REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE 428 OF 2001

KYANGAVO ..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. & ANOTHER ..... DEFENDANTS

JUDGMENT

By a plaint dated 22nd March, 2001 and filed in court on the same day, the plaintiff prays for judgment to be entered against the defendants, jointly and severally, for an injunction restraining the defendants by themselves or by their agents and or servants from alienating and or selling the plaintiff's parcel of land known as Ngong/Ngong/20499. He also prays for costs of this suit plus interest at court rates until payment in full.

The facts of the case are fairly straight forward and mostly not in dispute. In a nutshell, the plaintiff used to be a member of staff in the employment of the Kenya Commercial Bank Limited with effect from October 7, 1991. By a letter dated 17th April, 1998, he applied for a loan from the Bank. The Bank responded by a letter dated May 13, 1998, by and in which the Bank confirmed having granted a loan of Ksh 1,459,920/= under the Staff House Loan Scheme to enable the plaintiff purchase a house on LR No Ngong/Ngong/20499 at a total cost of 1,664,840/= inclusive of legal fees and stamp duty. According to that letter, the Bank's approval was "subject to compliance with all terms and conditions governing Staff House Loan Scheme as applicable to clerical staff and applicant meeting shortfall of Ksh 20,492/= from his own resources upfront."

Another term in the letter of offer was that the Bank would require a legal charge for Ksh 1,700,000/= over the suit property. By a charge instrument made the 27th day of May, 1998 and registered on June 2nd, 1998, the suit property was accordingly charged in favour of the Bank to secure the payment to the Bank of such sum not exceeding Ksh 1,700,000/= as then may be due and owing by the chargor to the Bank.

By a letter dated August 9th, 1999, the first defendant's manager, Banking services Branch, Moi Avenue, addressed a letter to the plaintiff to the effect that after due investigation, the said manager was satisfied that on diverse dates in July and August, 1999, the plaintiff involved himself in activities injurious to the latter's employer's interests. The letter said that the plaintiff was conversant with the details thereof. The plaintiff was further told in the letter that this was in contravention of the provisions of clause 5a(Viii) of the collective agreement covering section heads, check clerks, clerical, technical and subordinate staff. In view of this, the plaintiff was instantly dismissed from the Bank's service with effect from that letter's date, ie August 9th, 1999.

Following his dismissal from employment, the plaintiff does not seem to have serviced the loan from his erstwhile employer. Some letters demanding payment of arrears were written to him by the former employer between February and May, 2000, but there was no response. The matter was then referred to the bank's advocates who set in motion the procedures for realization of the security. These procedures culminated in the filing of this suit, seeking an injunction to restrain the Bank, as the first defendants, and the auctioneers, as the second defendants, from alienating and or selling the suit property as indicated earlier on.

The plaintiff's case against the defendants is that it was a term of the charge document that the interest applicable to the loan was 3% per annum, and that in breach of the terms of that charge, the first defendant charged interest on the loan at a rate of 36%. It is also his case that on or about 19th March, 2001, the defendants unlawfully and fraudulently advertised the plaintiff's parcel of land for sale by public auction on the 28th March, 2001. The particulars of fraud as stated in the plaint are that;

(i) the defendants had not served the plaintiff with the statutory notice,

(ii) the purported sale was unlawful and irregular,

(iii) the first defendant had charged a higher interest rate than the interest provided for under the charge

(iv) the sale had been fixed on a date prior to expiry of the purported notice period, and

(v) the scheduled public auction was contrary to the provisions of the Auctioneers Act.

In their defence filed in court on 2nd May, 2001, the defendants denied that they breached the term in the charge relating to interest and stated that reference to the breach in the plaint was misleading as to the full purport of the contents, terms and conditions contained in the charge document. The defendants further stated that the terms and conditions of the charge were very clear and the first defendant would crave leave to refer to the document for the full purport and intent thereof. Regarding the alleged fraud, the first defendant replied that the statutory notice was issued to the plaintiff vide the registered post to his last known address; that the notification of sale issued to the plaintiff was lawful and regular; that the claim that the first defendant had charged a higher interest rate than the interest provided for under the charge was denied in *toto*; that the allegation that the sale had been fixed on a date prior to expiry of the purported notice period was untrue and intended to mislead the Court. Finally, the defendants stated that the public auction scheduled for 28th March 2001 was not arranged contrary to the provisions of the Auctioneers Act as all the Rules had been complied with. The first defendant also averred that the plaint was defective as it did not state where the cause of action arose, and that the plaintiff's claims and prayers were misconceived and an abuse of the court's powers as they were calculated to extinguish the unfettered statutory power of sale of the first defendant which was being exercised lawfully.

Arising out of the pleadings, on 22nd August, 2001 the parties filed a statement of agreed issues. These were-

1. Whether the first defendant advanced to the plaintiff a sum of Ksh.1,700,000/= under the Staff House Loan Scheme to purchase parcel of land known as LR No Ngong/Ngong/20499

2. Whether the first defendant charged parcel of land No Ngong/Ngong/20499 to secure the loan of Ksh 1,700,000/= advanced to the plaintiff.

