



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL CASE NO. 22 OF 2005

OFFICEQUIP SERVICES LIMITED..... PLAINTIFF

VERSUS

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

RULING

By an application dated 17.01.2005 and filed in Court on the same day, by way of a Chamber Summons and brought pursuant to the provision of Order XXXIX rules 1 (a), 2, 2A, 3 and 9 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, (Chapter 21, Laws of Kenya) the inherent powers of the Court and all other enabling powers of the law, the Plaintiff applicant sought five orders but only urged two of them at the hearing of this application namely -

"3 That a temporary injunction do issue restraining the Defendant whether by itself or by its servants, or agents, Advocates or auctioneers, employees, successors or assigns or any other person acting for and/or on its behalf from selling, transferring, alienating, interfering with or in any other manner howsoever dealing with the land parcel know as L.R. No. 209/194/37 together with the building thereon situated at Pangani Area in Nairobi pending the hearing and determination of this application or further orders of this Court.

(4) That an order do issue compelling the Defendant to render to the Plaintiff true and accurate account for the loan and overdraft facility, herein for the entire loan and overdraft period and further furnish the Plaintiff with all Statements of accounts thereof todate to enable the Plaintiff carry out scrutiny and/or recalculation or verification thereof pending the hearing and determination of the suit or further orders of the Court.

The application is supported by the Affidavit and the Further Affidavit of Geoffrey Kariuki Mbugua sworn on 17th January 2005, and 24th January 2005 respectively, and not less than nineteen (19) grounds, but for the purposes of this Ruling the one ground that was urged was ground number (XI) - that no valid notice has been given by the Defendant as required by law.

On this ground, Mr. Odhiambo Counsel for the Plaintiff/Applicant urged that although the notice dated 14.04.2003 issued pursuant to the provisions of Section 69 A of the Transfer of Property Act (Group 8 Acts) was in order in form and substance, but the notice was not received by the Plaintiff because the Respondent's Legal Officer addressed the said letter to a wrong address, namely P. O. Box 40459, Nairobi and not P. O. Box 40359, Nairobi which is the Plaintiff's correct postal address. The Plaintiff consequently swears per its director, Geoffrey Kariuki Mbugua that it never received the said notice and until such notice was received, the Defendant/Respondent statutory power of sale did not arise.

The Plaintiff/Applicant is also aggrieved by the rate or rates of interest charged by the Respondent/Defendant Bank, and seeks an account of the interest rates charged.

The Defendant/Respondent filed a Replying Affidavit through its Legal Officer, Jeremiah Macharia Mutero sworn on 21.01.2005 and filed on the same date, and also grounds of opposition dated and filed on 20.01.2005.

In his submission, Mr. Ohaga was gracious enough to concede that the notice having been misaddressed and had not therefore been received by the Plaintiff no valid notice could have been served under the provisions of Section 69A which reads -

"69A. A mortgagee shall not exercise the mortgagee's statutory power of sale

unless and until -

(a) notice requiring payment of the mortgage money has been served on the mortgagor or one or two or more mortgagors, and default has been made in payment of the mortgage money or part thereof, for three months after such service

if no notice is served as is required by the said Section, the mortgagee's statutory power of sale could not have arisen. A notice addressed to a wrong address, is no notice at all. It is as if no such notice were issued.

Mr. Ohaga for the Defendant/Bank/Respondent however, submitted that if the matter was purely the question of notice, he would have conceded to the application and advised the Defendant/Respondent to issue new notices. The Replying Affidavit of the Defendant's Legal officer, Mr. John Macharia Mutero, had raised a whole range of issues which compelled the Defendant to oppose the application.

The Plaintiff has received previous notices, the Defendant had conceded to the Plaintiff's request to reschedule the loan facility, the Plaintiff had defaulted in payment of the rescheduled facilities, the Defendant had deferred previous advertised sales of the Plaintiff's property. In essence the Defendant pleads that the Plaintiff has been less than candid in his averments to the Court and has been guilty of material non-disclosure, and he is not therefore entitled to the equitable remedy of injunction.

Mr. Ohaga covered all other challenges raised by the Plaintiff regarding the validity of charge, interest rates and dispute over accounts as being no basis for the grant of an injunction. He as is usual, cited many and relevant authorities in this matter, the real question however is whether or not a valid statutory notice was issued in terms of Section 69A (a) and not Section 69 A (b) (regarding interest outstanding for a period of two months.)

The side note to Section 69 A of the Transfer of Property Act states - "**Regulation of exercise of mortgagees statutory power of sale**" (an amendment introduced by Section 13 of the Amendment Act of 1959). It lays down three ways or methods by which the mortgagee's statutory power of sale may be exercised. This power may not be exercised

unless and until -

(a) a notice requiring payment of money has been served on the mortgagor or mortgagors if there are more than one, and that there is default in payment of the mortgage money or part thereof for three months - **after** such service; or

(b) some interest under the mortgage is in arrears and unpaid for two months after being due, or

(c) there has been some breach of some provisions contained in mortgage instrument or in the Act, on the part of the mortgagor, or of some person concurring. in the making of the mortgage"

It seems to me that where a mortgagee opts to use one of these methods as a ground for exercising his statutory power of sale, his notice will specify to the mortgagor under what head and limb of those options he proposes to base the exercise of such power. Those powers are clearly **disjunctive** and not **conjunctive**. Where therefore the mortgagor opts to base his power on the basis of a **three months notice** and that notice is found not have been properly served, he cannot rely upon the other grounds, arrears of interest or breach of some provision in the mortgage instrument to found his statutory power of sale. See for instance the case of Margaret Njeri Mururi vs. Bank of Baroda (Kenya) Ltd (Civil Appeal No. 9 of 2001 where the Court of Appeal held that where the claim is for interest arrears Section 69A (b) requires a formal notice to the mortgagor stating that interest has been outstanding for two months after being due.

Having concluded that there was no proper statutory notice being duly served, the Defendant/Respondent's statutory power of sale had not therefore arisen. There shall therefore be an order restraining the Defendant/Respondent from selling the Plaintiff's property until a proper notice is served.

It is now accepted principle in these cases that a dispute as to accounts is no ground for granting an injunction. This being so, the principle also imposes upon the Defendant/Respondent mortgagee a corresponding duty to show that it had not only a right to vary or increase the rate of interest, but that the variation and increase in the rate of interest was not exercised dishonestly or for an improper motive and was not made arbitrarily, capriciously or unreasonably. The Plaintiff/Applicant has complained that the rates of interest have been increased by as much as 59% - 69%. In the circumstances, it will serve the interest 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 up to 31.03.2005.

There shall be an order accordingly.

In the result the Plaintiff substantially succeeds in its application and shall also have the costs of this application.

Dated and Delivered at Nairobi this 11th day of March 2005.

ANYARA EMUKULE

JUDGE