vary the quantum of instalment, whether by reduction or by increament, such an agreement would be binding as between them. If the defendant were to renege on such agreement, the court would most probably issue an injunction to restrain him from realising the security, if the plaintiff demonstrated to the court's satisfaction that she had complied with the mortgage instrument, as well as with the agreements which varied the repayment terms.

As the plaintiff had already paid over KShs. 13.0 million, and was still offering to pay a further sum of KShs. 2.0 million, it is her case that she would suffer irreparable loss if an injunction was not granted. Her reasoning is that the property is currently valued at KShs. 11.0 million. Therefore, if the defendant was allowed to sell off that property, the plaintiff would have lost not only the said property, but also the KShs. 13.0 million which she already paid to the defendant. Such loss could not be compensated in damages, submits the plaintiff.

Therefore, she asks that this court should grant an injunction in terms of the application dated 13th October 2005.

However, the defendant holds the view that the plaintiff does not deserve the reliefs sought.

It is the defendant's case that after the plaintiff had admitted defaulting in her repayments, the defendant became entitled to realise the security, subject only to the issuance of the requisite statutory notices. The defendant emphasized that just because the amounts claimed by the mortgagee were being disputed by the mortgagor, was not sufficient to warrant the grant of an injunction, to stop the mortgagee from realising the security.

In this case, the plaintiff has conceded being in default. She has also acknowledged receipt of a statutory notice. In the circumstances, the defendant submits that no injunction should issue in favour of the plaintiff.

That leads to the question as to whether or not the parties did not always agree, on a mode for paying-off arrears, after each occasion when the plaintiff had defaulted.

As the defendant does not deny the existence of agreements which were to allow the plaintiff clear arrears from time to time, I will accept the plaintiff's contention in that regard.

However, the defendant contends that the plaintiff failed to honour her own proposals to clear the arrears.

And, in an endeavour to demonstrate that the plaintiff did not honour her own proposals, the defendant made reference to its letter dated 1st August 1998, which showed that a cheque for Kshs. 200,000/= was dishonoured.

The defendant also exhibited a letter dated 9th February 2000, through which it expressed its concern and disappointment that the plaintiff had made no attempt to service her loan facility. The said failure is said to have resulted in the accumulation of arrears, to the extent of KShs. 2,143,692/75.

To my mind, those two examples suffice to show that the plaintiff was in arrears on a number of different occasions. And as the plaintiff has not denied having been in arrears, I understand that to mean that she was either falling behind in making payments as set out in the mortgage instrument, or

alternatively that even after she had negotiated with the defendant, she still failed to keep up with the revised repayment schedules.

For instance, when, as at 9th February 2000, the arrears were in the sum of KShs. 2,143,692/75, the plaintiff responded by paying KShs. 300,000/=. That payment was made by a bankers cheque dated 14th February 2000.

The plaintiff then proposed to pay KShs. 200,000/= to KShs. 250,000/= by mid- March 2000, followed by a further sum of KShs. 1,000,000/= by end of April 2000.

First, there is no indication whether or not the plaintiff's said proposal, which was contained in her letter dated 14th February 2000, was accepted by the defendant.

Secondly, even if the said proposal were accepted, and thereafter honoured by the plaintiff, the total amount she would have paid by end April 2000 would have been upto a maximum of KShs. 1,550,000/=, whereas the arrears were already in excess of KShs. 2.1 million.

In a nutshell, the plaintiff would still have been in arrears, even if she had made all the payments set out in her letter of 14th February 2000. Such a state of affairs could have given to the defendant the right to have the security realised. And just because the defendant did not actually take steps to realise the security, would not necessarily imply that the parties herein had reached some agreement that was to enable the plaintiff clear the arrears.

As I understand it, the plaintiff's main complaint is that she had already paid over KShs. 13.0 million, towards a loan sum of KShs. 5.0 million. It is for that reason that she strongly believes that the defendant's demand for a further payment of more than KShs. 7.2 million was excessive and unjustifiable. She feels that if the defendant was allowed to realise the security, that would constitute oppression on her. It is for that reason that she has come to this court, asking that the defendant be restrained, by an interlocutory injunction, from acting oppressively.

In that regard, the plaintiff contrasted herself to the plaintiff in **Ooko V BARCLAYS BANK of KENYA LTD [2002] 2 KLR 394.** She pointed out that in that case, the plaintiff had borrowed KShs. 800,000/=, and by the time when he was seeking an injunctive relief, he had only paid about KShs. 400,000/=.