3. Whether the advanced loan was Ksh 1,459,920/= or Ksh 1,700,000/=

4. What was the interest rate of the loan during employment and after employment with the first defendant.

5. Whether the first defendant breached the terms of the charge document.

6. Whether the defendants unlawfully and fraudulently advertised the plaintiff's parcel of land for sale by public auction on the 28th March, 2001.

7. Whether the particulars of fraud are correct.

8. Whether the plaint is defective

9. Whether the plaintiff's claim and prayers are misplaced, misconceived and a total abuse of the Honourable Court's powers

10. What orders should be made as to costs.

The plaintiff himself gave evidence under oath as PW1 and did not call any other witnesses. In his evidence in chief, he said that he used to be an employee of the Kenya Commercial Bank from 7th October, 1991 up to August, 1999. By a letter dated 17th April, 1998, he applied for a loan for Ksh 1,670,000/= from the Bank, and it was granted to him as evidenced in a letter of confirmation dated 13th May, 1998. The loan was broken into two- a house loan amounting to Ksh 1,459,920/= repayable by monthly instalments of Ksh 6,924/= per month over a period of 25 years and at an interest rate of 3% per annum. Secondly, there was a commercial loan amounting to Ksh 184,428/= payable over a period of 8 years at Ksh 3,704/= per month at an interest rate of 8% per annum. If he defaulted in payment, then a default rate would be charged at 15% per annum over and above the rates indicated. He produced the bank's letter of confirmation as plaintiff's exhibit No 1

The letter also provided that there would be no drawdown until the plaintiff provided security for the loan, and the security required was a legal charge for Ksh 1,700,000/= over the purchased property. The charge instrument was accordingly prepared in respect of parcel of land Reg No Ngong/ Ngong/20499. He signed the document on a date he did not remember and it was duly registered. The loan was to be repaid from his salary and the deductions were to be effected by the check-off system. In 1999, he was dismissed from the Bank and from then he didn't continue repaying the loan, but until then he had been servicing the loan.

Shown a letter dated 17th February, 2000 which was addressed to him through PO Box 28 Migwani and which letter was in respect of a banking facility, the plaintiff said that he did not receive the letter as his correct address was Box 10721, and when he was in the Bank he was using the bank's address at Box 30081, Nairobi. The letter dated 17th February, 2000 is No 7 of the first defendant's list of documents. The plaintiff said he did not receive any other communication. The next he came to hear about this matter was when he was served with a notice giving him 45 days within which to make payment of Ksh 1,424,737/= being the amount owing on the loan. He got this letter on 31st December, 2000. In paragraph 2 of that notice, he was given further notice that the sale of the property which was the subject matter of that notice would be advertised for sale by public auction upon expiry of the 45 days notice. This was followed by an advertisement of the property in the Daily Nation of March 19, 2001, and the property was going to be sold on 28th March, 2001. The letter of Notification of Sale was produced as exhibit No 4. It said that the sum of Ksh 1,424,737/= was the amount outstanding as at 31st December, 2000, with interest at the rate of 36.5%.

The plaintiff said that from the letter of offer, the rate of interest payable upon default was 18% on the house loan and 23% on the commercial loan. He was not given the whole amount of the loan he had applied for. Instead, he was advanced Ksh 1,459,920/= for the house and Ksh 184,428/ = by way of the commercial loan. He was then required to pay Ksh 20,492/= upfront. He concluded his evidence in chief by stating that the additional 15% interest above the rates indicated, was to be a default rate, but it was not to be imposed upon leaving the bank.

In cross examination by Mr Muriithi for the first defendant, the witness said he was neither a lawyer nor an auctioneer. Upon leaving employment of the Bank, he knew the facilities he had enjoyed would no longer be available to him as they were exclusively for staff working in the Bank. He was then shown a charge instrument which he admitted having executed. At page 4 of that document, he said that the Bank

could charge any rate of interest it pleased. He also confirmed having signed that charge instrument. When the plaintiff was applying for employment, he had used PO Box 28 Migwani as his address, but when he left the employment of the bank, he neither told the Bank that he would not be using that address, nor did he inform them of the address he would be using. When referred to the notice of public auction appearing in the Daily Nation of Monday, March 19, 2001, he acknowledged it was a public auction notice, but denied ever having seen any other notice. He also admitted having borrowed some money from the first defendant, and having not been paying since he left the employment of the Bank. The witness further admitted that he owes money to the Bank; that he has not paid any installment since he left the bank in August, 1999; that he was in default in servicing his loan and yet he was still in possession of the property purchased with the proceeds of that loan; and also that he had not made any payment in the last four years.

