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

Civil Case 553 of 2004

ISAACK KINYANJUI NJOROGE……..…PLAINTIFF

VERSUS

SAVINGS & LOAN (K) LIMITED…….DEFENDANT

R U L I N G

This application is brought pursuant to the provisions of Order 39 rules 1, 2, 3 and 9 of the Civil Procedure Rules; Section 3A of the Civil Procedure Act; the court's inherent jurisdiction; and all other powers and enabling provisions.

The substantive prayers sought by the Plaintiff are worded as follows:-

> **"1.THAT service of this application be dispensed with in the first instance.**
>
> **2. THAT the Defendant whether by itself or its servants or agents, or advocate or auctioneers or any of them or otherwise be restrained by an order for injunction until judgement in this action or further order of this court from the following acts or any of them, that is to say from advertising for sale, selling by public auction or private treaty or otherwise howsoever at any other time from completing by conveyance or transfer of any sale concluded by auction or leasing, letting otherwise howsoever interfering with the ownership of the title to and/or interest in THAT parcel of land known as L.R. No. 8285/219 – Kariobangi Nairobi (Hereinafter called the said "property").**
>
> **3. ALL FURTHER REGISTRATION or change of registration in the ownership, leasing, subleasing, Allotment, user, occupation or in any kind of right, title or interest in the said property with any Land Registry, Government Department and all other registering authorities BE AND IS HEREBY prohibited until further orders of this Honourable Court.**
>
> **4. THAT pending the hearing of this application, inter-partes, and interim order in terms of prayers 2 and 3 hereinabove be made to ensure that the orders made thereon are not rendered nugatory.**
>
> **5. THAT cost of and occasioned by this application be taxed and paid by the Defendant to the Plaintiff."**

It was the applicant's case that the statutory notice served upon him was defective. The defect was attributed to the fact that the period of the notice was said to run from the date of the said notice, as opposed to the date of service.

Secondly, the applicant submitted that the debits of interest to the loan were illegal. The grounds for

the illegality were two, said the applicant – first, that the charge documents were not signed by the Defendant. And, second, because there were two different securities which were to secure lendings at different times. The said securities were in the form of charges, which cited different rates of interest. Therefore, as far as the applicant is concerned, the statements of account maintained by the Respondent should have reflected the two different rates of interest. However, there were no such distinctions in the statements of account, and the applicant feels that it would be inequitable for the Respondent to demand such money which are not calculated on the basis of the two rates of interest. The applicant's contention is that by calculating interest on a uniform rate, whereas the charge documents provided for different rates, the Respondent was deviating from the terms of the contract.

The interest debited in contravention of the terms of the charge and supplemental charge are described as illegal, and the applicant submits that the respondent ought not to be allowed to exercise its statutory powers of sale, in the face of such illegality.

For those reasons, the court was asked to issue an injunction to stop the realisation of the securities.

In response to the Plaintiff's submissions, Mrs Shaw, advocate for the Defendant first pointed out that the Plaintiff did not place before the court, such material as would enable the court to grant the orders sought. She said that all the material which the applicant was making reference to, in putting forward his application, had been provided by the respondent. For that reason, the respondent feels that the applicant does not deserve the equitable remedy of an interim injunction, as he had not done equity.

If that complaint is meant to persuade the court that it should only give due consideration to the material which the applicant has placed before it when adjudicating on the application, then I must say that I do not appreciate its legal foundation. In my considered view, once material has been placed before the court, it matters not who put forward the said material. The court would then be obliged to give due consideration to such material, subject only to the rules as to admissibility.

In this case, the respondent is not suggesting that the material which it placed before the court was inadmissible. The Defendant only feels that without reference to such material, the applicant would have been unable to sustain his application. If my said understanding of the respondent's objection is correct, then all I can say is that the Defendant should not have helped the applicant by providing the documentation which the Plaintiff had omitted. But, once the said documentation was made available to the court, the defendant cannot then complain that the Plaintiff was using them to his advantage.

Next, the respondent submitted that the conduct of the applicant, over the years, was proof that the applicant was guilty of abuse of the court process. In order to emphasise that point, the respondent indicated that since the applicant was served with a statutory notice dated 6th June, 2001, he had filed a litany of suits and applications. The first such suit was HCCC No. 403 of 2001, which was filed on 19th March 2001. In that suit, the Plaintiff claimed that he had not been served with a statutory notice.

According to Mr. Laban Rotich the Defendant's Branch Manager at its Autorama Building Branch, where the Plaintiff is a customer, the Defendant did issue a statutory notice, subsequent to the challenge mounted by the Plaintiff, in that suit.

Thereafter, on 21st May 2002, the Plaintiff filed a new suit, HCCC No. 615 of 2002. One of the issues in that suit was that the statutory notice, issued on 6th June 2001, was defective. From the documents annexed to the affidavit of Laban Rotich, it is not clear what happened to that application.

But, it is clear that on 1st September 2003, the Plaintiff sued the Defendant in HCCC No. 535 of 2003. Once again, the Plaintiff raised the issue as to the perceived defect in the statutory notice dated 6th June 2001.

