REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Case 402 of 2006

SAMUEL NDIBA KIHARA …….....…….……1ST PLAINTIFF

VIRGINIA NDUTA NDIBA …….....…….……..2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED……..1ST DEFENDANT

ROBERT NGUNYI NJURA …….....……..…..2ND DEFENDANT

NANCY WANJIKU MBUGUA ……..…….....……..3RD DEFENDANT

RULING

The Plaintiff has brought a Chamber Summons dated 24th July, 2006. In that Chamber Summons the plaintiff is praying for an order to stop the Defendants from seeking vacant possession of the property LR. NO.76/202. The Plaintiff also seeks a prayer that the 1st Defendant do adjust the account number 600-0003164 to correspond to what the Plaintiffs state they legally owe the 1st Defendant. The application is under Order XXXIX Rules 1 2, and 3 of the Civil Procedure Rules. The 1st Plaintiff swore the affidavit in support of the application. He stated that on 4th September, 1995 he and 2nd Plaintiff obtained a mortgage over the aforestated property for Kshs.1.5 million which was repayable for a period of 15 years and for which money they intended to construct a residential house. The 1st Plaintiff stated that he and his co-plaintiff had to obtain a further loan to be able to complete that house. With regard to that mortgage the 1st Plaintiff stated that the 1st Defendant unilaterally changed the rate of interest from 22% to 26%. That that adjustment was not compatible with the ruling of Honourable Justice Mwera in HCCC No.1604 of 2000. That accordingly in view of illegal interest the amount the Plaintiffs ought to pay the 1st Defendant as at 30th April, 2001, was Kshs.3,712,894/- and not Kshs.6,411,232.08. That the difference of those two amounts related to illegal penalty interest charges levied by the 1st Defendant. That such charge of interest by the 1st Defendant was in contravention of Section 44 of the Banking Act. It was further deponed that in the year 2002 the parties in HCCC No.1604 of 2000 agreed to withdraw that suit on condition that the 1st Defendant will adjust the outstanding loan after deducting the penalty interest and other charges. The Plaintiff then stated that they had been paying towards the mortgage account and had paid in total Kshs.1,080,899/=. That despite that payment the 1st Defendant proceeded to sell the suit property to the 2nd and 3rd Defendants in a manner that the plaintiffs described to have been a secret sale. The Plaintiffs were of the view that the statutory notice dated 1st March, 2005 was invalid in law. That accordingly since the notice was invalid the subsequent sale of the suit property to

the 2nd and 3rd Defendant was also invalid. That in any case the property was sold at undervalue that is for Kshs.3.8 million while indeed the property is valued at Kshs. 10 million. The Plaintiffs complained in the affidavit that they were not involved in the identification of prospective buyers of the suit property to ensure that the property fetched a good price. They also stated the said sale of their property violated their constitutional right. The Plaintiffs stated that they had spent their life's earning to build the house on the suit property which they occupy with their four children.

The application was opposed and the 1st Defendant by its affidavit sworn by the Manager legal services stated that the suit as a whole was fatally defective for failure of the Plaintiff to give notice of 30 days as required by Section 136 of GLA Cap 280. The deponent further stated that the Plaintiffs' consent is not required in respect of variation of interest rate on mortgage account. In any case the deponent stated that by the letter dated 9th October, 1995 the 1st Defendant gave the Plaintiffs notice of variation of interest rate from 22% to 26% with effect from 1st September 1995. The deponent stated that the injunction that has been issued by Honourable Justice Mwera was discharged by the same judge on 3rd June, 2002. Accordingly that the argument raised by the Plaintiff that the mortgage account had failed to abide by that ruling will not have a standing. The 1st defendant stated by 31st December, 2005 the Plaintiffs were indebted to the 1st Defendant for Kshs.9,342,733.65. That as a result of the Plaintiffs continued default in the repayment of their mortgage debt the 1st Defendant exercised its statutory power of sale over the suit property and sold the same to the 2nd and 3rd Defendants by a private treaty. That on 7th July, 2006 the suit property was transferred to the 2nd and 3rd Defendant. The 1st Defendant refuted the allegation of undervalue by the Plaintiffs by saying that the suit property was valued by Tysons Limited which is a reputable firm and the same was valued at Kshs.4 million being the open market value and Kshs.3.2 million being the forced sale value. The 1st Defendant concluded by saying that the remedy for the Plaintiffs would be in damages rather than action which is before the court.

The 2nd and 3rd Defendant also swore an affidavit which was sworn by the 2nd Defendant on their behalf. They deponed that the two being husband and wife applied to purchase a property being the suit property which had been advertised in 1st defendant's property mart. That the property was being sold by private treaty. They confirmed that the property was registered in their name on 7th July, 2006 and annexed to the affidavit a copy of the Indenture of Conveyance. The 2nd and 3rd Defendant denied any involvement in any illegality in regard to the said purchase and stated that their purchase of the property was legally undertaken and was not in breach of any law.