The witness further told the Court that he was dismissed from his employment because there was a fraud in the Bank and he was suspected of having been involved. However, he neither sued the Bank, nor did he take any other measures upon that matter. He also told the Court that as of 17th February, 2000, the outstanding balance on the loan was Ksh1,221,041/80, and that by December that year the balance had risen to Ksh1,479,471/45, even though the notice was demanding Ksh 1,424,737/20 being the amount outstanding as at 31st December, 2002.

He finally said that he did not receive any notice sent through Migwani, but he admitted that he owed and still owes the Bank some money. That was the close of the plaintiff’s case.

The defence called one witness, Mr Kihago Nyagaka Atunda, who gave evidence under oath as DW1, and the defence did not call any other witnesses. Mr Atunda testified that he works with the Kenya Commercial Bank in the department which deals with recoveries. He knew the circumstances under which the plaintiff left the employment of the Bank, and before he left he had two loans. The first one was a house loan for Ksh 1,459,920/= and the second one a commercial loan for Ksh 184,428/ =. Although he had applied for a loan for Ksh 1,670,000/=, the charge executed was for Khs 1,700,000/=. The interest rate was 3% per annum on the house loan while on the commercial loan it was 8% per annum. Whereas the house loan was repayable over a period of 25 years, the commercial loan was to be repaid over 8 years.

Under the staff terms, if there is default in repayment, one is penalized by paying an extra interest rate of 15% over and above the staff rate, and this percentage does not change. But members of the public pay a much higher rate of interest than staff. If a member of staff leaves employment of the bank, he or she immediately ceases to enjoy the staff terms and pays interest like any other member of the public. But should he or she come back to work for the Bank, then he or she would revert back to the enjoyment of staff rates.

A day after the plaintiff left the employment of the Bank on 9th August, 1999, the rate of interest payable on his loan was varied from 3% staff rate to the market rates. Since leaving that employment, he never paid anything, and at the time of the hearing of this suit, the balance payable stood at Ksh 2,178,711/70. According to the charge instrument, the plaintiff's address was PO Box 30081, Nairobi, but after leaving employment, he never went back even to collect his mail. He should have gone back to arrange for the repayment of the loan but he didn’t.

Under cross examination by Ms Kalewa for the plaintiff, the witness said that the first time an auction was arranged for the sale of the suit property was around October, 2000. However, it did not take place because the date was changed to 28th March, 2001. Even though the plaintiff accuses the Bank of operating fraudulently, the first defendant’s lawyers issued the required three months statutory notice on 8th June, 2000. The witness did not think that this court has the power to grant the only prayer sought by the plaintiff.

The witness further said that upon an employee leaving the Bank’s employment, the terms of the loan repayment would change. However, he admitted that the letter of offer does not state that the interest rates indicated therein were applicable only to staff members, nor that only staff members would benefit from

those rates. Mr Atunda also said that four demand letters were sent to the defendant on 17th February, 2000; the second one on 13th March, 2000; the third one on 27th March, 2000, and the fourth one on 4th May, 2000. According to the witness, the statutory notice was also sent on 8th June, 2000 by the Bank's lawyers even though the witness had not produced a certificate of posting to show that this letter was sent by registered post. The initial sale was scheduled to be held on 17th December, 2000, but it was rescheduled for 31st December, 2000. The plaintiff was not issued with any other statutory notice, but he was served with a notice dated 22nd February, 2001 giving him 45 days within which to make payment of Ksh 1,424,737/20 outstanding as at 31st December, 2000 with interest at 36.5%… and further notifying him that upon expiry of the said 45 days, the suit property would be advertised for sale by public auction. Otherwise the notification dated 27th October, 2000 was for sale in December.

On re-examination by Mr Muriithi, the witness said he didn't know the difference between an affidavit of service and a certificate of service. The letter of 13th May, 1998 was a letter of offer, and the charge takes precedence over the letter of offer. That was the close of the defendants' case.

In her submission, Ms Kalewa for the plaintiff argued that the intended sale of the plaintiff's property known as Ngong/Ngong/20499 was unlawful and illegal for the reasons that no statutory notice was served on the plaintiff. The notification of sale was unlawful and illegal, and the advertisement was equally illegal and unlawful. The interest charged by the first defendant was also illegal and unlawful, and the defendants herein have not complied with the requisite statutory provisions which are mandatory for the sale of property by public auction.

With regard to the statutory notice, counsel referred to the defendant's exhibit No 8 and submitted that the law is very clear. Section 74(1) of the Registered Land Act, cap 300 of the Laws of Kenya, requires the charge to serve the chargor with three months' notice in writing. The purported notice was not served on the plaintiff. In his evidence, the plaintiff was very clear that the address on the face of the letter, to wit, Box 28 Migwani, did not belong to him. From the charge document dated 27th May, 1998, the plaintiff's address was indicated as Box 30081, Nairobi. The plaintiff had indicated that the address used on the purported notice was not his, and that he had not received the notice. The defendants made no effort to trace the plaintiff although he had an existing account with them. The defendant's agents did not do their best to locate and serve the plaintiff. Counsel therefore submitted that service by registered post to the wrong address was insufficient and of no effect.

