



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALRY DIVISION

CIVIL CASE NO. 638 OF 2006

SAMUEL NDIBA KIHARA.....1ST PLAINTIFF

VIRGINIA NDUTA NDIBA2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....1ST DEFENDANT

ROBERT NGUNYI NJURA.....2ND DEFENDANT

NANCY WANJIKU MBUGUA.....3RD DEFENDANT

JUDGMENT

1. Samwel Ndiba Kihara (the 1st Plaintiff) and Virginia Nduta Ndiba (the 2nd Plaintiff) who are husband and wife, bring this suit in respect to a facility granted to them by Housing Finance Company of Kenya Limited (the 1st Defendant or the Bank).
2. In a Plaint presented on 23rd November 2006, the Plaintiffs aver that at the time of taking the facility they were jointly registered as owner of LR No.76/202 (The Suit Property). That land is currently registered in the names of the 2nd and 3rd Defendants who purchased it by way of Private Treaty from the Bank.
3. The facility granted to the Plaintiffs was a Mortgage loan of Kshs.1,500,000/-, to be used for construction of a Residential premise on the said parcel of land. One of the terms of the facility was that the interest rate applicable was a rate of 22% per annum. A grievance by the Plaintiffs is that the Bank unilaterally and unlawfully increased the applicable rate of interest from 22% per annum to 26% per annum. That in addition the Bank imposed a penalty interest of 1.5% per month. It is the Plaintiff's position that the increased rates and the penal interest is unconscionable, unlawful and unreasonable and had the effect of pushing the monthly payment expected of them beyond their reach.
4. The Plaintiffs allege breach of statutes which include the provisions of Section 39 of the Central Bank of Kenya Act and Section 44 of the Banking Act. It has been alleged that the increment was imposed without the Bank seeking prior approval of the Minister of Finance.
5. The Plaintiffs have averred that on 1st March 2005 the 1st Defendant issued a Statutory Notice in exercise of its Rights in the Mortgage Document as stipulated in Section 69A of the Transfer of Property Act (1882) which was invalid. Further that a 45 days Notification of Sale issued on 2nd June 2005 was a clog to the equity of Redemption. That it was on the basis of illegal Notices that the Bank sold the property to the 2nd and 3rd Defendants.
6. The said sale has come under attack for several reasons. First, that the property was sold at a considerable undervalue. It being alleged that at the time of sale the open market value of the property was Khs. 8,000,000 whilst it was sold by Private treaty at Khs.3,800,000. Secondly, that the Plaintiffs were not involved in the process of identifying a buyer for a reasonable price.
7. In paragraph 22 of the Plaint, the Plaintiffs allege that the Defendants jointly and severally conspired to fraudulently sell and transfer the property in favour of the 2nd and 3rd Defendants. The particulars are as follows:-
 - (a) Conspiring to sell and mortgage the property at a fixed price of Khs.3,800,000/- and substituting the Plaintiffs from the Mortgage without involving other interested buyers by Public auction.

(b) Conspiring to exercise illegal statutory power of sale and not taking any consideration to the proprietary rights of the Plaintiffs in L.R No.76/202.

(c) Attempting to justify illegal documents as valid and effectual to the advocates who draw the conveyance and registration of the mortgage.

8. The Plaintiffs state that they are ready and willing to repay what is lawfully due to the Bank at reasonable monthly installments to enable them redeem their property and resist an attempt to have them evicted from what they claim is their matrimonial home.

9. Separately, the Plaintiffs invoke the Induplum Rule and urge that they should be refunded by the Bank any sums paid over and above double the principal sum being Kshs.800,000 with effect from 22nd May 2006.

10. Ultimately, the Plaintiffs pitch for the following Orders:-

(i) A declaration that the transfer of title L.R 76/202 situated South East of Kiambu Municipality to the 2nd and 3rd Defendants is Null and void on grounds of fraud, invalid and unprocedural notice, estoppel and want of Land Sale Agreement.

(ii) A permanent injunction restraining the Defendants or agents from taking vacant possession of L.R No.76/202, evicting and in any manner interfering with the Plaintiffs' quite occupation and possession of the suit land.

(iii) Damages for breach of contract, deceit, conspiracy and fraud.

(iv) An order for the 1st Defendant to supply a true account of the Plaintiffs' indebtedness.

