



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT 432 OF 2005

JOHN GITHUI NATHAN IKUBUPLAINTIFF

VERSUS

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

R U L I N G

The plaintiff who acted in person argued his application brought under Order 39 Rule 1,2,3 and 9 of the Civil Procedure Rules and sought the following orders: -

“ · That this Honourable court be pleased to order a temporary injunction restraining the defendant/respondent from selling or otherwise disposing of all the property known as NAIROBI/BLOCK 82/773 registered in the name of the plaintiff/applicant pending the hearing and final determination of this suit.

That this Honourable court be pleased to order the defendant/respondent to issue to the plaintiff/applicant a just and true contemporary account of the amounts owing from the plaintiff/applicant to the defendant/respondent pursuant to the terms mortgage facility provided to him as contained in the charge dated 26th may 1987”

The plaintiff’s application was supported by his affidavit. The following are the pertinent issues that, that affidavit brings out: ·

That the plaintiff borrowed from the defendant kshs 333, 000 on 27th May 1987 for the purchase of the property NAIROBI/BLOCK 82/773 (hereinafter called the suit property · The said suit property was charged to the defendant as security for the said facility. · That he faithfully serviced that loan up to 1993 when he lost his job.

· That between the years 1993 to 2005 the defendant began to levy on the plaintiff’s account arbitrary default charges and or penalties that were not provided for in the charge · That on diverse dates between the years 1987 to 2005 the defendant, in breach of the charge, arbitrary increased the rate of interest charged on the plaintiff’s mortgage account without prior notice to the plaintiff

· That between the years 1993 and 2005 the defendant contrived a situation whereby the plaintiff was unable to keep track of what he owed. · The defendant provided the plaintiff with a statement of the mortgage account, which showed that as at 17th June 2005 the plaintiff was indebted to the defendant kshs 1, 161, 264. 05: and the auctioneer, on the defendant’s instructions issued the plaintiff with the 45 days notice dated 17th June 2005, which indicated the plaintiff’s indebtedness to the defendant to be kshs 2, 511, 707. 10.

· **That in view of the matters shown hereinabove and the breach of the defendant the plaintiff stated that the defendant rendered it impossible for him to redeem the security of the suit property.**

The plaintiff in oral submissions said that he did not receive bank statements from the defendant and when he requested for the same the defendant threatened to sell the suit property.

He further said that since the filing of this matter the defendant served the plaintiff with another 45 days notice from auctioneers, which notice indicated the amount due as at 31st July 2005 to be kshs 1, 185, 006. The plaintiff then took the court through various entries in his account, which he said were contradictory, and showed sometimes increment or decrease without explanation. The plaintiff did not swear an affidavit in support of this argument, and the same were statements from the 'bar'. The plaintiff sought for prayers to be granted as prayed.

The defendant opposed the application and in so doing filed an affidavit and grounds of opposition. The defendant's affidavit brings out the following issues: - ·

That indeed the plaintiff was granted a facility by the defendant as pleaded in the plaint which was secured by the suit property. The defendant annexed the charge document. · That it was the term of the charge that the loan would attract interest initially of 1% per annum and the defendant was entitled to vary the interest at its own discretion.

· That the plaintiff who was in arrears communicated with the defendant on ways in which he proposed to pay those arrears. · That the defendant is entitled to charge interest on arrears and the principal amount. · That the defendant has acted bona fide and had often indulged the plaintiff · The defendant admitted that the auctioneer had demanded for an incorrect amount of kshs 2, 511, 707. 10 instead of kshs 1, 161, 264. 05.

In submissions counsel for the defendant stated that the plaintiff had not denied default and accordingly the defendant was within its right to exercise its statutory power of sale. That the issues raised by the plaintiff does not entitle him to the prayers for injunction. The defendant relied on the cases: - GCC 1534 OF 2000 MILIMANI CAESAR NJAGI KUNGURU – VERSUS - KENYA COMMERCIAL BANK LTD. That case held as follows: -

“It is trite law that a dispute as to the exact amount owed under the charge is not a ground for restraining a lender from exercising a statutory power of sale.”

HCCC NO 1129 OF 2000 MILIMANI LAWRENCE MUTHIANI MAITHYA – VERSUS – HOUSING FINANCE CO. OF KENYA LTD. In this case the court found that the plaintiff had not done equity, in that he had not serviced the loan. Injunction was refused. HCCC NO. 78 OF 2005 MILIMANI KENNETH NJAGI NJERU – VERSUS – HOUSING FINANCE CO. OF KENYA LTD. In this case the court faulted the plaintiff's failure to state the amount or state of affairs of his account with defendant the injunction application was dismissed. In considering my ruling I ought to be guided by the principles in the case of GIELLA – VERSUS – CASSMAN BROWN CO. LTD [1973] EA 358. The first principle is whether the plaintiff has shown a prima facie case with probability of success. To consider this principle I ought to consider the issues raised by the plaintiff. The plaintiff complained that the defendant arbitrarily increased interest rate and debited charges, which were not authorised. On the issues of the charges so debited the plaintiff failed to clearly state which ones they were. However on the issue of increment of interest rate I find that the plaintiff may have established prima facie case. The charge annexed to the plaintiff's affidavit and the defendant's replying affidavit does not have clause No. 5, which is the clause that deals with interest. I am not sure whether its exclusion is deliberate or not, had its exclusion only been on the plaintiff's affidavit the inference would have gone against the plaintiff. But when I checked the defendant's copy, it too did not have that clause. That being the case the defendant on a prima facie basis was not entitled to increase the rate of interest of the plaintiff's mortgage account.

The defendant, before this matter was filed in court, instructed an auctioneer to demand by 45 days

notice dated 17.6.2005 kshs 2, 511, 707. 10. After the filing of this suit the defendant by another 45 days notice dated 16.8.2005 demanded kshs 1, 185, 006. 00. It is not suggested by either party that any payment was made to the mortgage account to reduce the amount demanded so drastically. The defendant in its replying affidavit simply states that there was an error. They however do not state the form the error took. This is worrying particularly when one considers that the defendant's statement plaintiff's exhibit No. "JGNJ3" shows the amount due as at 17.6.2005 was kshs 1, 161, 264. 05, clearly which is not the amount reflected in the 45 days notice of the same date. This confusion of the amount being claimed from the plaintiff leads credence to the plaintiffs claim that the defendant has been arbitrary debiting wrong interest and unauthorized charges from the date of charge instrument

On a prima facie basis I am of the view that the plaintiff has satisfied the first principle of GIELLA – VERSUS –CASSMAN BROWN & CO LTD (Supra) and is deserving of an injunction sought.

The orders of the court are: -

(1) That this court does hereby grant the plaintiff a temporary injunction restraining the defendant from selling or otherwise disposing of all that property known as NAIROBI/BLOCK 82/773 pending the hearing and final determination of this suit.

(2) That the costs of the application dated 1st August 2005 are hereby granted to the plaintiff.

Dated and delivered this 28th September 2005.

MARY KASANGO

JUDGE