In support of her argument, she cited *Simiyu v Housing Finance Company of Kenya* [2001] 2 EA 540 in which it was held that there was no proper statutory notice or notification of sale to the plaintiff because the post office box number used by the first and second defendants did not belong to the plaintiff. She therefore submitted that without service of the statutory notice, any intended sale arising from an illegal notice would be fraudulent.

On the issue of notification of sale, counsel argued that the defendants allegedly sent four notifications of sale. The first one was dated 27th October, 2000 and it was sent to PO Box 28, Migwani. This notice was, therefore, not properly served on the plaintiff as that was not his address. She relied again on the authority of *Simiyu v Housing Finance Company of Kenya* (*supra*) for the proposition that without prior service of notification of sale, the plaintiff could not be said to have been given an opportunity to redeem the charge. In any event, the said notification of sale had advertised the sale for 14th December,2000. In his evidence, the defendant had said that this sale aborted and never took off. Counsel therefore submitted that once the sale did not take off, the notification became stale and spent and could not be of any effect in the absence of another notification on another date as it was only for that specific sale.

The second notice was dated and sent on 1st February, 2001. It was alleged that this notice was sent by registered post, but there was no evidence that it was sent by registered post and no affidavit of service by any of the defendants' agents. Ms Kalewa therefore submitted that the notice of 1st February 2001, was never served on the plaintiff and that from that perspective it was illegal. This particular notice indicated that the public auction would take place on 28th March, 2001. However, it did not comply with rule 15 of the Auctioneers Rules in that it did not disclose the value of the property to be sold or the reserve price. Ms Kalewa therefore contended that these omissions made the notification incurably and fatally

defective. At any rate, that notification did not comply with schedule II of the Auctioneers Rules, and therefore it was unlawful and illegal, she submitted.

On 22nd February, 2001, the defendants sent the third notification of sale giving the plaintiff 45 days notice to pay the amount of the debt outstanding and redeem his property. This notice was served on the plaintiff's wife on 15th March, 2001. A simple computation of 45 days from 22nd February, 2001 shows that these would expire on about the 6th day of April, 2001. In her submission, the period of notice under rule 15 (d) of the Auctioneers Rules is strictly 45 days. It was only after the lapse of 45 days without payment that the defendants would have arranged for the sale of the property and advertised in the newspaper. Counsel therefore submitted that any advertisement before the lapse of 45 days would be illegal and unlawful.

Document No 5 of the plaintiff's list of documents is an advertisement in the Daily Nation of 19th March, 2001, purporting to be a legal advertisement for the sale of the suit property on 28th March, 2001. Ms Kalewa submitted that it was clear from that exhibit that the defendants advertised for sale of the property before the expiry of the mandatory 45 days. Consequently, she further submitted that the sale advertisement was irregular, unlawful and illegal. Furthermore, the advertisement was dated 19th March, 2001 and advertised sale on 28th March, 2001 which was before the expiry of 14 days as provided in rule 15(e) of the Auctioneers Rules. This, Ms Kalewa maintained, was equally illegal. In support of her position she referred to the ruling of Ringera J in *Dr Simon W Chege v Paramount Bank of Kenya Ltd*, Milimani Civil Suit No 360 of 2001 for the proposition that a sale can only take place after 14 days of the advertisement.

Among the defendants' exhibits is yet another notice of sale dated 15th March, 2001 form the second defendants giving the plaintiff 14 days notice within which to pay or redeem the property. Ms Kalewa submitted that this notice was equally unlawful and illegal as the mandatory notice for redemption is 45 days. She cited *Trust Bank Ltd v Eros Chemists Ltd & Anor*, Civil Appeal No 133 of 1999(UR), for the proposition that a purported notice of 14 days is invalid and unlawful and any sale arising therefrom is illegal.

Of all the four notices, the plaintiff was only served with the notice dated 22nd February, 2001 which, in counsel's submission, was illegal as it purported to sell the property by advertisement on 19th March, 2001 before the expiry of 45 days. The other notices were equally irregular as not having been served effectively. Those allegedly sent by registered post were misdirected as the plaintiff had already changed his address and ceased to use the address to which the letters by registered post were addressed. Ms Kalewa therefore maintained that any notices sent to such an address by registered post were illegal, incurable and unlawful.

With reference to the amount recoverable, counsel for the plaintiff argued that document 6 of the defendants' list of documents was a valuation report dated 21st December, 2000. It shows that the property was valued at a current market value of more than Ksh 4.4 million, yet it is clear that the plaintiff borrowed only Ksh 1.7 million while in the purported notification of sale the defendant demanded payment of outstanding Ksh1,434,737/20 as the amount due and owing as at 31st December, 2000. This does not account for the amount which the plaintiff had already paid to the bank in a bid to redeem. From the notification of sale, it is not disclosed whether the amount claimed is in respect of interest or principal.

