



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**  
**Civil Suit 1209 of 2001**

**JOHN KARARI GITHINJI T/A**

**LIMPOPO SNACKS .....**

**PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL FINANCE CO. LTD. ....**

**DEFENDANT**

**R U L I N G**

The main prayer being sought in this application is prayer that the Defendant together with its agents, servants and/or employees be restrained from selling, disposing and/or in any other way interfering with L.R. THEGENGE/KARIA/2152 pending the final determination of this suit. There is also a prayer for costs. The ground for this same application is that the intended action by the Defendant will render the suit nugatory and the Plaintiff will suffer irreparable harm and damage. There is an Affidavit sworn by the Applicant John Karari Githinji together with annexures in support of the application. In the same Affidavit, apart from giving mitigating factors that has led to his being unable to repay the loan as required, the main ground raised by the Applicant is that the Respondent, did, contrary to the agreement between the two, increase the interest rate arbitrarily from 24% which was the contractual rate agreed upon to 32% which was not agreed upon. The second point raised is that the Notification of Sale does not disclose the amount of money due to the Respondent and which is to be recovered. The Applicant also maintains that if injunction is not granted the suit would be rendered nugatory and that statements of account have not been supplied to him. Lastly the Applicant contends that granting of the orders prayed for would not in any way prejudice the Respondent. There was also a further Affidavit sworn by the Applicant.

The Respondent opposed the application and vide Replying Affidavit sworn by its Accounts Officer Schemes, the Defendant stated in brief that the Applicant was granted a loan of K.shs 650,000/- at his own request, but that as loan drawdown was allowed under a bridging loan facility interest rate of 32% p.a. was applied for the bridging loan facility awaiting the final approval from the OPEC Fund release of the OPEC Funds. The Applicant was made aware of this and was actually aware of this. Once the OPEC approved the loan the bridging facility was converted into OPEC loan at interest rate of 24% p.a. The repayment of K.shs 10,834 p.m. was only in respect of the principal repayment excluding interest. This was amended to read K.shs 18,700 p.m. for 60 months and the Applicant was made aware of this vide a letter annexed as ANM4. The Applicant fell into arrears of K.shs 170,000 as at 31.7.2001 and on four previous occasions, the Respondent has made attempts to recover the loan by auctioning the property

charged as security namely L.R. No. THEGENGE/KARIA/2152. The total sum due to the Respondent is K.shs 856,790/60 which has accrued because the Applicant has made several promises and several proposals which he has never honoured. The Respondent maintains that the Applicant has always received statements of account; that Applicant has not shown in the Plaint what cause of action he has against the Respondent and his application is an abuse of the court process and is only meant to buy time. There were several exhibits annexed to this affidavit.

The main dispute as I see it is in respect of interest that was charged. At first the Applicant, in his first Affidavit did not come out clear on this as he made it appear as if the Respondent had charged the interest of 32% throughout as opposed to 24% which was the agreed interest. This was not the correct position and it became very clear later that the interest of 32% was only charged for three months while awaiting approval from OPEC; and once OPEC approved the loan, the interest charged was 24% which was in accordance with the agreement. I cannot hazard why the Applicant decided to hide the fact that the interest rate of 32% was not the rate charged after the loan was approved but was a rate charged on the bridging facilities before the loan was approved. All I state on that aspect is that the Applicant cannot hope to get the courts discretionary remedies by hiding such an important fact away from the court. Be that as it may in a letter dated 27<sup>th</sup> June 1998, addressed to the Chief Operating Manager KCFC Ltd, by the Applicant, the Applicant stated as follows:

“Chief Operating Manager,

KCFC Ltd.,

P.O. Box 21984,

**NAIROBI.**

Att: - Advances Manager,

Dear Sir,

**RE: OPEC III LOAN APPLICATION – K.SHS. 650,000.**

Our meeting on 27<sup>th</sup> June, 1998 refers.

I hereby confirm that the title No. Thegenge/Karia/2152 is already with your lawyers M/S Muthoga & Gaturu Advocates in Nyeri awaiting execution of the charge documents to facilitate registration of the legal charge.

As the project is almost ready to take off, I request for the drawdown of Kshs. 650,000 – as soon as possible to avoid any further losses in form of rent payments in view of the long period it has taken to complete the loan process.

I am agreeable to a bridging finance for the time being.

