



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 379 OF 2014

ANTONY NJENGA MUNA.....PLAINTIFF

- VERSUS -

EQUITY BANK LIMITED.....1ST DEFENDANT

GITONGA RINGERA T/A.....2ND DEFENDANT

VIEWLINE AUCTIONEERS.....3RD DEFENDANT

RULING

1. The plaintiff, **ANTONY NJENGA MUNA**, requests the court to grant an interlocutory injunction to restrain the defendants, **EQUITY BANK LIMITED** and **VIEWLINE AUCTIONEERS**, from advertising; offering for sale; disposing of; alienating; transferring; causing to be transferred; altering; registering or in any other way whatsoever interfering with his quiet possession, use and enjoyment of the suit property.
2. He accused the bank of increasing the rate of interest payable, thus making it practically impossible for the plaintiff to sustain the rate of payment and thus creating un-necessary arrears.
3. The plaintiff also blamed the bank for failing to provide him with Statements of Account, because the bank presumably wanted to hide the irregularities in the increase in the rate of interest.
4. The bank was faulted for not serving the mandatory Statutory Notice, through which it could have called upon the plaintiff to pay off the arrears. Having failed to serve that Notice, the bank's Redemption Notice was said to have been of no legal consequence.
5. The advertisement of the intended public auction of the suit property was also said to have fallen short of the legal requirements, because the bank's Statutory power of Sale had not arisen, in any event.
6. Finally, the plaintiff contended that the bank was actuated by malice, as evidenced by the failure to carry out a Valuation of the suit property before taking steps to realize the security.
7. The suit property is **L.R. No. DAGORETTI/KINOO/T.198**. It is registered in the name of **ANTONY NJENGA MUNA**, as the proprietor.
8. The plaintiff charged the property in favour of **EQUITY BANK LIMITED**, as security for the Loan Facility of Kshs. 7,000,000/-.
9. It is the plaintiff's case, as stated in his affidavit, that;

“...the Defendant must have made various changes in the rates of interest charged and/or applied to the loan account without informing me of the said changes?.

10. The plaintiff deponed that he was well aware that he was required to maintain sufficient funds in his bank account, which the bank could have used to offset the monthly installments of Kshs. 205,460/-. But the plaintiff said that that requirement was not spelt out in the Charge.
11. He was therefore very surprised when he was served with a Redemption Notice in August 2014. By that Notice, the bank was demanding the sum of Kshs. 5,808,021.22, which was described as the entire outstanding loan amount.
12. The plaintiff says that the Redemption Notice surprised him because the bank had not served him, prior to that date, with any Demand Note or a Statutory Notice.
13. Nonetheless, the plaintiff wrote to the bank, with a view to making proposals on how he would clear the arrears.
14. The reason given by the plaintiff for falling into arrears is that his transport business was paralyzed when his truck was detained in Burundi.
15. He described the situation he was in as a temporary financial crisis. He therefore had every intention to settle the matter amicably.
16. However, the bank then took steps to advertise in the press, the intended auction of the suit property. It was because of that development that the plaintiff was obliged to come to this court to seek an injunction to stop the sale.
17. His lawyer had advised him that the intended auction was unlawful, and it had no basis either in law or in contract because the bank had failed to comply with the mandatory provisions of the law which governed the chargee's exercise of his statutory power of Sale.
18. In answer to the application, the bank stated that the interest rates charged on the loan were in accordance with the terms of the Loan Agreement and the Charge Instrument.
19. It was categorically denied that the bank had increased the applicable rate of interest.
20. Clause 4 of the Loan Approval Letter dated 22nd December 2011 provides that Interest would be charged at the rate of 25% per annum;

“Or such other rate as may be determined by the Lender from time to time. The Lender reserves the right to amend the interest charges without prior notice to the Borrower?”

21. In effect, if the bank had amended the interest rates without notice to the borrower, that would, on a *prima facie* basis, have been within the terms of the Loan Agreement.
22. Clause 5 of the Agreement deals with “*Additional Interest?*”, and it says;

“If the Borrower fails to pay any sum payable under the proposed facility on its due date the Borrower shall pay interest on such sums from the date of such failure to the date of actual payment (as well after as before any demand, judgement or liquidation of the Borrower) at the rate of six per cent (6%) per annum above the rate specified in clause 3 of this letter?”