On the issue of interest, Ms Kalewa accused the first defendant of charging an interest rate not agreed upon. From their letter of offer dated 13th May, 1999, it is clear that the interest rates for the house loan and the commercial loan would have been between 18% and 23%, respectively, at the very highest. From the statutory notice allegedly sent to the plaintiff dated 8th June, 2000, the defendants alleged that the interest was agreed at 42% per annum. The charge document states that the interest rate shall be 3% per annum but that the rates could be varied from time to time. Counsel submitted that it is not fair and equitable for any party to an agreement to vary an interest rate unilaterally, referred to *Margaret Njeri Muiruri V Bank of Baroda*, Civil Appeal No 9 of 2001 (UR), and argued that an interest rate 42% is excessive, oppressive and punitive to the plaintiff.

In conclusion, she submitted that the plaintiff is entitled to the injunction restraining the defendants from alienating or selling the plaintiff's parcel of land.

In his response to Ms Kalewa's submissions, Mr Muriithi for the firstdefendant argued that with regard to the address of service, Justice Ringera was right when he held that the plaintiff had not been properly served in *Simiyu v Housing Finance Company of Kenya* (*supra*) as the address used was not hers. But such was not the case here. Similarly, in *Muiruri v Bank of Baroda* (*supra*), the Court observed that the loan borrowed was a comparatively small amount compared to the amount claimed which was a whooping Ksh 90 million odd which places that matter in a league of its own. Mr Muriithi therefore urged the Court not to rely on the above cases, or even on *Trust Bank v Eros Chemists & Anor* (*supra*) which had proliferated a lot of confusion. Instead, he submitted to the Court his own bundle of authorities which he asked the Court to rely upon.

With regard to the service of notices, Mr Muriithi argued that the notice to which the chargor is entitled under s 74(1) of the Registered Land Act, cap 300 of the Laws of Kenya, can be served on him personally or left at his last place of residence or business or it may be sent by registered post at his last known postal address as expressed in s 153 of cap 300. In the instant case, the plaintiff took the loan when he was an employee of the bank, using the bank's address. In the absence of a forwarding address, therefore, the bank would be entitled to communicate with the plaintiff through his last known postal address which would be the address he used while seeking employment.

In connection with the notification of sale and auction notices, Mr Muriithi admitted that the notice dated 22nd February, 2001was hopelessly defective, and could not support any sale. As a result, the notice of 15th March, 2001 was issued and served upon the plaintiff's wife who is an adult member of his family. Consequently, the defective notice dated 22nd February, 2001, was corrected by the notice of 15th March, 2001. Mr Muriithi further submitted that there was only one notification of sale – that which was dated 27th October, 2000, and there is no requirement that a party should serve a second notification of sale. In this regard, he referred the court to *Rai v Standard Chartered Bank (K) Ltd & Anor*, Milimani Civil Case No 830 of 1999(UR). He further submitted that one needs serve only one statutory notice, and one notification of sale. Thereafter, any time a sale is put off, all that the auctioneer has to do is serve a 14 day notice.

On the issue of interest rates, counsel for the first defendant submitted that a charge is a contract between the parties, and on the basis of *Elijah Kipng'eno Arap Bii v Kenya Commercial Ltd*, Milimani Commercial Courts Civil Case No 324 of 2000 (UR), he argued that interest rates can be varied and urged the Court to find as much. With regard to the two prayers that the plaintiff seeks, Mr Muriithi opposed the prayer for costs and submitted that the Court has no power to grant the injunction sought in prayer number 1. He argued that a legal charge is a contract between the parties, duly registered against the title in the Lands Office, and if the Court grants the injunction, this would be tantamount to discharging a valid charge. He submitted that while the Courts can issue temporary injunctions, granting the injunction sought would punish the first defendant who played by the book. He urged the Court not to grant the prayers sought.

In her reply, Ms Kalewa submitted that the defendants had not made any efforts to trace the plaintiff, and that they had purported to communicate with the plaintiff using an address given way back when he was applying for employment. The interest charged should be fair and equitable, and a party should have no authority to vary it unilaterally. She also submitted that since the defendants issued other notices subsequent to that dated 27th October, 2000, they should be bound by such subsequent notices. Finally, she said that what the plaintiff was seeking was an injunction to restrain the unlawful sale of its property, and that the Court had the jurisdiction to grant that injunction, and therefore urged the Court to do so.

Having heard the rival submissions of both counsel, it sounds prudent to begin from the beginning. The suit property herein is registered under the Registered Land Act, Chapter 300 of the Laws of Kenya. Under s 74 (1) of the Act, if default is made in payment of the principal sum or of interest or any other periodical payment or any part thereof… the chargee may serve on the chargor notice in writing to pay the money owing… and under s 74(2)-

"If the chargor does not comply, within three months of the date of service with a notice served on him under sub-section (1) of this section, the chargee may-

(a)…

(b)sell the charged property."

