



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION –MILIMANI
CIVIL CASE 813 OF 2002**

SYMON THUO MUHIA.....1ST PLAINTIFF

MARY NJOKI THUO.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

This is an application by the Plaintiffs/Chargors to restrain the Defendant/Chargee from selling, alienating, transferring or in any other way dealing with the Plaintiff's property L.R. NO.3591.22 Nairobi pending the final trial and determination of this suit.

The reasons for the Application are that the Defendant's notice dated 21.2.2005 is unlawful and in contempt of Court as the validity of the charge is an issue pending before this Court for determination and that selling the said property as threatened will steal a match on the Court process. The Plaintiff further states that the Defendant cannot prejudge an issue or issues pending before this Court.

The Application is supported by an affidavit sworn by the 1st Plaintiff who also depones that he has been authorized to swear the affidavit on behalf of the 2nd Plaintiff who is his wife. In the affidavit the 1st Plaintiff, depones that the Plaintiffs cause of action is for breach of contract which relates to certain sums advanced to the Plaintiffs by the Defendant on the security of the suit piece of land. The 1st Plaintiff further avers that the reliefs sought in the plaint include rescission of the said contract and discharge of the charge over the said property. He further depones that the Defendant disputes the Plaintiff's claim and has filed a counterclaim and maintains that the said contract and charge are valid and that judgment be entered for the Defendant for Kshs 3,156,509/= plus interest thereon at 26% per annum. He swears that the Defendant has submitted the dispute before this Court for adjudication and/or determination and the case is now set to be heard on 15.12.2005. He further swears that with knowledge of the above facts the Defendant served the Plaintiffs with a Statutory notice dated 21st February, 2005 in alleged exercise of rights or powers under the disputed charge. He also depones that the sums demanded are disputed and are the subject matter of this case. A copy of the said notice is annexed as "SMI". He further swears that by the threatened action the Defendant has usurped the proper function of this Court and prejudices the issues raised and amount to stealing a match on the Court process; is unlawful and amounts to contempt of Court.

The Defendant opposes the Application and has filed Grounds of Opposition. It has also filed a Replying Affidavit. The replying affidavit is sworn by one Joseph Kania the Manager Legal Services of the Defendant. He swears that there are no orders restraining the Defendant from exercising its statutory power of sale over the suit property. He further swears that a dispute on accounts is not a ground for the grant of an injunction. He therefore contends that the Plaintiffs have not established a prima facie case and their Application should be dismissed.

The Application was canvassed before me on 20th May 2005 by Mr. Oyatsi Learned Counsel for the Plaintiffs and Mr. Issa Learned Counsel for the Defendant. Mr. Oyatsi substantiated the averments in the supporting affidavit and emphasized that if the suit property is sold the Defendant will be stealing a match against the Plaintiff and the Court. Reliance was placed on the case of **Haircare Beauticians Ltd –v- Standard Properties Ltd and Another: Nairobi CA. No.179 of 1998 (UR)** which was an application for stay of execution and while the application was pending hearing the Applicant was evicted. The Court of Appeal observed that it would not sit back and encourage conduct unlawful or wrongful as a passport to favour. The Court granted a mandatory injunction restoring possession of the suit premises to the Applicant.

Counsel also relied on the provisions of Section 52 of the I.T.P.A. and argued that if the Defendant wanted to sell the suit premises, it should have sought leave of the Court. It was argued for the Plaintiff that if the suit property is sold an issue already pending before this Court will have been determined without trial. This according to Counsel would be unlawful. Counsel relied upon Halsbury's Laws of England Forth Edition Volume 9 paragraph 26 where the Learned author observes that commenting on pending legal proceedings which purports to prejudge the issues which are to be tried by the Court is intrinsically objectionable as being a usurpation of the proper function of the Court and may be punished as a contempt.

Counsel for the Defendant in opposing the application also substantiated the averments in the Replying Affidavit. He emphasized that for a party to be entitled to the equitable relief of a temporary injunction he had to establish the conditions set out in the case of **Giella –v- Cassman Brown and Co. Ltd (1973) EA 358**. In Counsel's view the Plaintiff had not attempted to establish the said conditions. Counsel submitted that there was no dispute that the Plaintiffs executed a charge in favour of the Defendant and the only issue for determination is whether or not the Defendant's statutory power of sale had arisen. In Counsel's view it had and the question of prejudice did not arise. Counsel argued that the authorities relied upon by the Plaintiff were not relevant. In Counsel's view Section 52 of I.T.P.A. does not prevent the exercise of the power of sale under Section 69 of I.T.P.A.

