REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 319 OF 2003

ANTHONY ATHANAS NGOTHO

T/A NGOTHO ARCHITECTS ……..……. PLAINTIFF

VERSUS

NATIONAL INDUSTRIAL CREDIT BANK LTD …….. DEFENDANT

RULING

This application is brought under Order 39 Rules 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law. It is seeking mainly one order:

> ***"That the defendant, its servant s and/or employees be restrained by an urgent temporary injunction from selling by public auction and/or otherwise the Plaintiff's two suit premises known as L R No 1160/42 KAREN and L R No 1/109 until the hearing and determination of this suit."***

The main grounds for the application are 6. These are as follows:

> ***1. That the defendant had granted the Plaintiff a Hire Purchase facility in the year 2000 in the sum of Kshs.27 million in respect of 3 (three) Benz Trucks and almost immediately when the said vehi cles were less than 2 (two) years old the defendant repossessed them and sold them secretly without the Plaintiff's knowledge at an aggregate throw away price of Kshs.9.7 million.***
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> ***2. That the defendants claim of Kshs.37,333,128/= is unsubstantiated and cal culations of the account made by Interest Rates Advisory Centre (IRAC) show that the defendant's claim is overstated by an aggregate sum of about Kshs.11,255,665.23 which sum together with the sum recovered from the sale of the Plaintiff's vehicles entitle d the Plaintiff to a cumulative credit in the sum of Kshs.20,955,656.23.***
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> ***3. That the defendant has in the past refused to furnish the Plaintiff and his agent M/s Interest Rates Advisory Centre (IRAC) with detailed Statements of Account hence leaving the Plaintiff in darkness regarding the defendants claim of Kshs.37,333,128/=.***
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> ***4. That the Plaintiff never understood the contents of the charge and mortgage which were prepared exclusively by the Defendant's Advocates and without giving the Plaintiff an opportu nity to be represented by his own Counsel.***

5. That the mortgage in respect of L R No 1/909 was sent to the Plaintiff's office by a messenger who signed the same and the messenger returned it to the defendant's advocates hence the attesting and the certific ate allegedly of the defendant's advocates is null and void.

6. That the defendant has already caused the Plaintiff considerable loss and damage by selling the Plaintiff's vehicles secretly at a throw away price of Kshs.9.7 million whereas the same had cos t a sum of Kshs.27 million when new and whereas the Plaintiff has used the same for a period of hardly 1½ years.

The Plaintiff filed an affidavit in support of the said application sworn on 19th May, 2003. Annexed to the said affidavit were many exhibits.

The Respondent opposed the application and filed a replying affidavit sworn on 20/11/2003 by Nyangaga a Manager in the Debt Managing Unit of the defendant company. There were many annextures to the said replying affidavit. The Plaintiff further filed a responding affidavit sworn on 24th November, 2003 in response to the defendant's replying affidavit. One exhibit was annexed to the responding affidavit.

Learned Counsel for the Plaintiff made a lengthy oral submission for the Plaintiff and highlighted what was in the chamber summons and the affidavit in support and the Responding affidavit aforesaid. Counsel submitted that the Plaintiffs three vehicles were sold secretly and without the knowledge of the Plaintiff. No public auction took place. In Mr Machira's view if the vehicles had been sold by public auction they would have fetched at least Kshs.20 million and the Plaintiff's financial burden would have reduced. It was further argued for the Plaintiff that the auctioneer who sold the Plaintiff's vehicles did not comply with the Auctioneers Rules. The sale according to counsel for the Plaintiff was fraudulent, oppressive and deceitful. As the sale of the 3 vehicles was fraudulent, the defendant should not be allowed to proceed with the sale of the Plaintiff's 2 properties. The sale also was a mockery of the provisions of the Auctioneers Act and Rules. In Counsel's view this issue should go for trial.