This section has been interpreted, and rightly so, to mean that the notice thereunder, commonly referred to as the statutory notice, should require the chargor to comply within three months after the date of service. Looking at the statutory notice dated 8th June, 2000 which was addressed to the defendant, the relevant part thereof reads-

"…unless you arrange to settle the same within three months from the date of receipt hereof the chargee will exercise its statutory rights under section 74 of the Registered Land Act…"

The format of this notice cannot be faulted. It satisfies the requirement that the notice should refer to the three months after receipt thereof, but not three months from the date thereof. From that perspective, this was a valid notice.

One issue that was canvassed at length was the address to which the defendants directed their notices and other communications to the plaintiff. It is on record that the notices and other relevant documents were sent to the defendant through PO Box 28 Migwani. It so happens that this was the postal address which the plaintiff used when he was seeking employment with the first defendant. During his employment with the first defendant, he used PO Box 30081, Nairobi, which was also the employer's address. It was also the address which he used in the charge instrument. Upon his dismissal from employment, he left without leaving behind a forwarding address. It would not have been practicable for the bank to address letters to him through its own Box No 30081 Nairobi, as any letters so addressed were sure never to reach him. In the circumstances the bank did the next best thing – to use his last known address in their records. This procedure finds support in s 153 of the Registered Land Act wherein it is stated –

"A notice under this act shall be deemed to have been served on or given to any person –

(a) if served on him personally

(b) if left for him at his last known place of residence or business in Kenya

(c) If sent by registered post to him at his last known postal address or at his last known postal address in Kenya

(d) …

(e) …"

In the charge instrument, which is itself a contract between the plaintiff and the first defendant, clause 13 thereof states-

"Any written demand or other notice made or given by the bank to the chargor for any of the purposes of this charge … shall be deemed to have been received by the chargor on the date on which it is served on the chargor personally or left for the chargor at the chargor's last known place of residence or business or sent by registered post to the chargor at the chargor's last know address in Kenya… as provided by section 153 of the said Act."

The Bank was therefore perfectly within its rights to communicate with the plaintiff by registered post through the plaintiff's last known postal address in Kenya. There was an express term to that effect in the contract between them, and therefore the Bank cannot be faulted for resorting to that mode of communication. I therefore find that there was nothing untoward or suspect for the Bank to send any

written demands or notices to the plaintiff by registered post to the latter's last known postal address in Kenya. For this provision to take effect, however, any such communication must be by registered post. To that extent this case is clearly distinguishable from that of *Simiyu v Housing Finance Company of Kenya* herein above referred to provided that any communication to the plaintiff was sent to him by registered post to his last known postal address in Kenya, it was an effective and valid communication.

This brings me to the issue of the auction notices. Ms Kalewa rightly stated that the defendants herein issued no less than four auction notices to the plaintiffs. But before these are discussed, it may be prudent to refer to the Auctioneers Rules, 1997, for guidance appropriate. Rule 15 thereof provides as follows-

"upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property-

(d) give in writing to the owner of the property a notice of not less than fourty five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction;

(e) on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement."

My understanding of this rule is that upon receipt of a letter of instruction, the auctioneer should, among other things, write to the owner of the property giving such owner not less than forty five days' notice within which to redeem the property by payment of the amount due as set out in the letter of instruction. If the forty five days expire and the owner has not paid, then the auctioneer should give at least fourteen days notice for the sale of the property. In total, the earliest period within which the property may be sold would appear to be about sixty days, which allow for 15 days notice which is to be given on expiry of the 45 days period. On this, I am in total agreement with the interpretation given by Ringera J in *Dr Simon W Chege v Paramount Bank of Kenya Ltd* (*supra*), and also that of Onyango Otieno J in *Nathakal M Rai v Standanrd Chartered Bank (K) Limited* (*supra*)

Applying the above interpretation to the facts of this case, it seems that the earliest notice to issue was the one dated 27th October, 2000. Although this notice was duly sent by registered post, it has its own problem. Even it gives the owner the statutory 45 days in which to redeem the property, it does not allow for the 14 days minimum notice of sale which should be given on expiry of the 45 days given for redemption. Given that rule 15 is couched in mandatory language by the use of the word "shall", I think that this notice does not pass the test of the combined effect of paragraphs (d) and (e) in that it will not have allowed for at least 14 days after expiry of the notification of sale. However, this is largely academic, as the sale was scheduled for December 14, 2000 and did not materialize .

Subsequent thereto, other notices followed. The next in line was the one dated 1st February, 2001, giving notice that the property would be sold on 28th March, 2001. Ms Kalewa argued that since the sale scheduled for December 14, 2000 aborted, that therefore the defendants should have given a fresh notification of sale for another 45 Days. With respect, that is not necessary. I share the view of Justice Onyango in *Rai v Standard Chartered Bank (K) Ltd* when he says that the notification of sale need not be given every time. But advertisements need to be done afresh every time fresh instructions are received by the auctioneer, and the sale should be at least 14 days after the first newspaper advertisement. However, here again the exercise is academic in as much as both counsel were agreed that this notice was never sent.

