

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 20 OF 2014

TITUS WAGENI MAINA.....1ST PLAINTIFF

ROSE WAMBUI KABUE.....2ND PLAINTIFF

VERSUS -

CFC STANBIC BANK LIMITED.....1ST DEFENDANT

KEYSIAN AUCTIONEERS.....2ND DEFENDANT

DIANA KWAMBOKA ONTIRI.....3RD DEFENDANT

RULING

1. The application before me is dated 28th February 2014. It is an application filed by the plaintiffs, **TITUS WAGENI MAINA** and **ROSE WAMBUI KABUE**, who are seeking an injunction to restrain the defendants from entering upon, selling, offering for sale, altering, sub-dividing, alienating, transferring or howsoever dealing with the suit land, L.R. No. 209/19594.
2. The plaintiffs have given the following reasons as the basis for their application:

“a) The Plaintiffs’ property known as L.R. No. 209/19594 was scheduled to be sold on 22nd January 2014, by the 2nd Defendant acting on instructions of the 1st Defendant;

b) Whereas the intended sale of the parcel of land known as L.R. No. 209/19594 did not take place on 22nd January 2014, the 1st and 2nd Defendants have purported to have sold the said property to the 3rd Defendant;

c) The intended sale of the plaintiff’s’ property was unlawful being premised on an instrument of Charge lacking essential validity as well as statutory notices and notifications of sale that are manifestly and incurably defective;

d) The purported sale of the plaintiffs’ said property is patently unlawful as at the auction of 22nd January 2014, no bid was accepted by the 2nd Defendant;

e) The declared forced sale valuation by the 2nd Defendant is thirty per centum (30%) below that contained in the forced sale valuation undertaken on behalf of the 1st Defendant, rendering the intended purported sale unlawful, mired in fraud and bad faith; and

f) The Plaintiffs/Applicants are reasonably apprehensive that unless restrained by an order of this Honourable Court, the 1st and 2nd Defendants shall proceed with the intended transfer of the plaintiff’s property to the 3rd Defendant, thereby causing the plaintiff’s substantial and irreparable loss.

g) In the circumstances, the interests of justice can only be served by issuance of injunctive and

preservatory orders in the terms prayed herein”.

3. In their submission, the plaintiffs submitted that at the time when the 1st Defendant, **CFC STANBIC BANK KENYA LIMITED**, issued statutory notices to the plaintiffs’ , there had be no default by the plaintiffs, in the repayment of the loan facility.
4. The plaintiffs’ position was that the alleged default was created by the bank, through the act of debiting the plaintiffs account with illegal and multiple entries. The said illegal entries were particularized by the plaintiffs’ as follows;

	MONTH	INTEREST PAYABLE (KSHS)	INTEREST CHARGED (KSHS)	UNLAWFUL INTEREST DEBITED (KSHS)
1.	OCTOBER 2011	63,698.65	255,708.16	192,009.51
2.	MAY 2012	63,698.65	112,845.10	49,146.45
3.	JUNE 2012	63,698.65	112,845.10	49,146.45
4.	JULY 2012	63,698.65	225,690.20	161,991.55
5.	AUGUST 2012	63,698.65	112,845.10	49,146.45
6.	SEPTEMBER 2012	63,698.65	112,845.10	49,146.45
7.	OCTOBER 2012	63,698.65	112,845.10	49,146.45
8.	NOVEMBER 2012	63,698.65	112,845.10	49,146.45
9.	DECEMBER 2012	63,698.65	86,025.63	22,326.98
10.	JANUARY 2013	63,698.65	77,116.05	13,417.40
11.	FEBRUARY 2013	63,698.65	77,068.65	13,370.00
12.	MARCH 2013	63,698.65	69,567.05	5,868.40
13.	APRIL 2013	63,698.65	76,875.50	13,176.85
14.	MAY 2013	63,698.65	120,938.85	57,240.20