Having set out the rival contentions, I take the following view of the matter. For a party to benefit from an order of a temporary injunction, he must show that he has a prima facie case with a probability of success at the trial. If the Court is in doubt as to whether or not a prima facie case has been shown, it will decide the Application on a balance of convenience. The Applicant should also show that damages would not be an adequate remedy for the injury suffered or likely to suffer if he is to obtain an interlocutory injunction. So, have the Plaintiffs shown a prima facie case with a probability of success at the trial?. The Plaintiffs concede that they executed a charge over the suit property. They say that they executed the charge in the belief that it would secure the principal sum borrowed plus interest and this was on the representations of the Defendant. In breach of the contract the Plaintiffs allege that the Defendant debited their loan account with various charges which belied the representations made by the Defendant. In the premises the Plaintiff prays that the contract be rescinded and the charge be cancelled and a discharge of the charge be registered against the suit property. The Plaintiff further prays for injunction restraining the Defendant from exercising any rights whatsoever under the said charge and the contract. They also seek a mandatory injunction compelling the Defendant to execute the discharge of the said charge and to deliver all the documents of title of the suit property. There is also a prayer for refund of funds allegedly paid in excess of sums due to the Defendant under the charge. It is significant that the Plaintiffs filed this suit before the Defendant had served any Statutory Notice of sale under the charge.

The Defendant delivered a defence and counterclaimed for Kshs 3,155,509.00 plus interest at 26% p.a. from 9th May 2002 until payment in full. In the body of the defence the Defendant averred that it was an implied term of the charge contract that if the plaintiffs failed to honour their obligations, the Defendant were entitled to charge an extra like default charge, penalty interest or other charges in order to force the Plaintiffs to adhere to their obligations and in order to mitigate the financial loss occasioned by the Plaintiff's default. The Defendant further avers that the extra charges were pursuant to well established trade custom and usage of which the Plaintiffs were aware. The Defendant also averred that the Plaintiffs were not entitled to rescind the contract and further that the Defendant held them to their covenant.

In a reply filed by the Plaintiffs it was averred that there were no implied terms to the charge and that the provisions of the charge could not alter or vary or supercede the express terms of the contract. The Plaintiff further denied the alleged established practice allowing extra charges and alternatively that if such a custom or usage existed it did not apply where there was a formal written agreement. The Plaintiffs also denied knowledge of such extra charges or practice. The counterclaim was denied.

From the above pleadings, it emerges that the Plaintiff's case at the trial will be that they have more than discharged their obligations to the Defendant under the charge and the extra levies or charges were not provided for in the documents that founded the contract.

The Defendant's case on the other hand will be that the extra, levies or charges were chargeable by reason of implied terms in the charge documents and also on the basis of established tradition or custom or usage as the Plaintiffs had let their mortgage account to fall in arrears. At this stage I am not required to determine any of the rival contentions with finality. Bearing that in mind, I am inclined to the opinion that the Plaintiffs appear to be on firmer ground as they base their contention on express terms of the contract whereas the Defendant bases its contention on a custom or usage which will have to be proved on a balance of probabilities at the trial. Being of that opinion I hold that the Plaintiffs' challenge against the default charges, other charges, interest on arrears and penalty interest is not a mere dispute over the amount payable. It is a challenge on the very basis of the Defendants claim. It is the basis upon which the Defendant seeks to exercise its statutory power of sale.

On a *prima facie* basis and as the Plaintiff has demonstrated that the only sums being claimed by the Defendant constitute the said extra levies and or charges and or penalty interest not provided for in the contract between them and the Defendant, I find that they have shown that they have a prima facie case with a probability of success at the trial.

The second necessary condition to consider is whether the Plaintiffs' injury could adequately be compensated in damages if an injunction were not granted at this stage. It has been held that once land has been charged it ipso facto becomes a commodity for sale. Loss of such a commodity would be compensable by damages. However, money is not everything. In any event it is not the Law that no temporary injunction will issue in all cases where damages are an adequate remedy. Indeed the Court of Appeal in the precedent setting case of **Giella –v- Cassman Brown & Co. Ltd** (supra) in respect of the second condition said:-

“normally an injunction will not issue where the injury complained of would be adequately compensated in damages”

The wording of this second condition suggests that the Court of Appeal recognized that there may be cases where an injunction will issue even if damages would be an adequate remedy for the injury the Applicant may suffer if the injunction is not granted.

In this case, the Plaintiffs allege that they have not only paid their obligation under the charge but have exceeded their obligation and made excess payment. In the light of the circumstances of this case I am inclined to grant the interlocutory relief of injunction sought. I accordingly order that a temporary injunction do issue restraining the Defendant from selling, alienating, transferring or in any other way dealing with the Plaintiffs' property L.R. No.3591.22 Nairobi pending the hearing and determination of this suit. The said injunction will be conditional on the Plaintiffs filing an undertaking on oath to pay damages, if any to the Defendant in the event that it is found at the trial that the injunction ought not to have been issued. The said undertaking to be filed within seven (7) days of today.

Costs shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-

Kimani for Issa for the Defendant

And Kilonzo Ms for Oyatsi.

F. AZANGALALA

JUDGE

14.6.2005