



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

**CIVIL CASE 22 of 2005**

**OFFICEQUIP SERVICES LIMITED .....PLAINTIFF**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA LIMITED .....DEFENDANT**

**R U L I N G**

In the plaint filed on 17.1.2005 the plaintiff claimed an order of permanent injunction restraining the defendant by itself, its servants, agents or assigns from selling, disposing off, transferring, alienating or interfering with or in any other way dealing with LR No.209/194/37 – Pangani, Nairobi. The plaintiff also sought a declaration that the defendant’s statutory power of sale has not accrued and or does not lie until the defendant gives credit for and renders true and accurate accounts on the repayments made by the plaintiff on the loan and overdraft. The plaintiff also claimed damages for breach of contract.

The basis of the plaintiff’s claim is pleaded in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27 and 28 of the plaint. In paragraph 5 it is pleaded that the plaintiff and the defendant agreed as follows:-

**(i) The defendant would give to the plaintiff a credit facility**

**to the tune of Kshs.3,500,000.00 made up of**

**Kshs.2,500,000.00 term loan for a period of 24 months and**

**1,000,000.00 overdraft facility for a period of 12 months.**

**(ii) Interest would be 6% mark-up above the bank’s base**

**rate of 22% per annum calculated daily and debited on**

**the account monthly and a penalty of 3% per month above**

**mark-up on arrears.**

**(iii) The loan to be repaid by monthly standing order of**

**Kshs.105,000.00.**

**(iv) The facility to be secured both by personal guarantees**

**by the plaintiff's directors and by legal charge over**

**LR No.209/194/37 (suit premises).**

It is then averred in paragraph 6 that the plaintiff executed a legal charge over the suit premises on 16.9.1997 and in paragraph 7 that prior to the charge the defendant represented to the plaintiff that the charge was in furtherance of the contract already entered into by the parties. It is next averred in paragraph 8 that the plaintiff was fraudulently induced into executing the said charge by misrepresentations made to its directors by the defendant's Chief Manager and or its advocates as to the true nature, purport and effect of the charge as a mere formality which fraudulent misrepresentation its directors relied on to its detriment. It is next pleaded in paragraph 9 that the defendant to the detriment of the plaintiff breached the contract by levying penalty interest on arrears and default charges which were never agreed by the parties or at rates which were never agreed or contemplated by the plaintiff and which are accordingly non-contractual, invalid, illegal, unconscionable and unjustifiable in the circumstances. It is further pleaded in paragraph 10 that pursuant to the said fraud against the plaintiff the defendant unilaterally, recklessly and negligently and without regard for the plaintiff's contractual interest and or capacity to service the loan varied the interest rate skywards upto 69% thereby making the plaintiff's loan account runaway and impossible for the plaintiff to service. It is next pleaded in paragraph 11 that at the time of the contract the defendant was by law not allowed to charge interest at a rate above 16.5% p.a. on the said loan and 19.5% p.a. on the overdraft and by charging interest rates above these rates the defendant was in flagrant breach of the law rendering the contract illegal, null and void and therefore unenforceable. In paragraph 13 it is pleaded that by a letter dated 3.12.2004 the defendant issued a notice of intention to sell the suit land on 27.1.05 if a sum of Kshs.11,026,501.45 being allegedly loan arrears was not paid. It is then averred in the same paragraph that the said notice is fatally defective, bad in law and of no legal effect. It is then pleaded in paragraph 15, that consequent to the defendant's failure or neglect to furnish full statements of the loan it does not know how the said sum of Kshs.11,026,501.45 has been arrived at. It is then pleaded in paragraph 16 that the plaintiff has made payments in excess of Kshs.9,500,000.00 which substantially over paid the credit facility but the defendant has refused, failed and or neglected to give credit thereof and or render accounts. In paragraph 17 it is pleaded that as a measure of goodwill and to maintain harmonious business relations with the defendant it offered to pay to the defendant Kshs.2,500,000.00 in full and final settlement but the defendant declined insisting on the said explained and unconscionable sum of Kshs.11,026,501.45. Paragraphs 18,19, 20, 21, 22, 23, 24, 25 and 26 are pleaded in the alternative.

Simultaneously with the plaint the plaintiff filed an interlocutory application by way of Chamber Summons in which it sought primarily injunctive reliefs to restrain the sale disposing, transferring, alienating, interfering with or in any other manner dealing with the suit property pending the hearing of the supplication and the suit. The plaintiff further sought an order compelling the defendant to render to the plaintiff true and accurate accounts for the loan and overdraft facility for the entire loan and overdraft period and to further furnish statements of accounts to-date.