(v) Costs of the suit

(vi) Interest at Court rates

11. On behalf of the Defendants two sets of statements of Defence were filed. One on behalf of the Bank and the other jointly for the 2nd and 3rd Defendants. On the question of the variation of interest the Bank's position is that the mortgage instrument provided for variation of the applicable rate and that it duly served the Plaintiffs with a Notice for the variation of interest rate from 22% to 26%. As for the allegation on the Penalty charges, the Bank maintains that they are lawful and are in accordance with the established Banking Practice and Trade customs and usage by Mortgage Finance Institution. In addition that Section 44 of the Banking Act and Section 39 of the Central Bank of Kenya Act are not applicable to the Mortgage Instrument. So it is for the Induplum Rule.

12. As regards the exercise of the statutory power of sale, the Bank pleads that it complied with the Law and was not obligated to consult or inform the Plaintiffs while selling the property by private treaty. It is stated that the Bank has a legally binding Contract entered between the 1st Defendant and the 2nd and 3rd Defendants on 26th May 2005. The allegations of fraud, deceit and conspiracy are denied.

13. As to the value of the property at the point of Sale, it is asserted that the suit property was valued by Tysons Limited which a reputable Valuation Firm and an open market value of Khs. 4,000,000 and a forced sale value of Khs.3,200,000 returned.

14. The 2nd and 3rd Defendants defend their purchase of the suit property which they alleged was advertised for sale by way of private treaty in the 1st Defendants property mart. The allegations of fraud are denied and the 1st Defendant Right to sell the property by private treaty is reiterated and defended.

15. The 2nd and 3rd Defendants state that the suit property was transferred to them by way of an Indenture of Conveyance by Mortgagee dated 22nd May 2006 and registered on 7th July 2006. The Defendants take a joint position that the Plaintiffs equity of redemption has been extinguished and the orders sought in the suit cannot be granted.

16. This suit was by Order of Court dated 3rd July, 2009 consolidated with ELC case No. 57 of 2008, Robert Ngunui and Nancy Wanjiku Mbugua vs Samuel Ndiba Kihara and Virginia Nduta Ndiba. The Plaintiffs in that suit are the 2nd and 3rd Defendants here and the Defendants are the Plaintiffs here. The cause of action is essentially for enforcement of the purchase of the suit property and the following prayers are sought:-

(a) A mandatory injunction compelling the Defendants to remove themselves, their servants and/or agents from the Plaintiffs property LR No. 76/202 Thindigwa;

(b) An order for eviction to remove the Defendants, their servants and/or agents from the suit premises;

(c) Vacant possession of the premises;

(d) Costs of the suit.

17. Both Plaintiffs testified and in addition called two witnesses. Wilfred Abincha Onono (PW3), a Certified Public Accountant who produced a Report on interest recalculation of the Plaintiffs' accounts. There was then James Kimani Horeria (PW4) who gave evidence of

the value of the subject property. For the Defendants, the Court heard and received evidence from two witnesses. One was Moses Ndung'u who gave evidence for the Bank. The other was the second Defendant who testified on his own behalf and on behalf of his wife the 3rd Defendant. The evidence of these witnesses, in so far as they are relevant to the issues to be determined shall be discussed in detail.

18. What are the issues for determination? The Plaintiffs proposed 19 issues but this can obviously be reduced. On the other hand, the Defendants framed 6 issues. It seems to me that looking at the pleadings the set of issues proposed by the Defendants are reflective, with slight modification, of what emerges for determination. The issues are:-

- a. Whether the 1st Defendant as from 1995 unlawfully increased the applicable rate of interest from 22% pa to 26% pa and imposed penalty interest unlawfully of 1.5% per month?
- b. Whether the 1st Defendant acted in contravention of Section 39 of the Central Bank of Kenya and Section 44 of the Banking Act?
- c. Whether the statutory notice issued to the Plaintiffs by the 1st Defendant on the 1st March 2005 is valid?
- d. Whether the sale of the suit property by the 1st Defendant to the 2nd and 3rd Defendants was fraudulent?
- e. Whether the suit property sold to the 2nd and 3rd Defendants was undervalued.
- f. Whether the Plaintiffs are entitled to prayers sought.
- g. Whether the 2nd and 3rd Defendants are entitled to the prayers sought in ELC No. 57 of 2008.

19. A facility of Kshs.1,500,000 was made available to the Plaintiffs by the Bank in a Letter of Offer dated 14th August 1995 and whose acceptance was made on 23rd August 1995 (P Exhibit page 1). In addition to signing the Bank's Loan conditions, the Plaintiffs executed a Mortgage dated 11th September 1995 over the suit property which was subsequently registered (P Exhibit pages 6-17). In the Letter of offer the interest rate provided was 22% per annum.