Mr Machira counsel for the Plaintiff further submitted that the Plaintiff's 3 motor vehicles were sold at a throw away price. If the Plaintiff's suit premises are sold the Plaintiff shall suffer double jeopardy. He further submitted that the Plaintiff's case is not one of accounts. The dispute between the Plaintiff and the defendant is about the entire agreement between the Plaintiff and the defendant which consisted of the Hire Purchase agreement, a charge and a mortgage. The three were intertwined and one cannot tell how much is owing. The defendant has not shown the interest charged, credit given and balance due. The purported statements made by the defendant do not make sense. Mr Machira for example argued that if the agreement between the Plaintiff and the defendant was made on 23rd October, 2000, how could the amount owed jump to Kshs.37,015,564.00 on 28th November, 2000 just about one month later? He gave further examples of incomprehensible statements of accounts.

Mr Machira also took issue with the rate of interest payable. He submitted that the charge document does not specify the rate of interest payable. The statement of account furnished by the defendant does not clearly set out the rate of interest applied. In Mr Machira's view the rate of interest to be applied should be the rate in the agreement dated 23rd October, 2000.

Mr Machira further submitted that the mortgage in respect of L R No 1/217 is dated 13th July, 1999 yet the agreement is dated 23rd October, 2000. The mortgage according to Mr Machira was a nullity as it has no relationship with the agreement and would constitute a past consideration which is no consideration in law. Mr Machira accordingly submitted that as the mortgage is a nullity, the applicant is entitled to an injunction as prayed.

Counsel for the Applicant further submitted that the mortgage documents were not explained to the applicant. The certificate on the mortgage document is signed by two advocates. Counsel submitted that it is not possible that two advocates witnessed the applicant's signature as the certificate seems to suggest. This only goes to confirm that the mortgage documents were not explained to the applicant. In Mr Machira's view the mortgage is a nullity and cannot form the basis of the mortgage's statutory power of sale.

Mr Machira submitted that as no valuations of the suit properties were carried out the applicant is entitled to an injunction since if the same is not granted the suit properties might be sold unfairly and contrary to the provisions of the law.

Mr Machira reiterated that the applicant had met the requirements set out in the case of Giella vs Cassman Brown.

He maintained that damages would not be an adequate remedy for the applicant and if there is doubt the balance of convenience tilts in favour of the applicant.

Finally Mr Machira submitted that the applicant is ready to abide with any conditions that may be imposed for the grant of the injunction sought. To show the applicant's bona fides he is prepared to deposit Kshs.7,000,000/= or 8,000,000/=. He undertook to prosecute this suit with diligence.

Mr Wanjama in reply relied on the replying affidavit of Reuben Nyangaga sworn on 20th November, 2004. In his oral submissions in court Mr Wanjama stated that the Charge, Mortgage and Hire Purchase documents may have been complicated but the respondent had no duty to procure the services of an advocate for the applicant. He submitted that the applicant accepted the letter of offer by signing a copy thereof. Similarly, the applicant signed the mortgage of 13th July, 1999 and in it admitted having understood the document. The same applies to the charge.

On valuation, Mr Wanjama submitted that the properties were valued. Indeed previously the Plaintiff had sought financial assistance from other financial institutions by offering the same securities. He cannot therefore say that he was new to banking transactions and securities required. Mr Wanjama emphasized that the applicant is not a rural person. He is in fact a former Chief Architect in the Ministry of Works.

Mr Wanjama further submitted that the allegation that the Plaintiff believed that he had 36 months to pay the subject debt was completely without basis. The letter of offer was clear beyond doubt. That in default of payment of the amount the entire sum outstanding would become payable.

Mr Wanjama submitted that clause 7 of the Hire Purchase Agreement provides for determination of the Agreement. The charge and mortgage too had provisions for determination of the contracts. The applicant should therefore not allege that he believed that he had 36 months to pay the loan.

On the issue of the sale of the Plaintiff's motor vehicles counsel for the respondent submitted that the same were not sold secretly and the respondent went out of its way to ensure that the sale was as open as possible. The motor vehicles were sold to the highest bidder and the defendant immediately informed the applicant of the results of the sale.

Counsel for the respondent further submitted that the sale of the said vehicle was not at an under value. The auctioneers had given their valuation of the suit properties. The same were higher than the final sales. In Mr Wanjama's view there was nothing unusual about this because the valuation was not professional. The valuation only represented an estimate. In any event counsel for the applicant gave his own valuation of the motor vehicles and the same was not very much different from the auctioneers valuation.