15	JUNE 2013	63,698.65	75,443.10	11,744.45
16	JULY 2013		TOTAL	791,659.19

5. If the alleged illegal entries were not debited to their account, the plaintiffs believe that they would not have been in arrears, and that therefore, there would never have arisen the need for the bank to issue notices to the plaintiffs.
6. The reason advanced by the plaintiffs for labelling those debits as illegal is that the same reflected an increment in the rate of interest which the bank was charging, yet the bank had not given to the plaintiffs any Notices prior to the variation of the interest rates.
7. According to the plaintiffs, the bank was under a statutory duty to issue notices to the borrowers, prior to giving effect to a variation to the applicable rate of interest. The said obligation is said to be imposed by Section 84 (1) of the Land Act.
8. It was the plaintiff's contention that the requirement that the borrower be notified before the rate of interest could be changed was imposed so that the lenders could not clandestinely vary the rates of interest, to the detriment of the borrower.
9. When the rate of interest was only changed after appropriate Notice was given to the borrower, that was said to give an opportunity to the borrower to reorganize, prepare and plan his finances.
10. On the other hand, the defendant pointed out that between the two parties herein there was an express understanding, in writing, that the bank could charge different rates of interest at its sole discretion, provided that the said rate did not exceed the maximum permitted by law.
11. The Charge instrument went on to indicate that the bank was not required to advise the chargor of the change in the rate of interest prior to such change taking effect.
12. Indeed the charge stated that the failure by the bank to notify the chargor prior to the change of the rate of interest, could not prejudice the bank.
13. The issue of the rate of interest is a substantive one, which ought not to be determined at this interlocutory stage. If the court were to determine that issue now, such decision may be prejudicial to one or the other party to the suit.
14. Suffice it to say that the issue was definitely arguable.
15. But it is also arguable whether or not a borrower or a chargor who asserts that his account has been debited with unlawful or illegal interest, ought to be allowed to wait until the security was about to be auctioned before he challenged the rates of interest which had been debited against his account over a long period of time. That question arises because the plaintiffs have pointed out that the debits they are challenging date back to October 2011.
16. I am not suggesting that just because a person does not take up an issue at the earliest possible opportunity, he should thereafter be barred from challenging an act or omission which was otherwise either unlawful or illegal.
17. Injunctive reliefs, such as those being sought by the plaintiffs herein, are equitable in nature. And, ordinarily, Equity does not aid the indolent.
18. The plaintiffs' reasoned that if the bank had not debited their account with figures which reflected a much higher quantum of interest than should have been the case, then there would not have arisen any arrears.
19. Assuming for the moment that the plaintiffs said reasoning was accurate, I find that the only way that the plaintiffs would have ensured that there were no arrears, was by paying the amounts which they deemed to reflect the correct calculation of that which was payable.
20. In my understanding, a borrower must pay to the lender much more money than is due in respect to the interest. If only the interest is paid, the principal sum would remain outstanding. Therefore, in order to pay the loan, the borrower must make payments which would clear the interest and also help reduce the principal sum progressively.
21. As the plaintiffs said that the interest alone amounted to Kshs. 63,698.65, every month, it would follow that if the plaintiffs paid that sum or less, their account would definitely fall into arrears.
22. From the bank statements made available by the plaintiffs, there were no payments made between

- December 2011 and June 2012.
23. Thereafter between 1st August 2012 and 18th January 2014, the bank statements show that the total amount of money that was paid into the account was Kshs. 109,432.04.
 24. In my considered view, when the borrowers failed to make any significant payments into their account they knew or ought to have known that the account would definitely be in arrears. Accordingly, the arrears were not a creation of the bank's actions, but were the direct consequence of the plaintiffs' failure to service the loan facility.
 25. The plaintiffs made it clear, at paragraph 6 of their Amended Plaintiff, that the loan was supposed to have been paid by way of monthly instalments of Kshs, 80,000/-. When they failed to make those payments, they fell into serious arrears.
 26. The plaintiffs have confirmed that they were served with a statutory notice and, later, with a Notification of sale. However, because the plaintiffs held the view that the chargees' statutory powers of sale had not accrued, they have described the said notices as invalid and void "*ab initio*"
 27. But even assuming that the statutory notice and the Notification of sale were valid, the plaintiffs submitted that the bank flouted the provisions of Section 97 (1) of the Land Act 2012, by selling-off the land at 30% below the forced sale valuation.
 28. Another interesting contention of the plaintiffs' was that there had never existed any reasonable probability that they would repay the loan. That point is derived from the plaintiffs' financial position and their resources, which could not have made it possible for them to pay the loan.
 29. Frankly, I am unable to appreciate how the plaintiffs want the court to help them escape from their obligation to repay a facility which they sought for and obtained from the bank by saying that they do not have the ability to pay the loan, yet they also wish to have the bank stopped from selling a property which they had offered as security for the loan.
 30. On the one hand, they claim to lack financial ability, whilst on the other hand, they contend that the property which they had tendered as security was worth much more than the money which the bank is claiming.
 31. In effect, when the value of the security is much more than the debt, the borrower or the chargor can be deemed to be capable of repaying the loan which is secured by the said security.
 32. On a *prima facie* basis I find that the statutory notice issued by the bank was not in strict compliance with the provisions of Section 90 (2) (b) of the Land Act. I so find because the charge was obliged to tell the chargor, who had defaulted through a failure to pay money, the amount which must be paid to rectify the default.
 33. In this case, the bank appears to have only specified the total amount that was still outstanding. The bank did not provide particulars of the sums of money which, if paid, would rectify the default.
 34. But then again, what is the purpose served by a Notice?
 35. A Notice is a communication which relays to the recipient information from the person sending it, requiring the said recipient to either act or to refrain from taking the particularized action.
 36. Under Section 90 of the Land Act, the law requires a chargee to give a written Notice to a chargor whose default has continued for one month. The Notice envisaged by that provision was one that would require the chargor to pay the money owing or to perform and observe the agreement.
 37. It was arguable that by demanding payment of the whole sum, the bank was simply asking the chargor to perform or observe the provisions of paragraph 9 of the Charge Instrument.
 38. But then again, it must be acknowledged that Section 90 (2) of the Land Act expressly gives particulars of what the law deems as constituting adequate notice.
 39. The question as to whether or not the terms of a contract can oust or supercede the provisions of statute, thus comes into play.
 40. Assuming for a moment that the Notice given to the plaintiffs was not adequate, that would imply that as and when the chargee were to give an adequate Notice, it should be able to take further steps to realize the security. In effect, I hold the considered view that when a chargor or a borrower is challenging the validity or adequacy of either a statutory notice or of a Notification of sale, and if the court finds merit in such a challenge, the chargee should be accorded an opportunity to remedy any such defect. If the defect can be remedied, then the chargee need not wait until the suit was heard and determined.
 41. What I find most disturbing is the fact that the plaintiffs were not servicing the loan, and yet they