In support of the argument present before court and in particular in respect of the Plaintiffs' argument that statutory notice served upon the Plaintiffs by the 1st Defendant the Plaintiff relied on the case of **Trust Bank Limited v Eros Chemist Limited (2000) 2 EA 550.** The Plaintiff relied on the holding of the case as follows:-

"**Accordingly there was a positive and mandatory requirement that a valid notice of sale of charged property had to expressly state that the sale would take place after a three-month period following service of notice had elapsed".**

The Plaintiff argued that since the notice was irregular subsequent sale was void. In support of that argument the Plaintiff relied on a case that related to the RLA Section 74 (1). This is the case of **Ochieng v Ochieng (1995-1998)2EA 260.** The court will not rely on the passage quoted by the Plaintiff because it was accepted by the Plaintiff and the 1st Defendant that subject property is registered under the GLA. Similarly the court will not rely on the case of **Kenya Commercial Bank Ltd v Osebe (1982) KLR 296.**

The Defendant's counsel stated that the Plaintiffs had no cause of action against the 2nd and 3rd Defendant since the property had been registered in their names. In support of that argument the 1st Defendant relied on the case of **Jacob Ochieng Muganda v Housing Finance Company of Kenya Limited Nairobi Civil Appeal NO.453 of 2001 (unreported)** which case quoted the finding made in the same case by the High Court as follows:-

"**the plaintiff's equity of redemption was extinguished and he could not obtain an injunction to restrain the defendant from transferring the suit property to the purchaser. The position is correct in law for it is well established that a mortgagor's right to redemption is extinguished by the mortgagee's entry into a binding contract for sale of the mortgagor's property either by public auction or private treaty (see section 60 of the T.P.A. as amended by Act No.20 of 1985)".**

The 1st Defendant also relied on the case of **Priscilla Krobrought Grant v Kenya Commercial "Finance Company Ltd. & 2 others Nairobi Civil Application No.277 of 1995 – Court of Appeal (unreported)** where the court made a finding in respect of a property that had been transferred into the purchaser's name that such a transfer gave the purchaser an indefeasible title which could not be challenged. There were more cases cited to the court but the court is of the view that the ones cited in this ruling suffice to represent the arguments of the parties. The Plaintiff's argument that the 1st Defendant breached the relevant statutes namely The Banking Act and also breached the Mortgage Deed in applying the rate of interest of 26% does not find favour with this court. The reason is that even if the statutes prevented the increase of interest rate at that time which was clearly argued by the Plaintiff, the parties did, however, by the mortgage deed agree that the rate of interest would be varied on the Plaintiffs being given notice of such variation. The 1st defendant in its replying affidavit annexed a letter dated 9th October, 1995 and addressed to both plaintiffs when they were notified of the change of interest rate to 26%. The parties having entered into the contract that is the mortgage deed the court cannot interfere with the terms of that contract. The court finds therefore that the defendants have not breached the mortgage deed in their aforesaid terms. The Plaintiffs argument that the ruling of the Honourable Justice Mwera indicated that the rate of interest applicable to mortgage account is not supported by that ruling. That ruling granted the Plaintiff an injunction and proceeded to order the Plaintiffs to make monthly repayments of their mortgage debt. As it turned out the Plaintiffs later failed to honour that order of the court and by another ruling delivered on 3rd June, 2002 the court discharged the injunction. There is therefore, no basis for such an argument by the Plaintiffs. The Plaintiffs found fault in the statutory notice dated 1st March, 2005 by saying that the said did not provide for 3 clear months required under the ITPA Section 69. I have looked at that statutory notice and the notice I found that required the Plaintiffs to pay within 3 months the mortgage debt and after the expiry of the notice the 1st Defendant indicated it would exercise its power of sale if such payment was not effected. On a prima facie basis I do not find that that notice does in any way breach Section 69B ITPA. On the 1st Defendant argument that the Plaintiffs' suit is invalid for failing to give 30 days' notice, the same does not find favour with the court. The reason for that finding is because the Plaintiff is challenging 1st Defendant's exercise of statutory power of sale under the ITPA. That being the case that statute does not require notice to be given as argued by the 1st Defendant. Had the Plaintiff sought to invoke GLA then they would have been under duty to give the 30 days notice as required by that Act. The Plaintiff by its chamber summons seeks to stop the Defendants from taking vacant possession of the suit property. Looking at the prayer and considering that the 2nd and 3rd Defendant are now the registered owners of the suit property such an order as sought cannot be granted. On a prima facie basis the court finds that the Plaintiff's right of redemption over the suit property was extinguished when the property was sold to the 2nd and 3rd Defendant. That being the case there would be no basis to grant the Plaintiffs the orders that are sought. Similarly the order for the 1st Defendant to adjust the loan account cannot be obtained in an interlocutory application. Such an order can only be obtained after the final hearing of the suit. The Plaintiff has therefore failed to satisfy the general principles of granting an injunction that is the Plaintiff has not shown a prima facie case with probability of success nor has the Plaintiff shown that damages cannot compensate them in this matter. On the issue of damages the Plaintiffs in their supporting affidavit were of the view that the 1st Defendant should have involved them in the sale of the suit property to ensure that the same did fetch a high price. That averment would seem to suggest that damages can sufficiently compensate the Plaintiffs. The end result is that the Plaintiffs' Chamber Summons dated 24th July, 2006 is hereby dismissed with costs to the Defendants. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 8th day of November, 2006.

MARY KASANGO

JUDGE