



**REPUBLIC OF KENYA**

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

**CIVIL SUIT 506 OF 2006**

**JOSHUA WALTER OGUTU.....1<sup>ST</sup> PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**R.M. NGURU T.A NGURU ENTERPRISES AUCTIONEER .....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff filed the present action against the defendants and in the plaint filed herein the plaintiffs have pleaded that the 1<sup>st</sup> defendant has been applying illegal and exorbitant interest rates on their loan. Further the Plaintiffs pleaded that the first defendant is intent on selling the suit property in exercise of its statutory power of sale without having given the plaintiffs the necessary statutory notice. Further the plaintiffs have also pleaded in the plaint that the first defendant in advertising the charged property of sale have falsified the size of the property by describing it as having three bedrooms rather than four bedrooms. As a consequence to that alleged falsification the plaintiffs pleaded that the 1<sup>st</sup> defendant is both negligent and fraudulent. The plaintiff proceeded to give particulars of the alleged negligence and fraud. The plaintiff by a Chamber Summons dated 11<sup>th</sup> August 2006 sought an interlocutory injunction to stop the defendants from selling the charged property namely LR No. Nairobi/Block 111/780 House No. 92 Komarock Phase 1. The 1<sup>st</sup> plaintiff swore an affidavit in support of that application. He deponed that the plaintiffs initially obtained a loan from the 1<sup>st</sup> defendant of kshs 441 000/- and that loan was cleared and the property which was charged as security was discharged. Subsequently by another charge dated 23<sup>rd</sup> February 1998 the plaintiffs obtained another loan from the 1<sup>st</sup> defendant of kshs 1, 000, 000/-. The deponent further stated that the plaintiffs have made substantial payments on the mortgage account with the 1<sup>st</sup> defendant. The plaintiffs however stated that the 1<sup>st</sup> defendant had been lumping illegal and inflated interests on their account and had refused to correct those interest rates and had thereby clogged their equity of redemption. On the 29<sup>th</sup> of August 2006 the plaintiff deponed that the 2<sup>nd</sup> defendant advertised the charged property for sale by public auction but in so advertising the plaintiffs had not been served with the necessary statutory notice. Further that that advertisement described the charged property as a 3 bedroom mainsonnetee which was valued at kshs 1.4 million rather than describing it correctly as a 4 bedroom house at whose value is kshs 3.5 million. The plaintiff deponed that in that mis description of the charged property the 1<sup>st</sup> and 2<sup>nd</sup> defendant were manipulating the proposed auction with intent to cheat the plaintiffs. Finally the plaintiff in the supporting affidavit swore that the plaintiffs had made payment total kshs 207, 000 which was not reflected in their account. The plaintiff did swear further affidavits one was sworn on the 9<sup>th</sup> of October 2006. The plaintiff in this further affidavit the plaintiff accused the 1<sup>st</sup> defendant of failing to value the charged property despite having received from the plaintiff kshs 26, 500/- . Further the plaintiffs deponed that the 1<sup>st</sup> defendant began to apply interest on the account immediately the charge was executed despite the provision of two months grace period given to the plaintiffs. The plaintiffs again repeated the 1<sup>st</sup> defendant has been charging illegal interest and in support of that contention relied on an annexed calculation of the account done by Tony Tom & Associates. In that report the accountant found that the 1<sup>st</sup> defendant had loaded unnecessary charges on the plaintiffs account with the 1<sup>st</sup> defendant. The accountant further stated that those charges were illegal charges. The plaintiff also filed a further affidavit sworn on 30<sup>th</sup> of November 2006. The plaintiff once again reiterated in that affidavit that the 1<sup>st</sup> defendant had exaggerated and inflated the interest on their

account. The 1<sup>st</sup> plaintiff further stated that he had been persistently ill and as a consequence had failed to follow up the payments to the 1<sup>st</sup> defendant.

The application was opposed by the 1<sup>st</sup> defendant by a replying affidavit sworn by the legal officer of the 1<sup>st</sup> defendant. The deponent confirmed that the plaintiffs had been advanced a loan which was secured by the suit property. The plaintiff after receiving the loan had become irregular in their repayments and as a consequence that account had accumulated arrears. That as at 1<sup>st</sup> September 2006 the plaintiffs owed the 1<sup>st</sup> defendant kshs 1, 564, 133. 95/-. The 1<sup>st</sup> defendant denied that the plaintiffs had fully paid their account as stated in the affidavit in support of the plaintiffs application. The 1<sup>st</sup> defendant annexed to the replying affidavit the plaintiffs loan account showing that there were arrears thereof. The 1<sup>st</sup> plaintiff further stated that the auction which was advertised was only done after the proper process had been followed. Further the 1<sup>st</sup> defendant stated that the plaintiffs had been served in the statutory notice by a letter dated 13<sup>th</sup> of August 2004 which letter was addressed to both the plaintiffs. 1<sup>st</sup> defendant annexed a copy of certificate of posting showing that the said letter was posted by registered mail to the plaintiffs. Further the 1<sup>st</sup> defendant said that the plaintiffs had made offers to clear their arrears by their letter written to the 1<sup>st</sup> defendant dated 16<sup>th</sup> of June 2003. That letter was annexed to the affidavit.

