

From the material on record and the submissions of the Counsel for the parties it is obvious that the Plaintiff is indebted to the Defendant. According to the Plaintiff the agreed sum due is Kshs 17 million. The Defendant puts the sum due at Kshs 36,100,076.80 as at the time of the replying affidavit of James E. Odwako which affidavit was sworn on 8th June 2004.

The Plaintiff further admits that he is in default in his repayment. The crux of his case is that he had after the ruling of Onyango Otieno J. (supra) agreed with the Defendant on the manner of settlement of the said sum of Kshs 17 million. This agreement involved arrangements regarding the period of redemption of 90 days on release of the security documents for use as security by another financier. It is the Plaintiff's case that as he arranged the refinancing and before the release of the security documents the Defendant advertised his property. Further complaints are made including allegations of amount claimed as erroneous and based on unconscionable inequitable and excessive rates of interest as well as unjustified penalties and illegal charges. Failure to furnish statements of account is also made and so is failure to value the property before the intended sale. The Plaintiff further argues that if the property is sold he will suffer irreparable loss and damage.

The Defendant has denied all the complaints made by the Plaintiff. It specifically denies that the sum due has been agreed at 17 million and that the mode of redemption had also been agreed. It refuses to accept the proposal made by the Plaintiff. It contends that the Plaintiff's indebtedness to the Defendant is beyond question and the default has been freely admitted. No prima facie case has therefore been shown for the grant of the injunction. The Defendant has further complained about the conduct of the Plaintiff and in its view the same does disentitle the Plaintiff to the equitable relief of injunction.

I have given the application very careful consideration. I have no hesitation in finding that the Plaintiff has not shown a prima facie case with a probability of success at the trial. The sum due has not been agreed at 17 million. The mode of redemption has not been agreed. I have not been persuaded that the Defendant agreed to release the security documents for the Defendant to arrange refinancing. The Plaintiff has freely admitted indebtedness to the Defendant. The default in the repayments is obvious. Indeed the proposal by the Plaintiff is a clear a testimony that the Plaintiff cannot redeem the security herein. I do not see what can in the circumstances of this case prevent the Defendant from seeking to exercise its statutory power of sale which arose along time ago as the Plaintiff has been in default of repayments for a long time.

It is now settled that a dispute as to the exact amount owed under a charge is not a ground for restraining a lender from exercising its statutory power of sale. The Plaintiff has made omnibus complaints regarding rates of interest, unjustified penalties and illegal charges without crystallizing the complaints. This with respect is not enough and disputes in this regard perse do not form the basis of injunction.

By this application the Plaintiff seems to be asking the Court to assist him modify his charge contract with the Defendant. This is not the function of the Court.

I have seen the ruling of Onyango J. referred to by both Counsel. The conditions were that

First the Applicant was to pay Kshs 1,000,000/= to the Respondent on or before 6th March 2000 and (2) thereafter to pay Kshs 450,000/= per month with effect from 31st March 2000 and thereafter at the end of each subsequent month till this matter is heard and finally decided and (3) that upon the Respondent approving the sale of part of the subject property then the deposit paid by the purchaser was to be paid to the Respondent to hold as stake holders till completion. In default the Respondent was to exercise its power of sale as by Law required.

I have perused the statements of account exhibited by the Plaintiff. It is clear that the Plaintiff did not attempt to comply with the conditions set by Onyango J. He made some payments. But not in terms of the said order.

In my view as the Plaintiff failed to comply with the Order of Onyango J. the Defendant was entitled to

exercise its statutory power of sale as the Learned Judge had ordered.

Having found that the Plaintiff has not shown a prima facie case with a probability of success at the trial, I need not address my mind to the other conditions for the grant of an interlocutory injunction. The application is without merit and is dismissed with costs to the Defendant.

**DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF
SEPTEMBER 2004.**

F. AZANGALALA

AG. JUDGE