



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO.604 OF 2001

JOSEPH OKOTH WAUDI.....PLAINTIFF/APPLICANT

=V E R S U S=

NATIONAL BANK OF KENYA.....RESPONDENT/DEFENDANT

R U L I N G

The Applicant/Plaintiff (hereinafter referred to as 'Applicant') brought this application under Order 39 Rule 1 & 2 of the Civil Procedure Rules seeking for an injunction to restrain the Respondent/Defendant (hereinafter called the 'Respondent') by itself, its employees, directors, servants and agents from selling or offering for sale of Plot No. Mombasa/Block XXI/226/M.I by public auction or at all until this suit is heard and determined or until other orders of this court. Interim orders thereto were earlier granted by me and the application came up for interpartes hearing on 19.2.2002.

The application is supported by an affidavit sworn by the Applicant dated 3rd December, 2000 to which he annexes a charge dated 16th December, 1996, a Further Charge dated 11th June, 1997 and a Second Further Charge dated 24th March, 2000. Also annexed thereto are other documents which will be referred to during this ruling as reason may arise, but include a Notification of Sale by Garam Investments dated 28.11.2001 which, inter alia, indicates that the property aforementioned which is for auction sale was valued at Kshs.20,000,000/- as at 17.8.1999. It also shows the amount outstanding as arrears from the Applicant to Respondent as Kshs.14,343,744/70 as at the said date and still accruing an interest at 26% per annum.

The Respondent filed a Replying Affidavit and a Supplementary Affidavit annexing several documents, mainly various correspondences between the Respondent and the Applicant or their advocates. To the Supplementary Affidavit was among others, annexed to it a copy of another Valuation Report of the abovementioned property done by Regent Valuers International (K) Ltd., showing that the same property which in 1999 was valued at Kshs.20,000,000/-, was now in December 2002 valued at Kshs.11,000,000/-

I have considered the affidavits supporting and opposing the granting of the remedy sought of an injunction. I have also examined the annexures from both sides as well as considered the arguments put up by both learned counsel.

There is no dispute that the Applicant borrowed from the Respondent the sums of Kshs.2,000,000/- under the aforementioned Charge, Kshs.3,150,000/- under the Further Charge; and Kshs.4,000,000/- under the Second Further Charge. Furthermore, although the Applicant throughout his affidavit does not specifically admit having defaulted in repaying the said consolidated sums of loan together with any lawfully accruing interests as agreed between the parties, he does not nevertheless deny such default. The main objections raised by Applicant against the Respondent's exercise of its power of sale and upon which he bases this application for a temporary injunction, are contained in paragraphs 6, 10 and 11 and

may be summarized as follows:-

- a) That the Respondent unlawfully charged and loaded the Applicant with unlawful interest against the provisions of S.39 or 40 of the Central Bank of Kenya Act.
- b) That the Respondent's letter of Instructions to the auctioneer to effect an auction sale and the Auctioneers Notification of Sale of the property the subject matter herein, were fatally defective.
- c) That the Valuation Report relied upon by the Auctioneer was either out of date or wrongly signed and therefore fatally defective.
- d) That the sum of Kshs.4,000,000/- secured by the Second Further Charge was never released and yet Respondent unlawfully continued to charge interest thereon.

Upon those grounds then, the Applicant argued that if the Respondent is not restrained, it will auction the suit premises to recover the claimed sum of Kshs.14,343,744/- in an illegal exercise of its power of sale against the interest of the Applicant.

In answer to the above arguments the Respondent argued that it only charged lawful interest authorized by Applicant as per the interest rate provisions in the three charges aforementioned; that its letter of instructions to the auctioneer to auction-sell the suit premises and the auctioneers Notification of Sale were lawful and correct and were not in any way defective; that the first Valuation Report was indeed outdated and probably not fit for use for the purpose of the auction-sale, but that the actual Valuation Report used by the auctioneer for this purpose was one dated 4.12.2002 annexed to the Supplementary affidavit sworn by the Respondent's Branch Manager, Delilah K. Ngala; and finally, that the Second Further Charge was created not to give further funds to the Applicant who was hopelessly in arrears but to create a further security to cover the extra and further interest sums that had overgrown the existing charges. The Respondent further explained in his supporting affidavit that the amount of interest grew too large for the Applicant to manage because he failed to maintain repayment schedules as agreed under the charges and that in applying the penal interest against the overdrafts, it was following banking procedures and customs adopted by all banking institutions.

As stated above, I have considered all the material on the record. The Applicants seeks an injunction and the principles for granting such injunction are now well settled under our jurisdiction. However, before examining such principles, I need to consider some issues of fact that were raised by the Applicant touching the Respondents letter of instructions to the auctioneer, the Auctioneer Notification of Sale and the Regent Auctioneer's Valuation Report.