The third notice was the one dated 22nd February, 2001, which the plaintiff admits to having received. Although this notice is headed "sale by public auction", it goes on to give the plaintiff " a 45 days notice within which to make payment of Ksh 1,424,737/20 being the amount outstanding as at 31st December, 2000, with interest at the rate of 36.5%… Take notice that we shall advertise upon expiry of the said 45 days notice for the sale of your above captioned property by public auction. Take further notice that if you do not comply with this notice we shall proceed without any further reference to you." This sounds to me more of a notification of sale than a notice of sale which should be for at least 14 days. And if it is,

indeed, a notification of sale, the owner should be accorded a full 45 days before the sale can be effected in a further 14 days thereafter. However, in the instant case, two things happened. On 15th March, 2001, a notice of sale was addressed to the plaintiff herein, to the effect that the suit property would be auctioned on 28th March, 2001. This was closely followed by an advertisement in the Daily Nation of 19th March, 2001, in which the plaintiff's suit property was advertised for sale by public auction on 28th March, 2001 as had been stated in the notice dated 15th March and addressed to the defendant. Two consequences ensue. By issuing a notice of sale on 15th March and designating the sale for 28th March, this falls short of the required 14 days by one day. Similarly, by advertising a sale in the newspaper on 19th March, the earliest date when the sale should take place would have been on or about April 2nd. Fixing the sale for 28th March, 2001, therefore, breaches R 15 (e) of the Auctioneers Rules. Similarly, the 45 day period from 22nd February, 2001 would run to 8th April, 2001. In both instances, the property would have been sold long before the expiry of the 45 days. I agree with Ms Kalewa that the sale thereby advertised for 28th March, 2001 was irregular, unlawful and illegal.

Mr Muriithi was very candid when he described the notice dated 22nd February, 2001 as hopelessly defective and said that it could not support any sale. To add to the confusion over that notice, the auctioneer who served it on the plaintiff's housegirl described it as a 14 days notice. The upshot of all this is that save and except for the notification of sale dated 27th October, 2000, all the notices purporting to support the sale scheduled for 28th March, 2001 were invalid for failure to adhere to the requirements of either rule 15(d) or (e) of the Auctioneers Rules, or both.

Another touchy issue in this matter is with regard to the rate of interest charged by the first defendant. In their letter of offer dated 13th May, 1999, they confirmed having granted to the defendant a loan of Ksh 1,459,920/ = under the Staff House Loan Scheme to enable him purchase a house.

The letter reads in part-

"Our approval is subject to compliance with all terms and conditions governing Staff House Loan Scheme as applicable to clerical staff…"

The letter further says of interest-

"Interest will accrue on a daily basis at 3% and 8% per annum and will be applied at the end of each month. However in all respects, a default rate will be charged at 15% per annum above the rate indicated in the foregoing for amounts in excess of the authorized limits for the time outstanding."

Even though the issue of the Staff House Loan Scheme was referred to in the letter of offer, it was not mentioned any where in the charge instrument. This gave room for the plaintiff's counsel to argue that since there was no reference to the Staff House Loan Scheme in the charge, the plaintiff ought to continue enjoying the same terms on his loan as he enjoyed before he left the employment of the plaintiff. In other words, his loan should not attract commercial rates of interest.

In his evidence in chief, DW1, Mr Atunda, was very categorical that if an employee leaves the first defendants' employment, he, *ipso facto*, stops enjoying the facilities of the Bank. However, in cross examination, he admitted that the letter of offer did not expressly indicate that the interest rate is applicable only to staff members. There was no clause or provision to the effect that only staff would benefit at the stipulated rates. In reexamination, he did say that the charge takes precedence over the letter of offer. And it is true that the charge is silent as to whether the plaintiff can continue to enjoy the staff facilitates after ceasing to be a member of staff. These would include repaying the house loan at a minimal interest rate of 3% per annum.

In my opinion, the better view is the one expostulated by Mr Atunda. When a bank facility is offered to and accepted by a person who at the material time is an employee of the Bank, there is an implied term that such an employee would continue to enjoy the privileges and advantages appurtenant to such a facility for as long as he continues to be an employee. In the event that he ceases for whatever reason to be an employee, then any contractual terms applicable to him in his capacity as an employee would, *ipso*

facto, cease to apply to him. If so, a person in the position of the plaintiff would cease to enjoy the payment of low rates of interest.

Even if I am wrong in so thinking, clause 1, of the charge instrument is very explicit. It states, in part-

"…the chargor shall become liable to pay to the Bank… together with commission fees and other usual banking charges and together with interest… at the rate of 3% per annum, such interest to be calculated on daily balances and debited monthly by way of compound interest provided that the Bank shall, in its sole discretion determine the rates and method of calculating the interest applicable from time to time with full power and authority to the Bank to charge different rates for different accounts/or transactions.

provided further that the Bank shall not be required to advise the chargor or other such principal debtor prior to any change in the rate or rates and method of calculating the interest payable nor shall failure of the bank to advise the chargor or other such principal debtor as aforesaid prejudice in any way howsoever the recovery by the Bank of interest charged subsequent to any change…"

The Bank has thus contractually secured for itself the right to vary interest rates, whether the borrower is a member of staff of the Bank or not. Contracts are made by the parties themselves. Courts come in to construe those contracts and arbitrate any disputes concerning or touching upon them, but not to make those contracts for the parties.