20. The mortgage document had the following provisions in respect to the interest that would be payable:-

“3. It is hereby agreed that the interest payable by the Borrower shall be calculated on the amount for the time being outstanding hereunder (whether principal or interest) by the Borrower to the Company on a reducing balance basis with monthly rests and that no part of any payment made by the Borrower to the Company shall be treated as being a payment on account of such principal amount unless all interest due or deemed to be due or accrued has been paid.

4. It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows:-

- (i) Until the service of such a notice as is hereinafter referred to interest shall be at the rate specified in the Schedule hereto.
- (ii) The Company may from time to time serve on the Borrower a demand notice requiring payment of interest at such increased or reduced rate as the Company shall determine having regard to such circumstances as the Company considers to be relevant and the decision of the Company in this behalf shall not be questioned on any account whatsoever.
- (iii) In the event of the Company requiring a variation of the rate of interest under the provisions of sub-clause (ii) of this clause the Company will notify the Borrower of the amount of the resulting varied monthly installment payable under the Provisions of clause 2 hereof and the first of such varied monthly installment shall become due and payable on the first day of the month next after notification of the amount thereof to the Borrower.
- (iv) All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effect as referring to interest as fixed or altered by the provisions of this clause.

21. The Plaintiffs' grievance in respect to interest rates is twofold. First that there was a variation of interest from 22% pa to 26% pa. And then an imposition of penalty interest rate at 1.5% per month. The Bank does not dispute levying those interest rates. What the Court must do is to determine whether the variation and/or imposition of penalty interest was lawful.

22. The Mortgage instrument empowered the Bank to increase interest from time to time. That is the effect of the provisions of clause 4(ii) of the Mortgage Instrument. The power to vary interest rate is however circumscribed by the need to give Notice to the customer. And the provisions of clause 4(i) are unequivocal that until the Service of such a Notice, the rate prevailing at the time of notice is taken to be the rate of interest. In his evidence, the witness for the Bank conceded to this and it was submitted by Counsel for the Bank that a Notice was indeed issued. The witness under cross-examination said as follows,

“The Notice is not part of this Document. This was mentioned in an earlier Ruling.”

23. The Bank's Counsel had submitted that the ruling was in High Court Civil Case No. 402 of 2006. But for purposes of this trial, that Notice was not produced and I am unable to find that the Defendant made sufficient effort to prove that it was issued.

24. The Court was asked by the Bank, I think in the alternative, to find an entry in the Statement of Account as a sample notification of interest used by the Bank. At the Defendant's bundle page 26 is a Statement of Account issued by the Bank for the Plaintiffs' account. It has this statement at the bottom,

"We certify that the total amount of loan interest charged to this account in the period 02/01/2000 to 31/12/2000 was Khs.1,569,688.87 at the rate of 24.00% per annum. Please note that interest is calculated based on 360 days per annum".

The fallacy of that argument is apparent in the plain reading of the statement itself. What the statement does is to simply certify, inter alia, the rate of interest applied. It is not a Notice to vary interest. A Notice would be an advance warning or information that the Bank intends to vary its interest. This is in fact the express contemplation of the provisions of clause 4(iii) that the varied monthly installment which results from a variation of interest shall become due and payable on the first day of the month next after the Notification of the varied monthly installments.

25. In so far as the Bank has failed to prove that it issued a Notice to vary interest from 22% per annum to 26% per annum, this Court has to find that it was in breach of its own covenant.

26. There is yet another difficulty that the Bank faces. In paragraph 11 of the Plaint, the Plaintiffs assail the variation of interest for failure by the Bank to seek and obtain prior approval of it by the Minister. This would be in breach of section 44 of the Banking Act which provides as follows:-

"No institution shall increase its rate or other charges except with the prior approval of the Minister."

27. The effect of the holding by the Court of Appeal in Civil Appeal No. 282 of 2004 (Margaret Njeri Muiruri v. Bank of Baroda (Kenya) Limited [2014] eKLR, is that Section 44 of the Banking Act is applicable to rates of interest as it is to other Banking charges. And on the manner and burden of proving the compliance with the provisions of section 44, the Court of Appeal held:-

"18. On the first issue, it was the respondent's evidence and submission that it was unclear whether the interest increase was done in compliance with Section 44 of the Banking Act. This section requires banks to notify the Minister for Finance before any change in the rate of banking is effected. It provides as follows:

"Restrictions on increase in bank charges

44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

19. The trial court held that the appellant, because she is the one who claimed that the bank acted without the minister's approval, was the one to adduce evidence to prove this assertion. With respect, this is not the correct position. It is generally true that he who asserts must prove. That much is contained in Section 108 of the Evidence Act. However, Section 112 of the Evidence Act further provides that:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

In the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009) this Court, differently constituted held that:

"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

20. In the appeal before us, it was the respondent bank which fell within Section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the Banking Act places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the Minister?