Mr Wanjama further stated that even if there had been an under sale, this alone cannot entitle the applicant to an injunction and even if there had been an under sale, this of itself would not form the basis of an injunction in respect of other securities. The properties were advertised to the whole world and the Plaintiff can even attend. The question of under sale does not therefore arise.

On the dispute over the amount owed counsel for the respondent submitted that such a dispute cannot form the basis of an injunction.

Mr Wanjama argued that the accounts have been supplied to the applicant and interest and late payment penalty has been correctly charged in accordance with the letter of offer, the charge and mortgage.

On legality of the securities counsel for the respondent submitted that the same are perfectly legal.

Counsel further submitted that the challenge by the applicant on the valuation done is of no consequence as there is sufficient material before the court that can be used at the auction of the suit properties.

Counsel for the respondent further submitted that the applicant sued the respondent in Nairobi HCCC No 990 of 2001. He sought an injunction to stop the sale of his vehicles which application was dismissed.

Mr Wanjama therefore prayed that the applicant's application be dismissed with costs as the applicant came to court as an after thought when all along the applicant had sought the respondent's indulgence to be given time to pay his debt which he has admitted.

Mr Wanjama relied on the following cases:-

1. Nairobi HCCC No 570 of 1998 (Unreported): Pelican Investment Limited vs National Bank of Kenya Limited. In this case it was held that a dispute as to amount due is not enough to stop a mortgagee from exerc ising its statutory power of sale.

2. Nairobi HCCC No 1543 of 2000 (Unreported): Caesar Njagi Kunguru vs KCB Limited. Here again it was held that a dispute as to amount was not enough ground to grant an injunction.

3. Fina Bank Limited vs Ronak Limited (20 01) 1 EA 54 In this case it was held that a contractual relationship was not to be impeached merely because the rate of interest was not given.

4. Nairobi HCCC No 360 of 2001: Dr Simon Waihango Chege vs Paramount Bank of Kenya Limited

In this case it was found that even a residential property becomes a commodity for sale once charged. In the light of the above Mr Wanjama submitted that the applicant had not established the test set out in the Giella vs Cassman Brown case.

If there is doubt the counsel for the respondent submitted that the balance of convenience tilts in favour of the respondent. He submitted this because the money has been owed for a long time. The applicant will be burdened with further interest.

In a brief reply Mr Machira maintained his earlier position and reiterated that this case is peculiar and exceptional and the cases quoted by counsel for the respondent are not relevant. He maintained that the parameters set by the Giella vs Cassman Brown case have been met and the prayers sought should be granted.

I have perused the Plaintiff's application, the plaint, the affidavit in support and the annextures thereto, the replying affidavit and annextures thereto, the responding affidavit and its annexture. I have also considered the oral submissions of counsel for and against the application. I have also considered the authorities sited. I have found as follows:

The sale of the applicant's three vehicles is the subject of NAIROBI HCCC No 990 of 2001 which is pending hearing and final determination. The Plaintiff sought an injunction against the repossession of the said vehicles. The application for injunction was refused and the vehicles were subsequently sold. The applicant has serious complaints against the said sale. He is at liberty to ventilate these complaints in NAIROBI HCCC No 990 of 2001. I do not therefore wish to express my opinion on the validity or otherwise of the sale of the said motor vehicles. The sale is relevant in these proceedings in determining the balance if any owed by the Plaintiff to the defendant.

The applicant further complained that the respondent's demand for payment of Kshs.37,333,128/= is unsubstantiated and that the same is overstated by an aggregate sum of Kshs.11,255,656.23. This sum

together with the proceeds of the sale of motor vehicles according to the applicant entitles the applicant to cumulative credit of Kshs.20,955,656.23. This to me appears to be a dispute on accounts despite the huge sums involved. This type of dispute per se would not form the basis of an injunction.

The applicant's further complaint is about the respondent's past refusal to furnish detailed statement of account hence leaving the applicant in darkness regarding the respondent's claim of Kshs.37,333,128/=. This again to me appears to be a complaint in respect of accounts. This again per se is not a ground for the grant of an injunction.