Yours faithfully,

**J.K. Githinji”.**

This letter was clearly seeking a bridging finance and was seeking drawdown of this loan money before the security was perfected. The Applicant as I understand, it wanted the Bank to put him into funds before the charge was registered. When he said in this letter that he was agreeable to a bridging finance for the time being, he clearly knew that that arrangement for the time being was a different arrangement from that contained in the OPEC agreement. He was ready for that arrangement and he was the author of

it The Respondent responded in its letter dated 28.08.98 which stated as follows:

“John Karari Githinji,

T/A Limpopo Snacks,

P.O. Box 2153,

NYERI.

Dear Sir,

RE: OPEC III BRIDING LOAN OF K.SHS 650,000/-

We refer to the above and enclose herewith our cheque Nos. 005256 and 005257 for K.shs 361,800/- and K.shs 288,200 payable to KCB Ltd. Nyeri (for the credit of your account) and to M/S Fixed Abode Enterprises respectively.

The payments covers full drawdown in respect of the OPEC III loan and interest will be charged at 32% for the time being until we receive the OPEC funds. The relative debt advice is also enclosed for your records.

Kindly acknowledge receipt and note that the accruing interest will have to be paid monthly during the three (3) months grace period.

Yours faithfully,

Sgd

T.N. KAMOTE

ACCOUNT OFFICER

FOR: ADVANCES MANAGER”

The Applicant in an attempt to convince me that the interest rate of 32% charged was illegal, felt it fit not to annex his letter to the Respondent dated 27<sup>th</sup> June 1998. As can be seen, and as I have stated, he was the author of that three months’ interest rate of 32% upon bridging loan facilities as he wanted to be put in funds as early as possible and was agreeable to a bridging loan. Further he accepted the cheques enclosed in the letter and which were sent under the conditions one of which was that the rate of interest would be 32% for three months. That was the period awaiting approval from OPEC and awaiting perfection of the security. The Respondent was at that time, in my opinion, taking a risk and was not bound by the OPEC agreement as that could have only come into operation after OPEC approved the loan and after the security was perfected by registering the charge. I am not hearing the entire case, but I am not satisfied that a prima facie case with a probability of success has been shown to me as far as this issue of interest is concerned.

On the question of increasing the instalment, the explanation given by the Respondent sounds to me plausible. The Applicant was made aware of the same amendment vide a letter from the Respondent dated 17.8.99 to the Applicant. He accepted it and signed the duplicate in confirmation that he received it and accepted the contents. He signed it on 18.8.99. This again, is one of the important documents the Applicant never felt fit to annex to his affidavit and for obvious reasons.

In both cases, i.e. in the case of complaint about interest rate and complaint about amendment of monthly instalments, the Applicant has never complained against the actions till the property was threatened with sale. All he has done is to promise payments and make proposals to the Respondent to enable him get indulgences. I feel certain in my mind that if his allegations on the two complaints were anywhere near truth, he would have complained to the Respondent before the property was threatened with sale.

The Respondent is a financial institution. The property threatened with sale has not been shown to be a residential house and so no sentimental attachment has been shown. The Respondent would be able to make good the loss should the Applicant succeed in his case after the property is sold. Thus the suit will not be rendered nugatory at all. As to the various problems the Applicant has undergone necessitating his inability to pay the loan such as the death of his father, the demolition of his business premises by KPCU, and lack of business in Nyeri, I also sympathise with him on the same, but sitting here as a judge, I cannot stop feeling that much as the Applicant has experienced some difficulties, so is the Respondent likely to run into difficulties if this debt is not recovered. I cannot rewrite the contract between the parties and add a condition that the property will not be sold if the Applicant suffers certain setbacks. I have to go by the contents between the parties as was entered into at the relevant time.

The sum total is that there is some money outstanding even by the allegation of the Applicant himself. In law, I cannot restrain the mortgagee from exercising his power of sale simply because the Applicant is disputing the amount due. The legal proposal in Halsbury's Laws of England, Volume 32, 4<sup>th</sup> Edition at paragraph 725 is clear on that. It states as follows.

“725. When Mortgagee may be restrained from exercising power of sale

The Mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the Mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into court, that is the amount which mortgagee claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor's solicitor, the court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent incumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem.”

As I have stated hereinabove, no prima facie case with a probability of success has been advanced in this application. No irreparable damage has been shown and I am not in doubt in this application.

I must and I do dismiss this application with costs to the Respondent. Orders accordingly.

Dated and delivered at Nairobi this 11 day of September, 2001.

ONYANGO OTIENO

**JUDGE**