21. To illustrate this point, we find persuasive authority in the High Court case of John Gatutu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001) where Sergio J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the Banking Act. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal."

28. It being conceded that there was a variation of the rate of interest from 22% per annum to 26% per annum, the Bank shouldered the burden of providing proof that it had sought and obtained the prior approval of this variation from the Minister for the time being in Charge of Finance. There was no effort by the Bank to discharge this onus. This is a second reason why the Court must hold that the variation of interest from 22% per annum to 26% per annum is unlawful.

29. On the penalty interest, it is conceded by the Bank that the same is not provided for by either the Letter of offer or the mortgage instrument. It was however pleaded and reiterated in the submissions by the Bank that, as the Mortgage account was in arrears, the Bank was entitled to impose the penalty charges in accordance with the established Banking Practice and Trade Usage and Custom by Mortgage

Finance Institutions. Counsel for the Bank sought to persuade the Court that the Courts in numerous cases have acknowledged that Banks are entitled to levy such charges. The Counsel sought to rely in the decisions in the following cases:-

- i. Orion East Africa Ltd vs. Housing Finance Co. of Kenya Ltd Nairobi HCC No. 914 of 2001.
- ii. Maithya vs. Housing Finance Company of Kenya Ltd (2003)1 EA, 133.
- iii. Lordsvale Finance PLC vs. Bank of Zambia (1996) All ER

30. On my part, I observe that the Bank seeks to rely on the penalty interest as a Trade Usage and Custom. My understanding of the Law is that, unlike a matter upon which the Court should take Judicial Notice, a Trade Usage and Custom must be proved by way of evidence. Considering somewhat similar circumstances, Newbold, P. in C.A Harilal & Co. v. Standard Bank Ltd [1967] EA 512 pg 517 observed,

“Where a claim is based upon a trade usage then the pleadings should quite clearly aver not only that fact but the precise nature of the trade usage on which the claim is founded”.

On his part Duffus, J.A said,

“On the question of usage, as my Lord the President points out, this has not been pleaded, though I should think it possible that a usage if properly pleaded and proved, could be established to show that there would be a variation of interest paid by or to a bank in accordance with the change of a recognized and established bank rate”.

The Court of Appeal held a similar view in Civil Appeal No. 57 of 2005 Highway Furniture Mart Limited vs Permanent Secretary Office of the President & Another (2006) eKLR, reiterating the Mercantile Usage must be pleaded and proved.

31. Although pleaded the Bank makes no attempt to prove the said Trade Usage or Custom. I am unable to uphold the argument by the Bank that it could impose a penalty interest without its provision in the Contract. The penalty interest was unlawful.

32. In reaching this conclusion I find some comfort in the holding of Odunga J. in Francis Joseph Kamau Ichatha vs. Housing Finance Company of Kenya Limited [2014] eKLR in which he delivered himself as follows:-

“Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1)(b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court”.

33. This Court shall return on the question of the unlawfully varied interest and penalty interest. For now I turn to consider the issue of Statutory Notice. The Plaintiffs expended considerable energy in trying to show that because of change of addresses they did not receive Statutory Notices allegedly served by the Bank. But this would be a substantial departure from the Plaintiffs’ own pleadings. This is what the Plaintiffs state in paragraph 13 of their Pleint,

“On 1st March 2005, the 1st Defendant personally issued a statutory notice, in exercise of its rights in the mortgage document as stipulated in Section 69A of the Transfer of Property Act (1882) which was invalid and proceeded to sell the mortgaged property to the 2nd and 3rd Defendants”.

34. The issuance and service of the statutory notice was admitted and not in contention. The Plaintiffs pleaded this expressly and are bound by their pleadings. It will therefore be needless to consider any arguments that depart from this admitted position. As to whether, save for the possible impact of the unlawful rates on the Plaintiffs’ indebtedness, the Statutory Notice was invalid the Plaintiffs did not place any material before Court that the Notice did not conform with the requirements of the Law.