That application was heard by Emukule, J. who on 11.3.2005 granted an order restraining the defendant from selling the plaintiff's property until a proper notice was served. The learned Judge further made the following order:-

... **“It will serve the interests of justice to both parties if the defendant/respondent would prepare an account showing in accordance with the manner of keeping of ordinarily bankers books –**

**(a) the principal sum advanced showing the date when advanced.**

- (b) interest rate applied then;**
- (c) variation and date of variation of interest**  
**amount of such variation;**
- (d) amount due, month by month,**
- (e) amount paid month by month,**
- (f) amount in default month by month**
- (g) default interest month by month**
- (h) any other charge which was contracted**

**under the charge instrument all made upto 31.3.2005.**

**There shall be an order accordingly.”**

On 8.4.2005 the defendant through its advocates issued a fresh statutory notice of sale under Section 69 A (a) of the Transfer of Property Act. The notice was in respect of the suit property. It is that notice that provoked the present application by way of Chamber Summons, in which the plaintiff primarily seeks an interlocutory injunction restraining the defendant whether by itself, or its servants or agents from advertising for sale, selling, disposing, transferring, alienating, interfering with or in any other manner dealing with the suit property pending the hearing and determination of this suit or further orders of the court. The application is expressed to be made on the main grounds that the defendant has refused, failed and or neglected to comply with the court's order to render accounts to the plaintiff; that in disobedience of the said court order the defendant has issued a statutory notice of sale expressing intention to sell the suit property; that the defendant has instructed M/S Wagly Auctioneers, who have issued a 45 days Notification to sell the suit property unless the plaintiff pays Kshs.16,367,530.55; that the said sum is excessive and illegal as the sum owed by plaintiff the sum cannot exceed Kshs.6,115,517.76; that the plaintiff's financial advisers have discovered that the defendant has levied illegal rates of interest contrary to the Banking Act and the Central Bank of Kenya Act; that the plaintiff is ready and willing to resolve the dispute on the basis of the recalculated accounts and that the plaintiff stands to suffer irreparable loss if the suit property is sold as it has a market value in excess of Kshs.24,000,000.00. The application is supported by an affidavit sworn by Geoffrey Kariuki Mbugua, the plaintiff's Managing Director. The application is opposed. There are Grounds of Opposition and a Notice of Preliminary Objection filed on 21.11.2006.

When the application came up before me for hearing on 27.11.2006, Counsel for the defendant raised objection to the application based upon two grounds set out in the said Notice of Preliminary Objection which are:-

- (1) That the application is *res judicata* in view of the order**  
**of the court made on 11.3.2005.**
- (2) Alternatively if the plaintiff is dissatisfied with the**  
**accounts that were furnished in accordance with**  
**the said order its remedy is to apply to court in terms**  
**of Order 39 Rule 2 A (2) of the Civil Procedure Rules.**

Counsel for the defendant submitted that the plaintiff's application for injunction having been heard and determined, it was not open to it to bring another application seeking the same orders. In counsel's view the defendant had complied with the order to furnish accounts and other documents and if the plaintiff thought that the defendant was in disobedience of the order it should apply for an order to punish the defendant under Order 39 Rule 2A (2) of the Civil Procedure Rules.

Counsel for the plaintiff on his part argued that the defendant had not furnished the documents and information ordered by the court on 11.3.2005 and could not therefore issue a fresh statutory notice.

In my view when the court allowed the defendant to issue a fresh statutory notice, that order in itself could not preclude the plaintiff from challenging the same when the same was subsequently issued. The fresh statutory notice created a fresh factual situation which situation could not in law or fact be contemplated at the time of issue of the order of the court. Indeed in my view, independent of the requirement to furnish accounts, a fresh statutory notice is challengeable on other proper grounds. In the case at hand the defendant says it furnished the documents and information in terms of the order of 11.3.2005. The plaintiff is of a contrary view. I would therefore have to peruse the documents furnished by the defendant in order to ascertain the correct position. It is settled now that a Preliminary Objection in point of law cannot be raised if any fact has to be ascertained. Counsel for the defendant assured me that the documents furnished on their face show that the defendant has complied with the order of the court with regard to the furnishing of an account. I have looked at the said documents and I confess I am unable to agree with counsel for the defendant. An analysis would be necessary to determine whether there has been full compliance with the order of the court.

The upshot of this matter is that the Preliminary Objection is not a proper Preliminary Objection and is overruled with costs to the plaintiff.

It is so ordered.

**DATED** at **NAIROBI** this 14<sup>th</sup> day of December 2006.

**F. AZANGALALA**

**JUDGE**

**MARY KASANGO**

**JUDGE**