The court has considered the arguments presented before it and the affidavits on record together with the pleading. It does seem that the plaintiffs application is brought on the basis of three issues. The first is that the 1<sup>st</sup> defendant has charged exorbitant and illegal interest. In respect of this the plaintiffs failed to show the illegality in the rate of interest charged by the 1<sup>st</sup> defendant. Having looked at the charged document the court has found that there is provided therein liberty of the 1<sup>st</sup> defendant to change the rate of interest on notice to the plaintiff. The plaintiffs did not argue that they were not notified of those changes and indeed amongst the exhibits annexed to the supporting affidavit is a letter dated 1<sup>st</sup> of September 2006 written by the 1<sup>st</sup> defendant to the plaintiffs informing them of the change of rate of interest. The plaintiff relied on the recalculation of the account by their accountant but even in that recalculation, their accountant did find that the plaintiffs were indebted to the 1<sup>st</sup> defendant for the amount of kshs 197, 587. 09. It does therefore seem that the plaintiffs have not cleared their indebtedness with the 1<sup>st</sup> defendant. It has been held by our courts that dispute of the amount due cannot be a basis of granting an injunction. The second issue that the court has identified is the plaintiffs allegation that the 1<sup>st</sup> defendant in exercising their power of sale has failed to give statutory notice to the plaintiff. That argument was defeated by the 1<sup>st</sup> defendant exhibit No. 4 of the letter dated 13<sup>th</sup> August 2004. The 1<sup>st</sup> defendant also annexed the certificate of posting of that statutory notice. It was not enough for the plaintiffs to simply deny receipt of that notice it was incumbent upon them to prove by making inquiry with the post master general with regards to that statutory notice. The plaintiffs did not argue that the address used in that letter was not their address. Accordingly that allegation is rejected and defeated as aforesaid. The third issue that the court has identified is the plaintiff allegation that the 1<sup>st</sup> defendant has caused a mis-description of their property by understating the number of bedrooms it has. Further the plaintiff alleged that the correct value of their property is Kshs3.5 million rather than the value given by the 1<sup>st</sup> defendant. Indeed the plaintiff stated that the 1<sup>st</sup> defendant has failed to carry out a valuation of the charged property before sale contrary to the Auctioneers Rules. That as it may be, the courts findings is that the 1<sup>st</sup> defendants power of sale has arisen by virtue of the alleged arrears in the plaintiffs account and by virtue of the statutory notice that was issued to the plaintiffs. I am of the view that such statutory power of sale cannot be defeated by Subsidiary Rules such as the Auctioneers Rules. Indeed I am happily persuaded by the case of **Komassai Plantations Ltd v Bank of Baroda Kenya Ltd [ 2002]2 EA** where the court had to decide whether a lack of 45 days notice as required under the Auctioneers Rules was sufficient to stop a sale by auction where the power of sale had arisen. The holding of that case in part is as follows:

**“Rule 15 (d) of the Auctioneers Rules, which provides for 45 days’ notice before sale, was *ultra vires* the Auctioneers Act and its general purpose and was a clog on the power of sale and violated sections 69A and 69B of the Transfer of Property Act, as well as sections 65 and 74 of the**

**Registered Land Act. Rule 15 (d) was thus void and a nullity,”**

For that reason that argument does not find favour with the court. If indeed the 1<sup>st</sup> defendant have failed to correctly describe the plaintiffs property such mis-description if that does lead to under sale, since the plaintiffs have obtained a valuation of the property any loss which may be incurred as a consequence thereof can be compensated in damages. The holding of the case of **Giella –v – Cassman Brown & Co. Ltd [1973] E A** was that were damages would compensate a party an injunction would not be granted. The courts findings further is that the plaintiffs have failed to show a prima facie with a probability of success to justify this courts granting the prayer of injunction as prayed in the application before court. Accordingly the application by chamber summons dated 11<sup>th</sup> September 2006 is hereby dismissed with costs to the 1<sup>st</sup> defendant.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 8<sup>th</sup> day December 2006.

**MARY KASANGO**

**JUDGE**