The Defendant then, objected, successfully to the prosecution of HCCC No. 535 of 2003, provided that the first suit which had been filed by the Plaintiff was still subsisting. In a considered Ruling, L. Njagi J. stayed the suit. In the light of that development, the Plaintiff withdrew the second suit (i.e HCCC

No. 615 of 2002), leaving the other two cases still pending.

From the history of the litigation between the parties herein, the Defendant strongly feels that the Plaintiff was bent on filing new cases, every time the Defendant took steps to realise the security. Therefore, the Defendant deems the applicant's actions as an abuse of court process, which should be sufficient to have the Plaintiff declared a vexatious litigant. The Defendant's views in this regard are informed not only by the number of cases filed by the applicant, but also by virtue of the fact that the Plaintiff had failed to disclose, to this court, the existence of the cases which he had filed earlier.

The statute which governs vexatious proceedings is aptly named as **"The Vexatious Proceedings Act",** and it is Cap. 41. By virtue of section 2 thereof, the High Court is empowered to declare a person a vexatious litigant. However, such declarations would need to be made in applications made at the instance of the Attorney General.Secondly, the orders can only be made after the court grants the said person an opportunity of being heard, in such proceedings.

Therefore, I hold the considered view that the declaration sought by the respondent cannot be granted in the present proceedings.

The Defendant then pointed out the fact that the Plaintiff had expressly admitted owing money to the Defendant. The said admission of indebtedness is contained in a letter written by the Plaintiff's previous advocates, M/s Onesmus Githinji & Company.By a letter dated 23rd July 2002, those advocates stated, inter alia, as follows:-

"The technical issue raised in the suit notwithstanding, it is acknowledged that our client is indebted to yours but not to the extent indicated in the notification of sale. We have advised our client and he is prepared to pay to yours what is properly and actually due."

As a follow-up to that letter, the Plaintiff engaged messrs Jowan Associates, a firm of accountants, financial & management consultants. The said firm issued a report dated 25th January 2003, in which they concluded that the arrears amounted to Kshs. 752,199.40, whilst the interest on arrears amounted to Kshs. 467,829.65. Those were the figures as at 11th October 2002.

But then, as the Plaintiff earlier submitted, he was now disputing the Defendant's right to levy any interest. His reasons being that the charge document was not signed, and also because the charge and the supplemental charge cited different rates of interest, which had not been captured in the statements of account.

In response to those contentions, the Defendant has submitted that the parties did consider themselves bound by the terms of the charge and supplemental charge. Also, the parties did act in accordance with the terms of the said securities, including the issuance of notices to the Plaintiff wherever the Defendant wished to increase the rates of interest.

HARSHAD LTD V. GLOBE CINEMA LTD & OTHERS [1960] EA 1046 was cited as authority for the preposition that want of form could not repudiate the liability of the chargor.

In that case, the mortgage was signed by the borrower only, but not by either the mortgagor or the mortgagee. That notwithstanding, the court held as follows:-

> **"Normally the Registrar of Titles would require both signatures as set out in the form but once the mortgage is registered then surely the rights which are conferred by S. 51, S. 96 and S. 125 proceed to flow. It would defeat the whole purpose of the Ordinance if, in the absence of fraud, a litigant could go behind the fact of registration on a technicality such as this. Here the defendants have acted on the mortgage and although the form is statutory and not contractual I am unable to agree that they can now repudiate their liability on the grounds that the Plaintiff did not sign the mortgage."**

That finding, by Sheridan J., was quoted with approval, by the Court of Appeal **in Uhuru Highway Development Ltd v. Central Bank of Kenya & 2 Others, Civil Appeal No. 126 of 1995.**

In view of that line of reasoning, it is probable that the charge and supplemental charge may ultimately be held to be good security. However, there is no certainty that that will be the position. In other words, although it is an attractive argument, the Plaintiff's challenge to it cannot be dismissed off-hand.

Then, there is the issue as to the interest rates. In the Charge document dated 8th March 1990, the rate of interest cited was 18% per annum. Whilst, in the Further Charge dated 8th October 1991, the specified rate of interest was 21% per annum. Therefore, the Plaintiff contends that the statements of account should have reflected those two rates.

However, the said statements did not have two different rates. Therefore, the Plaintiff says that the amounts being claimed by the Defendant are wrong, because they are informed with interest calculated on the wrong basis.

But the Defendant responds by justifying the interest charged to the account of the Plaintiff. It points out that every single time before the rate of interest was varied, the Defendant gave due notice to the Plaintiff. Copies of the said notices have been made available to the court, and the Plaintiff has not taken issue with them. Does that fact entitle the Defendant to charge such interest as was specified in the notices, even if the same were not the rates spelt out in the Charge and Further Charge?

In **FINA BANK LTD V. RONAK LTD [2001] 1 E.A 65**, the Court held that there was no sound basis for granting an interim injunction simply because the charge document did not specify the exact rate of interest. In that case, the charge documents reserved, in favour of the chargee, the right to charge interest at variable rates, in its absolute and sole discretion. However, no exact rates were specified.