The applicants' further complaint is based on his failure to understand the contents of the charge and the mortgage which documents were exclusively prepared by the respondent's advocates without giving the applicant an opportunity to be represented by his own counsel.

I agree the charge and the mortgage are complicated legal documents. This is why they are required to be executed in a special way. At the time when a party is seeking a financial facility the primary object is the facility. The documents executed by the party are usually never scrutinized. Most parties therefore rely on the good will if any of the financial institutions. The charge in this case was executed by the applicant in the presence of one Wanjuki Muchemi Advocate. This charge has a certificate signed by the said Wanjuki Muchemi stating that the said advocate explained to the applicant the effect of subsection 1 of Section 69 and sub section 1 of Section 100 A of the Transfer of Property Act 1882 of India. The subsections are set out in full in the charge document.

The mortgage document appears to have been signed by the applicant in the presence of two advocates W W Gitao and L N Musigimi. There is a certificate to the effect that the advocates explained the effect of the same sub sections to the applicant.

On the face of the documents, they appear to have been validly executed. The documents may not have been explained to the applicant, but that is not what the documents say. Yet in law documents speak for themselves. I am not therefore satisfied that the charge and mortgage documents were not explained to the applicant.

The applicant's fifth complaint regarding the certificate on the mortgage in respect of L R NO 1/909 has been answered in the preceding paragraph.

The last complaint of the applicant is in respect of the fact that as the applicant has already suffered as a result of the sale of his motor vehicles, the sale of his two properties would cause him irreparable injury that cannot be compensated by an award of damages. Double loss would not of itself form the basis of an injunction.

The complaint which the respondent has not satisfactorily explained is the date of the mortgage over L R No 1/909. This document was made on 13th July, 1999. It was registered on 22nd July, 1999. Yet the letter of offer is dated 23rd October, 2000. The letter of offer mentions this mortgage at page 2 as "Legal Charge over Hurlingham Commercial plot charged and registered to cover 8 million." How was the mortgage registered even before the letter of offer was accepted. Was there some other transaction between the applicant and the respondent which I have not been informed about?

I am not satisfied that the validity of this mortgage is beyond question. Yet this mortgage forms the basis of the respondent's statutory power of sale. If the respondent purported to exercise its statutory power of sale under the suspect mortgage then the exercise of the purported power of sale may be wrong. This apparent defect in the mortgage shows a prima facie case with a probability of success for the applicant and damages would not be an adequate remedy for the applicant.

However the applicant does not deny that the respondent advanced him a loan of Kshs.27,477,963/=. He does not also deny that interest is chargeable on this sum. On the basis of an account prepared by his agent, the applicant admits that as on 1st April, 2003 the total outstanding amount was Kshs.28,413,320/= before taking into account the amount realized on disposal of the motor vehicles. This means that if the

proceeds of the sale of the motor vehicles are taken into account the balance then would be Kshs.18,713,320/=. The amount now outstanding as of now must therefore be in excess of this figure if interest at whatever rate is taken into account.

In the result, although I have found that the applicant has shown a prima facie case with a probability of success and that an award of damages would not adequately compensate the applicant, the applicant can only benefit from an order of injunction if the same is granted on terms. I therefore make the following orders:

1. That the respondent, its agents, servants and/or employees be and are hereby restrained from selling by Public Auction and or otherwise the Plaintiff's premises known as L R No 1160/42 KAREN and L R No 1/909 pending the payment of Kshs.8 million by the applicant to the respondent which payment should be made within 45 days from the date hereof.

2. That on payment of the said sum of Kshs.8 million within the period provided the injunction order granted shall be maintained until the hearing and determination of this suit.

3. That in default of payment of the said sum of Kshs.8 million within the period provided the interlocutory injunction shall stand discharged and the respondent shall be at liberty to proceed as it deems fit.

4. The applicant should also file a written understanding as to damages within the next 15 days.

5. The costs of this application shall be in the cause.

Dated at Nairobi this 17th day of March, 2004.

F. AZANGALALA

JUDGE

17.3.2004