REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE 413 of 2003

USAFI SERVICES LIMITED …….…..…… PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA.……...……1ST DEFENDANT

DOLPHIN AUCTIONEERS ……..2ND DEFENDANT

CENTENARY VALUERS AND

PROPERTIES CONSULTANTS…….……...…… 3RD DEFENDANT

RULING

This application is brought under Order 39 rules 1, 2: Order 29 rule 1 of the Civil Procedure Rules, L. N. No. 120 of 1997 Auctioneers Act, Cap. 526 of the Laws of Kenya. The application is dated 1.7.2003, and seeks the following orders:

1. Already spent.

2. The Defendants jointly and severally, their agents and/or servants, be restrained from threatening to advertise, sell, offering for sale, selling or in any way dealing with L.R. No. 36/VII/272 in Eastleigh Section Seven at the junction of Kunguru Street and Major Muriithi Road, Nairobi currently advertised for sale on 14.7.2003 or any other time pending the hearing and determination of this suit.

3. Costs of this application.

The application is supported by affidavit of G. Chege Kirundi of even date, and on the grounds **inter alia:** the 1st Defendant intends to sell by public auction the suit property at Kshs.12million below the market price, and in total disregard of the reserved price of the market price Kshs.25million; and 2nd Defendant has disclosed the reserve price of Kshs.13million given maliciously and in collusion with the 1st Defendant by the 3rd Defendant to the potential buyers and the Kshs.12 million for 417/03 is intended to finalise the already arranged private sale; the 1st Defendant has contravened and violated Section 44 of the Banking Act Cap 488 by increasing interest rate, charging 2% flat rate on the principal sum of Kshs.15 million and has unlawfully debited plaintiff's account without the consent or approval of the Minister of Finance, giving a distorted loan balance of Kshs.15 million.

Further, the applicant avers that the 1st Defendant has charged maintenance fee, interest and commissions on Kshs.15million with full knowledge that part of the principal sum has not been withdrawn and wishes to liquidate the suit property unfairly and unreasonably to the plaintiff's detriment. The fundamental unilateral variation of contract has discharged the Plaintiff from the mortgage; that the

1st Defendant has mixed up plaintiff's account with 25 other accounts maliciously and/or negligently thereby breaching Section 31, as read with Section 49 of the Banking Act, Cap. 488 of the Laws of Kenya, and finally no mandatory Notice of 45 days have been issued by the 2nd Defendant under the Auctioneers Rules and Chapter 526, Laws of Kenya.

In their Replying Affidavit, by Henry Khejeri, dated 10.7.03, the Defendants aver that: there is no dispute that the 1st Defendant gave a loan term and an overdraft facility to the Plaintiff on clear terms in that contract and interest rate of 23%; the 1st Defendant never agreed to increase the overdraft facility to Kshs.15million from 10.5 ; that a mortgage of Kshs.15 million was created against LR. No. 36/VIII/272, which is registered in the Plaintiff's name; the interest rate on the loan and overdraft were clearly stated in the letter of offer; and the 1st Defendant was under no duty to inform or advise on any charge in the interest rate; that interest began being charged on the Plaintiff's account upon crediting of the plaintiff's account with the facilities; that the Plaintiff repaid only 1 installment in the 23 months; that the Notification on of sale dated 7.2.2003 was erroneous but the action was not successful; that the value of the property depreciated as the 3rd Defendant's valuation shows which 1st Defendant followed. Further, that it is true that the sale Notification given by the 2nd Defendant did not give 45 days Statutory Notice but the sale failed and the valuation expressed there has been overtaken by events; the submission of bank accounts of other customers was erroneous and inadvertent, without malice but that does not affect the matters in issue; that the Plaintiff is not the right person to raise the issue of wrong accounts being sent to him in this court; that the Plaintiff acquiesced in the charges by the 1st Defendant; that when the Plaintiff went beyond the overdraft facility ceiling that is what attracted the additional 12% interest as it was not within the contract; and that that does not entitle the Plaintiff to a discharge from its obligations under the charge; that the Plaintiff does not dispute the debt with the 1st Defendant and the latter's right to realize its security.

Having perused the pleadings herein, especially the lengthy Affidavits and the annextures thereto, and the authorities cited by counsel for both sides, I have reached the following findings and conclusions.

Interlocutory applications and their outcome have their positives and disadvantages. Within our jurisdiction, they have, by and large, become a tool for litigation by installments. When virtually each and every matter at issue in the Plaint becomes a subject for proof by affidavit evidence, there is virtually nothing of value left for the main trial. That seems to be the position in the present application vis-a-vis the main suit.

The pleadings disclose issues of common ground which need not occupy this court at this interlocutory stage. For example, that there is a loan and an overdraft facility agreement between the parties; that the applicant defaulted on the terms thereof, that the indebtedness issue is only in terms of how much, not whether it is acknowledged; that the provisions of the law on realizing the security by the Defendants and their agents and or servants were clearly violated, but such violations did not, and cannot, obliterate the plaintiff's indebtedness to the 1st Defendant.

To recap, the above issues are, and should be, canvassed at the main trial, yet they occupy more time than the trial itself may not, and should not, take.

Once the legal provisions on realization of the security are not complied with, in the present case failure to give the requisite Notification of Sale, the fact that the public auction did not take place does not cure the unlawfulness of such an aborted sale. The cure lies in the issuance of a fresh Notification of Sale that complies with the legal provisions, it is irrelevant that a chargee's statutory right of sale has arisen. The unlawfulness of exercising such right sweeps the legality completely off its feet.

Before concluding, it is important to point out that grant of interim orders as prayed for in this application, has more often than not, led to the party enjoying such an interim injunction going to sleep. This in turn has led to unnecessary backlog of uncompleted cases, filing the shelves in our courts. That must not be encouraged.

Taking into account all the above reasons, this court grants the following orders:

1. Prayers No. 2 of the Chamber Summons herein, dated 1.7.03, on condition that the Plaintiff moves with speed and picks a hearing date for the suit, within this calendar year, or as soon as practically possible, but not later than the end of the first term of 2006.

2. Costs to be in the cause.

Dated and Delivered in Nairobi this 27th day of May 2005.

O. K. MUTUNGI

JUDGE