In contrast, the plaintiff herein emphasized that she had borrowed KShs. 5.0 million, but had already paid over KShs. 13.0 million, by the time she came to seek for an injunction.

In the circumstances, the plaintiff believes that her situation cannot be compared to that in the **Ooko case** (above).

Of course, the facts in this case are not comparable to those in the Ooko case. However, that does not in any way diminish the finding (in the Ooko case) that when the chargor was in default of payment, the chargee is entitled to realise the security, provided that it has given the requisite notice to the chargor.

In the case of **GODFREY NGUMO NYAGA V HOUSING FINANCE COMPANY of KENYA LTD, CIVIL APPEAL NO. 134 of 1987,** the Court of Appeal unanimously expressed itself as follows:

"**Where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the court may interfere if there is no basis upon which the right could be exercised or if it was being exercised oppressively."**

In that case the applicant was some Shs. 40,000/= short in payment. And on that basis, the learned judge of the superior court declined the injunction after he had asked the said appellant where the money was.

When the matter went before the Court of Appeal, the said Court stated:

"**In the event, the Judge's question "where is the money?" was not wrong. It may have sounded harsh, but it was a call for repayment which it was the duty of the Appellant to make."**

That would imply that even though a demand for payment might appear to be harsh, that alone is not a ground upon which the court could rule that it was oppressive. By so saying, it should however not be presumed that I find the demand herein to be harsh.

The facts pertaining to the sums demanded are that the defendant seeks to recover more than KShs. 7.2 million. On the other hand, the plaintiff had offered to pay a sum of KShs. 2.0 million, in full settlement of such balance of the loan as may be still due.

In the circumstances, it is evident that there is a dispute as to the amounts said to be due and owing from the plaintiff.

In **HABIB BANK A. G. ZURICH V POP-IN (KENYA) LTD & 3 OTHERS,** the Hon. KWACH J.A. held as follows:

"……**That clearly is an admission of default and as I understand the law, a dispute as to the exact amount owed under a mortgage is not a ground upon which a mortgagee, who has served a valid statutory notice, can be restrained from exercising its statutory power of sale."**

In this case, it is abundantly clear that the plaintiff has defaulted in her obligations to remit regular instalments towards the settlement of the loan amount.

But most significantly, the plaintiff did engage the services of the Interest Rates Advisory Centre (IRAC), for purposes of re-calculating the balances which were still owed to the defendant.

After IRAC had done its re-calculations, they came to the conclusion that, as at 31st December 2004, the plaintiff owed KShs. 4,321,499/09. Therefore, through the evidence which the plaintiff has put, before the court, there can only be a conclusion that there is still a substantial amount due and payable by the plaintiff, to the defendant.

In the circumstances, I hold that the plaintiff has failed to establish a prima facie case with a probability of success.

As regards the plaintiff's contention that the sale of the suit property would make it impossible for her to raise money to buy another house worth KShs. 11.0 million, I am afraid I did not appreciate how such loss could be deemed as being irreparable.

I say so because the plaintiff did notify the court that her property is currently valued at KShs. 11.0 million. In effect, the plaintiff has given a value for the suit property. Therefore, if the trial court were to ultimately come to the conclusion that the defendant was wrong to have sold the said property, wrongfully, her loss, if proved, would already have been quantified. As there was no suggestion at all that the defendant could be unable to raise the sum of KShs. 11.0 million together with interest thereon, I find no basis for holding that such loss as the plaintiff might suffer, if an injunction is not granted, would be incapable of being compensated by an award of damages.

Finally, it is noted that the latest payments, as reflected in the plaintiff's affidavit, were made in 2004. That would imply that in the year 2005, as well as in the year 2006, upto the month of October, the plaintiff had not made any payments. Had she done so, one would have expected her to highlight that fact.

In the light of the fact that for as long as there is some outstanding balance, it would continue attracting interest, if the defendant was stopped from realising the security until the suit was heard and

determined, there would, in my considered opinion, arise a situation in which the debt might soon outstrip the value of the suit property. Therefore, I believe that the balance of convenience actually favours the realisation of the suit property. The reason for so saying is that at worst, it would only be the plaintiff who would have lost the property. However, as I have already said, she could be compensated for such loss.

But if the debt grew to an amount that exceeded the value of the property; if the property was eventually sold, both the plaintiff and the defendant would be losers. There is no good reason why the court should give orders that could ultimately cause both parties to be losers.

For all those reasons, I find no merit in the plaintiff's application dated 13th October 2005. It is therefore dismissed, with costs to the defendant.

Dated and Delivered at NAIROBI, this 13th day of November 2006.

FRED A. OCHIENG

JUDGE