Parties to a contract are at liberty to negotiate whatever conditions they like. If a condition is harsh or unfair, then the other party is at liberty to reject it. However, once the parties have agreed to terms, it would be unfair thereafter for one of them to claim that some condition or conditions was or were unfair. By accepting the harsh conditions in the first instance, he will have compromised himself. One has made ones bed, so one must lie in it. The plaintiff should not complain. In the circumstances, the case of *Elija Kipng'eno Arap Bii v Kenya Commercial Bank Ltd*, Milimani Civil Case No 324 of 2000 is adequate authority for the proposition that the variation in the interest rates was within the terms of the charge signed between the parties.

This brings me to the last issue in this matter. Is the plaintiff entitled to an injunction as prayed for? This suit was filed on March 22,2001 almost three years ago. On the face of the record, it seems that the main objective of the suit was to forestall the sale of the plaintiff's plot LR No Ngong/ Ngong/20499, which sale had threatened to be executed on 28th March, 2001 as per paragraph 10 of the plaint. If the prayer for injunction was directed at that particular sale, as is apparent from the particulars of fraud at page 10, it would be understable. But if the prayer is meant to seek a general permanent injunction, then we have a problem.

As this judgment is already degenerating into an inaugural lecture, let me say that there are two matters that need to be addressed before a permanent injunction can be granted. In the first instance, there is a charge, executed by both parties, duly registered, and it is a valid charge. This charge provides the only security to which the first defendant can have recourse in the event that the plaintiff breaches his obligations to repay the loan, as he has already done. If the permanent injunction is granted, this will amount to discharging a lawful charge, and thereby depriving the first defendant of its lawfully acquired security. That would defeat the purpose for which the security was given. It would also be inequitable.

Secondly, the injunction sought is an equitable remedy. He that comes to equity must come with clean hands and must also do equity. The conduct of the plaintiff in this case betrays him. It does not endear him to equitable remedies. He admitted in this Court, quite frankly, that since leaving the employment of the bank over four years ago, he has never paid a cent towards redemption of the loan. He admits that he is in default, and yet he is also in possession. He cant have it both ways. Either he pays the loan, or allows the bank to realize its security. He who comes to equity must fulfill all or substantially all his outstanding obligations before insisting on his rights. The plaintiff has not done that. Consequently hehas not done equity. In the hands of the plaintiff, a permanent injunction would wreck havoc to the first defendant, and that would be inequitable. While chargees are enjoined by law to follow the laid down procedures for the realization of their security, the Courts must not at the same time be converted into a haven of refuge by

defaulters. Even lenders and charge have their own rights.

If I may now specifically answer the issues agreed upon by the parties, I find that the first defendant advanced to the plaintiff a sum of Ksh 1,644,348/= under the Staff House Loan Scheme to purchase parcel of land know as LR No Ngong/Ngong/20499, and the first defendant charged that parcel to secure the loan advanced to the plaintiff. The actual amount advanced was neither Ksh 1,459,920/= nor Ksh 1,7000,00/= over the property purchased. Here were two loans in one, a house loan and a commercial loan.

The interest rate of the loan was 3% for the house loan, and 8% for the commercial loan during employment. After employment, the interest rate was entirely in the hands of the first defendant. In the context of the charge instrument executed both by the plaintiff and the first defendant, the latter did not breach the terms thereof. The defendants irregularly advertised the plaintiff's parcel of land for sale by public auction on the 28th March, 2001 as the procedures followed did not satisfy the requirements of rule 15(d) and (e) of the Auctioneers Rules, 1997. For that reason, the advertisement was unlawful. However, I don't think it was fraudulent. I think that the defendants were frantically trying to realize a security, as they were entitled to do, but in the process overlooked certain matters of procedural detail. Otherwise I don't think their intentions were fraudulent in the sense of amounting to a moral blemish.

I don't think the plaint is defective merely for not stating where the cause of action arose. Since the jurisdiction of the court is admitted, it follows that the cause of action must have arisen within the jurisdiction of the court. And under the Constitution, the High Court has jurisdiction throughout the country. However, the prayer for a permanent injunction is misconceived. It cannot lie in the circumstances of this case. I think that the appropriate order to make, therefore, is a declaration that the sale which was scheduled for 28th March, 2001 was irregular and unlawful for breach of rule 15 of the Auctioneers Rules. As for costs, I find that each of the parties has scored a positive and a negative. For that reason, each party will bear its own costs. It is so ordered.

Dated and Delivered at Nairobi this 13th day of February 2004.

L.NJAGI

JUDGE