The instructions of the Applicant, Garam Investments Auctioneers is marked as exhibit "JOW.4". It instructs the auctioneers to advertise for sale the suit premises by way of public auction without disclosing the name of the principal. It enclosed the Valuation Report dated August `1999, stating further that a current Valuation Report would follow. The current Valuation Report dated 4.12.2002 is said to have followed and the copy thereof was annexed to the Supplementary affidavit filed by the Respondent. The Applicant attacked it as being non-genuine on the grounds that if it existed earlier, it should have been filed with the Replying affidavit and that it was not properly signed by a Valuer. I have examined it carefully and note that the same was signed by two qualified Valuers of Regent Valuers International (K) Ltd. for and on behalf of the firm. I find nothing out of place with the practice of signing for the firm and see no reason to put it the practice under suspicion. In any case the Respondent had clearly shown that it would send the current Valuation and was all along alive to the issue of sending a valid Report. Nor do I find anything wrong with the Respondents instructions to auctioneers. The Notification of Sale was therefore complete, correct and valid. It complied with all the other requirements as per the Auctioneers Rules including all other required informations. Small and technical did not interfere with Chargee's process of trying to exercise of its power especially where they are not shown to have substantively affected the main issues.

An applicant for an injunction has to show that he has in his favour a prima facie case with reasonable chances of success or that if the injunction is not granted in his favour he will suffer irreparable loss that may not be compensatable by damages and finally, that if either of above issues are not in his favour, nevertheless, considering all the circumstances of the case, the balance of convenience tilts in his favour. Has the Applicant satisfied these principles?

The Appellant's main ground was that the Respondent charged illegal interest against the provisions of Section 39 or 40 of the Central Bank of Kenya Act. He stated that before 1997 on a given date the Central Bank of Kenya liberalized interest rates. He argued that in so far as the Respondent before then charged or applied interests rates which appeared high, it must have done so against the Act. He failed to produce or point out to any section or rules made under the said Act fixing interest rates at a given level so that his arguments that the Respondent charged over and above such rates would make sense. He argued in general terms, appearing all along to grope in the dark and finally coming out none the wiser. Nor did he prove that the large sums which accrued due to the application of the allegedly high interest rates, interest were unlawful and unwarranted. While it is true that Chargees end up charging interest upon interest and also charge penal interest which altogether finally overburden the chargors, the blame eventually ends up at the chargors' door. They are the ones who sign the contracts that authorize the Chargees to apply such interest rates. Often the Chargors rush to court only where somehow they have persistently defaulted and made their cases hopeless. But this court, as in this case, can do little to undo the contract that the Applicant voluntarily sealed. In this case the Respondent was authorized by Clause 1(a) of the Charge "*in its sole discretion from time to time to decide, with full power to it (lender) to charge different and penal rates for different accounts, such interest to be computed according to the usual mode of the Lender*" without seeking the consent of the Chargor and without even advising the Chargor prior to any change of such rates of interest. The Applicant did not attempt to show that the Respondent applied tricks or fraud when the charge contract was entered into. Nor did he show that the Respondent used its superior position to force him into this contractual obligation. How then can this court interfere in such private contractual arrangement between two or more persons who voluntarily chose to do their thing? It cannot. As it was stated in the case of Lavuna & Others vs Civil Servants Housing Co. Ltd & Another – C.A. Nairobi 14/95 (UR) and in Halsbury's Laws of England Vol.32, 4th Edn., para.725:-

".....in the ultimate analysis, this is a suit brought by Chargors to restrain a Chargee from exercising its statutory power of sale under the Charges executed by them as security for money advanced to them and receipt of which they have unequivocally acknowledged. Default is not denied. Service of statutory notice is admitted. I have always understood the law to be that a court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage".

This was also so stated by Kwach J.A. in Habib Hank A.G. Zurich vs. Pop- In (Kenya) Ltd. & Others, C.A. 147, 1989 (UR). I accordingly hold that the ground argued by the Applicant must be rejected.

Upon the second test of the principles indicated earlier, which are also the principles pronounced in the now famous Giella case, I hold that the Respondent, being a bank, in respect of which no evidence of instability was put forward during the prosecution of this application, will be in a position to compensate the Applicant if he finally wins the case after the suit premises will have been auctioned. I need not touch on the third arm of the principle.

I therefore hold that the Applicant has failed to fulfil or satisfy the principles upon which injunctions are granted. His application must therefore fail. It is dismissed with costs to the Respondent. The Respondent is now at liberty to exercise its power of sale. It is so ordered.

Dated and delivered at Mombasa this 10th day of April, 2002.

D. A. ONYANCHA

J U D G E

Mr. Kinyua for - Applicant/Plaintiff

Mr. Mburu - for Respondent/Defendant