35. It is common cause that the Bank sold the mortgaged property to the 2nd and 3rd Defendants by way of private treaty. The Agreement of Sale dated 8th February 2006 (P Exhibit pg 50-51) shows the purchase price to be Khs.3,800,000. Common as well is that the property has been transferred to the two Defendants by way of an Indenture of Conveyance by Mortgagor which was registered on 7th July 2006.

36. The Mortgage under question was governed by the Transfer of Property Act (1882). A Mortgagee’s right to exercise its statutory power of sale by way of private treaty is undoubted and provided for by Section 69(I) of The Act in the following terms:-

“A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned

thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage- money, or part thereof, immediately due and payable".

37. Although there is opinion that under the provisions of this Section there can be no sale by way of private treaty if there has been no previous attempts to sell the mortgage property by public auction (see Warsame J. (as he then was) in Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 others [2008] eKLR), the Bank may not run afoul of this proposition. There is evidence that prior to selling the property by way of private treaty the Bank had attempted to sell the property by way of public auction. The property had been advertised for sale on four occasions (See the advertisements at D Exhibit pages 51, 52, 53 and 54). On one of the occasions the Plaintiffs sought and obtained an injunction in Civil suit No.1604 of 2000 which stopped the sale by auction. The following was the evidence of the 1st Plaintiff:-

"I did not understand all those charges as I only expected one entry of the agreed interest of 22% per annum. According to the letter of offer the monthly installment was supposed to be Kshs.27,855/=. I wrote several letters to the 1st Defendant complaining about the debits aforesaid. These were not responded to. This constrained me to go to Court and file Case No.1604 of 2000. I was the 1st Plaintiff. The 2nd Plaintiff was Virginia Nduta. The 1st Defendant was HFCK and the 2nd Defendant was Watts Enterprises Ltd. I sought to stop sale of the property by the 1st Defendant through the 2nd Defendant. After the ruling, I approached the 1st Defendant to try and resolve the same".

38. In the circumstances of this case the Bank cannot be faulted for exercising its statutory power of sale through private treaty. In the Plaintiff it had been charged that the Defendants were guilty of conspiracy and fraud. The particulars of fraud were set out to be as follows:-

(a) Conspiring to sell and mortgage the property at a fixed price of Kshs. 3,800,000/ and substituting the Plaintiff's from the mortgage without involving other interested buyers by Public Auction;

(b) Conspiring to exercise an illegal statutory power of sale and not taking any consideration to the proprietary rights of the Plaintiffs in L.R. No. 76/202;

(c) Attempting to justify illegal documents as valid and effectual to the Advocate who draw the conveyances and registration of the mortgage.

39. Of these three particulars, it is true that the Property was sold by private treaty. Nevertheless, the law is that the Bank was entitled to sell the property in that manner and at any rate its attempt to sell by way of public auction had been frustrated by the action of the Plaintiff in seeking a Court Injunction. In regard to the other two particulars of fraud, this Court has been unable to find any evidence in support thereof. Fraud is a quasi-Criminal charge and it must not only be specifically pleaded but requires prove on a standard though below beyond reasonable doubt is above the usual standards in Civil Proceedings, that is on a balance of probabilities.

40. Unable to that find any blame attaches on the 2nd and 3rd Defendants, I would uphold their Defence that they are purchasers for value without notice.

41. I turn to the allegation that the sale was for undervalue. In support of this argument, the Plaintiffs invited a Valuer to testify on their behalf. PW4 prepared a Valuation Report in respect to the property for purposes of returning an open market value of the property. His further instructions were to give an opinion of the value, not at the date of valuation but as at 21st May 2006. The importance of that date being the date when the property was sold by the Bank to the 2nd and 3rd Defendants. The evidence of PW4 is that he inspected the property on 20th November 2008. His evidence was that he used the construction rate in determining the value of the property. In respect to the land he used a Sale Agreement in which the purchase price was Kshs. 2,500,000 being a sale of a comparable property.