In the present case, both the charge as well as the further charge did specify a rate of interest. But the said security documents also expressly reserved, in favour of the bank, in its sole discretion, the right to charge such rate or rates of interest as the bank shall from time to time decide.

In the light of that express term of the charge and further charge, the bank cannot be faulted for charging such rate or rates of interest as it did.

he other issue raised relates to the statutory notice; was it or was it not defective?

The said statutory notice, dated 6th June 2001, indicated that the period of Three Months would run from the date of the notice.

There can be no doubt whatsoever that the notice was defective. **In TRUST BANK LTD V. OKOTH [2000] 1 EA 274,** it was held that the statutory power of sale was not conferred on a mortgagee could not be exercised unless and until notice requiring payment of the mortgage money had been served on the mortgagor and default had been made in payment thereof for three months after service. That decision was arrived at by the Court of Appeal when it was giving consideration to the provisions of Section 69A (1) (a) of the Indian Transfer of Property Act.

Notwithstanding the defect in the statutory notice, the bank insists that it was entitled to realise the security. The reason for that contention was that the bank did not invoke the provisions of Section 69A (1) (a, but that they placed reliance on the provisions of Section 69A (1) (b). The said Provisions of statute reads as follows:

"69A (1) 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 of two or more mortgagors, and default has been made in payment of the mortgage-money,**

or any part thereof, for three months after service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due."

The two subsections are clearly disjunctive. In other words, each of them gives rise to the right by the morgagee to realise the security. In effect, the mortgagee can exercise its statutory power of sale after giving three months notice, or alternatively, after the interest has been in arrears for two months or more. In the latter case, there is no requirement for issuing notice.

In the Replying Affidavit, the Defendant has made it clear that it was invoking the provisions of Section 69A (1) (b). Therefore, the Defendant did not need to issue a statutory notice. In **OCEANIC VIEW HOTEL LTD V. KENYA COMMERCIAL BANK LTD**, MSA **HCCC NO. 241/00**, Khaminwa Comm. of Assize (as she then was) held as follows:-

"I find that this statutory notice purported to be served upon the company was not valid for being contrary to the statutory requirements. However, it is clear that the Bank could lawfully exercise its powers of sale because interest was outstanding for more than 2 months period."

In principle, I am in agreement with that finding, as it is founded on the wording of the statutory provisions. However, I feel that it is necessary to make one point. If the chargee should issue a statutory notice which is defective, he ought not to be allowed to proceed with the exercise of his statutory power of sale, by invoking the provisions of Section 69A (1) (b), in the same breath. By giving notice, the chargee must be deemed to have exercised the option of invoking Section 69A (1) (a). Therefore if that notice is invalid, the mortgagee must go back to the drawing boards, to invoke Section 69A (1) (b).

In this case, the statutory notice is defective. But the Bank is not placing reliance on it at all. Indeed, the said notice dates back to 2001. Therefore, in my considered view, there would be nothing wrong for the bank to now rely on the provisions of Section 69A (1) (b), as it has done.

The Plaintiff's own accountant has expressly stated, in his report, that the Plaintiff is in arrears of interest. That fact would entitle the bank to exercise its statutory powers of sale, without having to give notice to the Plaintiff.

In conclusion, I find that there is one arguable cause of action. It pertains to the effect of the unsigned security document. If the said documents should ultimately be held to be invalid, as security, the Plaintiff may well prove that the bank did not have legal authority to exercise a statutory power of sale, over the suit property. But at the same time, if such power had been exercised, the result would be messy, insofar as the property may already be in the hands of a third party, who was an innocent buyer.

On the other hand, the Plaintiff admits borrowing money, and offering the property as security. He has not repaid the money. Why therefore should he be deserving of the court's protection simply because the securities, though registered, were not signed by the chargee?

In an endeavour to do justice to the parties, I did order the Plaintiff to pay a total of Kshs. 300,000/= by 30th June, 2005, as a pre-condition to putting-off the sale, which had been scheduled for 23rd June 2005. If the Plaintiff made the said payment, I believe that he is entitled to further protection. But as the debt was said to be in the sum of Kshs. 2,864,833.14, as at 30th July 2004, it would only be right to withhold the Defendant from exercising its statutory powers of sale if the Plaintiff made further payments. Therefore, I do order the Plaintiff to pay a further amount of Kshs. 700,000/- on or before 30th October 2005. If he pays that sum, over and above the earlier ordered payment of Kshs. 300,000/=, the Defendant will be restrained from selling the suit property, L.R. No. 8285/219 – Kariobangi, Nairobi, until this suit is heard and determined. However, if the Plaintiff did not pay the Kshs. 300,000/=, as earlier ordered; or if he does not pay the further sum of Kshs. 700,000/=, as now directed, this application for injunction will stand dismissed with costs.

The costs of this application shall be in the cause.

Dated and Delivered at Nairobi this 27th day July 2005.

FRED A . OCHIENG
JUDGE