- wish to have the court preserve the subject matter of the suit.
42. Bearing in mind the plaintiffs contention that they lacked the financial ability to pay-off the loan, I find that any delay in resolving the entire case would be highly prejudicial to all the parties.
 43. In this case, the plaintiffs have acknowledged that the suit property had already been sold to the 3rd Defendant, **DIANA KWAMBOKA ONTIRI**. However, they also emphasize that the purchaser had not completed making payment of the purchase price.
 44. In those circumstances, the plaintiffs expressed the view that the subject matter of the suit be preserved until the case was heard and determined.
 45. I have taken note of the fact that when the plaintiffs first sought an interlocutory injunction, with a view to stopping the sale, the court granted the said relief, *albeit* conditionally. The court directed the plaintiffs to pay Kshs. 1,600,000/- to the bank. The amount of money was to have been paid by the close of business on 22nd January 2014.
 46. It is very significant that it was the plaintiffs who offered to pay that amount of money, which they described as the arrears due to the bank.
 47. Notwithstanding, the plaintiffs' said offer and the resultant order of the court, it has transpired that the plaintiffs did not make the payment.
 48. The conduct of the plaintiffs suggests that while they are seeking equitable reliefs, they were not being equitable.
 49. Finally, in the plaint, the plaintiffs seek a permanent injunction to restrain the defendants from selling, alienating or howsoever dealing with the suit property. If anything, the plaintiffs want the charge to be discharged.
 50. Those reliefs are sought although the plaintiffs readily conceded before Kimondo J. that they were in substantial arrears.
 51. From a *prima facie* perspective, I find that it was unlikely that a borrower or chargor who was not paying back the loan he borrowed can either obtain a permanent injunction to stop the realization of the security, or can obtain an order for the unconditional discharge of the charge.
 52. The point I am making is that the plaintiffs have not proved a *prima facie* case with a probability of success; that is in relation the substantive reliefs claimed in the plaint.
 53. The plaint also has some alternative reliefs. One of the said alternative reliefs sought by the plaintiffs is for Damages for the irregular/unlawful sale of the suit property.
 54. When a party asks the court to compensate him by way of damages, that presupposes that the said relief could be an adequate remedy. In the circumstances, if damages could be an alternative remedy to the other reliefs which the plaintiffs prayed for, I find that such loss as the plaintiffs may suffer due to the actions or omissions attributable to the defendants, are not irreparable.
 55. In the final analysis, therefore, there is no merit in the plaintiffs' application dated 28th February 2014. The said application is dismissed, with costs to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 11th day of March 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mwangi for the 1st Plaintiff

..... for the 2nd Plaintiff

Miss Mudaye for Miss Ndmia for the 1st Defendant.

No appearance for the 2nd Defendant.

Nyanyuki the 3rd Defendant.

Collins Odhiambo – Court clerk.