23. In this case the plaintiff did readily concede that he was in arrears. In the light of the terms of clause 5 (above) the interest chargeable by the bank then rose by 6%, from the 25%.
24. On a *prima facie* basis, the plaintiff did not demonstrate that the bank charged interest in excess of 31% per annum, from the date when the plaintiff fell into arrears, therefore, I find that the bank was not in breach of the contract.
25. When the rate of interest goes up, the monthly repayment installments would be expected to increase in size.
26. In this case, the plaintiff wrote to the bank on 24th August 2014 explaining that because their truck had been detained in Burundi, making it difficult for the plaintiff to remit payments of Kshs. 204,000/-, the plaintiff offered to reduce the monthly installments to Kshs. 100,000/-.
27. Such a reduction in the monthly installments, even if the plaintiff had met the payments, would not have cleared the arrears.
28. But, did the bank issue Notices to the plaintiff prior to taking steps to realize the security?
29. The defendant has shown the court a letter dated 12th September 2013. The said letter was called a “Demand Notice, pursuant to Section 90 of the Land Act.
30. The Notice told the plaintiff that he had 3 months to pay-off Kshs. 6,215,600.42 which was the

- balance of the principal sum together with interest and other monies payable by the plaintiff.
31. On 14th January 2014, the bank issued another Notice to the plaintiff. This was a Notice giving the plaintiff 3 months, to pay Kshs. 5,474,135.17.
 32. The Notice specified that the interest rates applicable were 18% per annum, and a default rate of 6% per annum.
 33. In effect, the bank had actually reduced the applicable rate of interest, contrary to the plaintiff's assertion that there had been an increment.
 34. Was it wrong for the bank to ask the plaintiff to pay the whole outstanding balance instead of only the arrears?
 35. In posing that question, there is a presumption that the whole outstanding balance cannot be due and payable when only some arrears are outstanding. However, that presumption is not necessarily correct.
 36. In **ALBERT MARIO CORDEIRO & ANOTHER Vs VISHRAM SHAMJI** Hccc No. 329 of 2014 Gikonyo J noted as follows;

“The plaintiffs have gone to great lengths to define what rectification of default under section 90 means. But I think that the general assumption that where there is non-payment of some installments the Chargor should only be asked to pay the outstanding installments and the other terms resumes as a matter of course, not to be entirely defensible. I also think that it will not be illegal for a charge to provide that in the event of default in payment of one or more installments the entire debt becomes payable. In such case, the default to be rectified is payment of the entire sum?.

37. I am entirely in agreement with my learned brother on that score.
38. However, I failed to trace, in the Charge Instrument, any clause which made it clear that upon the chargor or the borrower defaulting in making payment of some monthly installments, the balance of the loan would automatically become due and payable.
39. Therefore, I find that the Demand Notices issued by the bank in this case did not comply with Section 90 of the Land Act, because they did not indicate the quantum of the arrears that was outstanding at the time each of the said notices were issued.
40. As regards the contention that the suit property was matrimonial property, I find that that fact alone is not sufficient reason to warrant the grant of an injunction to stop a chargee from exercising its statutory powers of Sale.
41. In any event, the person seeking to rely on that premise is the registered proprietor of the suit property. When he was offering it as security, he was well aware that it was matrimonial property. He cannot now seek to fall back on those grounds to bar the bank from realizing the very security which he had offered.
42. In order to be able to lawfully exercise its statutory powers of sale, the bank would have to first issue a valid Demand Notice, followed by a Statutory Notice and later by a Redemption Notice, if the chargor will have defaulted.
43. For now I find that the proposed auction is not lawful as it was premised on an invalid Notice.
44. However, the court cannot grant an injunction which would last until the suit is heard and determined. Such an order would be inconsistent with justice.
45. The bank needs to only issue new Notices which are compliant with the law, and it can then proceed to realize the security.
46. I therefore order that an interim injunction will issue forthwith to stop the defendants from selling the suit property. However, this order will only remain in force until the bank issues appropriate and lawful notices.
47. The costs of the application are awarded to the plaintiff.
48. The bank is also ordered to settle the auctioneer's charges and other expenses such as for the advertisements. In other words, those charges are not to be debited to the account of the borrowers.
49. For the avoidance of any doubt, it is only the costs relating to the sale which has been called off which will be borne by the bank.

DATED, SIGNED and DELIVERED at NAIROBI this 10th day of February 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of:

Muchoki for Gachie for the Plaintiffs

Waithaka for Karuga for the Defendants

Collins Odhiambo – Court clerk.