42. This would have to be compared with the Valuation Report prepared by Tysons on 1st December 2005 which was used by the Bank as the basis for selling the property to the 2nd and 3rd Defendants. The Report returned 6 values as follows:-

“1. Open Market Value	Kshs. 4,000,000/-
Words:	Kenya Shillings
	Four Million only.
2. Mortgage Value	Kshs. 3,700,000/-
WORDS:	Kenya Shillings Three
	Million Seven Hundred
	Thousands Only
3. Forced Sale Value	Kshs. 3,200,000/-

Words: Kenya Shillings Three

Million Two Hundred

Thousand Only

4. Maintainable Rent Kshs.18,000/-Per Month

Words: Kenya Shillings Eight

Thousand Only per

Month

5. Investment Value Kshs. 1,840,000/-

Words: Kenya Shillings One

Million Eight Hundred

Forty Thousand Only

6. Insurance Value Kshs. 3,000,000/-

Words: Kenya Shillings Three

Million Only

43. Whilst it is true that the Bank did not call the maker of their Valuation Report and so I am asked to ignore it by the Plaintiffs' Counsel, the Report made by their own witness is not without difficulty. The sale by the Bank was a forced sale and the concern of the Court would be whether the forced sale value was understated. It is in this regard that the Report by PW4 falls short. In his evidence PW4 was categorical that he was instructed to find the market value of the property and so did not render an opinion on the forced sale value. Because of this the Plaintiffs have a challenge proving that the forced sale value returned by the Bank's Valuer being 3,200,000 was an under value, noting that the 2nd and 3rd Defendants bought the property at a higher price of Kshs. 3,800,000.

44. Let me now make an observation on the claim by the 2nd and 3rd Defendants. They are currently the registered owners of the subject property having purchased it by way of private Treaty. The process leading to the sale and the manner of sale has, at least this far, not been faulted. Even if, after taking of accounts that this Court will be directing it is found that there was no default on the part of the Plaintiffs and occasion had not arisen for the Bank to exercise its statutory power of sale, the 2nd and 3rd Defendants maintain that the title that they have acquired is beyond impeachment. This is an argument that relies on the provisions of Section 69B of the Transfer of Property Act which is to the following effect:-

“(1) A mortgagee exercising the mortgagee's statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights, and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage.

(2) Where a transfer is made in exercise of the mortgagee's statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A transfer on sale by a mortgagee, made after the commencement* of the Indian Transfer of Property Act (Amendment) Act, 1959, shall be deemed to have been made in exercise of the mortgagee's statutory power of sale unless a contrary intention appears”.

And from various decisions of this Court the 2nd and 3rd Defendants may well be in pole position!

45. However this argument has to be weighed against the Plaintiffs' view that there is occasion when the acquired title can be cancelled. I have myself found the following observation from the Court of Appeal in respect to whether a transfer made in exercise of the Mortgagee's Statutory Power of Sale, even in the absence of any fault or wrongdoing on the part of the Purchaser, is completely insulated from impeachment,

“From the above survey of the case law, it is clear that the issue whether or not the impugned sale by the 2nd Respondent in exercise of its statutory power of sale can be set aside on ground of fraud is a complex legal issue. It is an issue which has to be determined in the perspective of the general duties of a mortgage, the relevant provisions of RTA and TPA, the relevant case law and upon consideration of evidence as to whether the sale was tainted with impropriety amounting to fraud”.

(See Elijah Kipnego Arap Bill vs. Samwel Mwehia Gitau & Another [2009] eKLR).

46. The Court will make its determination on this issue and other claims after the taking of accounts.

47. On the taking of accounts, the Plaintiffs had sought the following prayer (iv) in the Amended Plaint,

“An Order for the 1st Defendant to supply a true account of the Plaintiffs' indebtedness”.

This Court has found that the Bank imposed unlawful and uncontracted interest rates and its impact on the Plaintiffs' indebtedness can only be revealed by the taking of accounts. An Order for taking of accounts is therefore inevitable and in fact imperative! I would also think it to be consistent with prayer (iv) above.

48. In the upshot, I direct that parties herein agree on and appoint an Independent Accountant to take accounts between the Plaintiffs and the Bank and to file his Report within 45 days of the date of his appointment. In default of such agreement each party to appoint an Accountant and the two Accountants to appoint an umpire and the three to prepare a Report of the accounts within 45 days of the appointment of the umpire. Where parties agree on one accountant, his costs will be shared equally by the parties. However, where three Accountants are appointed each party will bear the costs of its Accountant while the costs of the umpire will be shared equally by the parties.

49. In taking the accounts regard will be given to this Court's finding on the unlawful and uncontractual interest rate imposed and make a Report as to the extent, if any, of the Plaintiffs' indebtedness as at the date the Bank exercised its Statutory Power of Sale.

50. The final decision of this Court shall await the filing of the said Report.

51. Any party is at liberty to apply.

Dated, Signed and Delivered in Court at Nairobi this 19th day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kihara h/b Mageto for Plaintiffs

Muchee for 1st Defendant

N/A for 2nd and 3rd Defendants

Nixon – Court clerk