REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 700 OF 2005

PHILIP KIOKO KATHENGE.....1st PLAINTIFF

DOROTHY MUENI KIOKO.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED.....DEFENDANT

RULING NO. 2

1. The application before me is dated 20th December 2005. It is an application which was filed by the plaintiffs, who were seeking an interlocutory injunction to restrain the defendant from advertising for sale, or interfering with, or alienating, or otherwise howsoever dealing with the suit property, **L.R. No. NAIROBI/BLOCK 60/64.**

2. According to the plaintiffs, they were compelled to seek the injunction because on 1st November 2005, the defendant had served a Notification of Sale upon them. The plaintiffs believed that that Notification was without foundation because the Statutory Notice dated 30th July 2003 was defective.

3. The plaintiffs other contention was that the Notice was, in any event, extinguished by an agreement between the parties dated 28th June 2004.

4. Pursuant to the Agreement dated 28th June 2014;

> **"a) The plaintiffs were to pay Kshs. 350,000/- in full settlement of the debt;**
>
> **b) No further interest was to be charged; and**
>
> **c) The defendant received part-payment from the plaintiffs".**

5. Not only is the defendant said to have been party to that Agreement, it re-affirmed the same by agreeing to re-schedule and extend the repayment period.

6. As far as the plaintiffs were concerned, it would be inequitable to allow the defendant to now revert to the Statutory Notice which had been compromised.

7. If, as the plaintiffs say, the Statutory Notice was extinguished by the Agreement dated 28th June 2004,

then it would follow that a fresh Statutory Notice would have to be issued before the defendant could sell the security.

8. The plaintiffs also assert that they had already paid-off the whole loan, pursuant to the law. Indeed, the plaintiffs believe that they had paid more than they should have. Therefore, they even have a claim for a refund of Kshs. 171, 617.80.

9. When canvassing the application, the plaintiff placed reliance upon the case of **EAST AFRICA INDUSTRIES LIMITED Vs TRUFOODS LIMITED [1972] E.A. 420,** in which the Court of Appeal laid down the following principles, for the grant or the rejection of an application for interlocutory injunction;

> ***"There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on a balance of convenience. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages".***

10. On its part, the defendant relied on the decision in **GIELLA Vs CASSMAN BROWN & COMPANY LIMITED [1973] E.A 358.** The leading judgement in both authorities was written by Spry V.P. But in this latter case, the learned Vice President of the Court of Appeal set out the sequence in which the ingredients were to be accorded consideration by the court. He said;

> ***"The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, the Plaintiff/Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiffs/Applicants might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide the case on a balance of convenience".***

11. It therefore follows that the first issue to be addressed was whether or not the plaintiffs have shown a prima facie case, with a probability of success.

12. It was the submission of the plaintiffs that the initial Statutory Notice dated 31st July 2003 was compromised through the Settlement Agreement dated 28th June 2004.

13. To my mind, that submission did not challenge the validity of the original Statutory Notice, as at the time it was issued. The plaintiffs are saying that there was compromise, through a Settlement Agreement.

14. The defendant acknowledged that the parties did arrive at some settlement on 28th June 2004. In the circumstances, if the parties did arrive at a settlement, it should be expected that the whole dispute was resolved.

Why therefore is the dispute still raging?

15. It is because the defendant threatened to exercise its statutory powers of sale. The defendant took that step after the plaintiffs allegedly defaulted on their obligations, as set out in the Settlement Agreement.

16. The plaintiffs' complaint in that respect appears to be this;

> ***"…that the Respondent ought to have issued a fresh statutory notice upon the Applicants after the alleged breach".***

17. In order to understand the issue concerning the alleged breach of the Settlement Agreement, it is

necessary to set out the terms of the Settlement Agreement.

18. The said Agreement was written out on the defendant's letter-head, as a letter dated 24th June 2014. When the letter was received by the 1st plaintiff, he signed it, stating that the terms and conditions set out in the letter were confirmed to constitute the arrangement between the parties. As the signature was appended on 28th June 2004, that constituted the date of the Agreement, whose terms were as follows;

> ***"RE: DEAL REFERENCE: KIOKO P98117057 L.R. No. NRB/BLOCK 60/64 – OTIENDE ESTATE MR & MRS PHILIP KATHENGE"***
>
> *Subsequently we write to advise you that we have evaluated your counter proposal and are acceptable to your full and final figure of Kshs. 350,000 subject to the following terms and conditions:-*
>
> *1. That Kshs. 60,000.00 is paid within first 5 months as per your offer and the balance of Kshs. 50,000.00 to be paid within the sixth month.*
>
> *2. Offer lapsing on 30th November 2004, thereafter we shall charge interest at the prevailing market rate.*
>
> ***"Kindly confirm this offer to enable us take further action"***

19. The Settlement Agreement made it very clear that it lapsed on 30th November 2004, after which the bank would charge interest at the prevailing market rate.

20. On 17th February 2005 the 1st plaintiff wrote to the defendant stating that he had only paid the sum of Kshs. 60,000/-, leaving an outstanding balance of Kshs. 290,000/-. He blamed the prevailing economic condition in the country for his inability to meet the terms and conditions of the Settlement Agreement.

21. The 1st plaintiff then asked the defendant to permit him to pay the balance at the rate of Kshs. 15,000/- per month.

22. On 9th March 2005, the defendant responded to the 1st plaintiff's letter of 17th February 2005. The defendant informed the 1st plaintiff that the balance outstanding was Kshs. 468,093.85. That balance was said to continue attracting interest at the rate of 17% per annum.

23. The defendant reminded the plaintiffs that they had failed to honour the terms and conditions of the mutual agreement for settlement of the plaintiffs' indebtedness. The defendant further reminded the plaintiffs that the offer had lapsed on 30th November 2004.

24. On a *prima facie* basis, it is evident that the Settlement Agreement dated 28th June 2004 was not an end in itself. It was not the pronouncement that the plaintiffs liability had been paid for in full.

25. The Agreement expressly stipulated that if its terms and conditions were not complied with by 30th November 2004, the Agreement would not only lapse, but the outstanding balance would then attract interest at prevailing market rates.

26. As the plaintiffs acknowledged that they did not pay Kshs. 290,000/- by 30th November 2004, it would appear that the defendant was then entitled to debit interest on the balance.

27. The plaintiffs have exhibited the defendant's letter dated 6th July 2005. By that letter, the defendant informed the plaintiffs that the letter constituted a Statutory Notice.

28. Pursuant to that Notice, the plaintiffs were asked to pay the loan amount of Kshs. 474,222.30, with

interest thereon at 18.75% per annum.

29. The plaintiffs were told that they had a period of 3 MONTHS from the date of service of the Notice, to pay the loan. If they failed to pay the loan within the time indicated, the defendant said that it would exercise its statutory rights under section 74 of the Registered Land Act.

30. On a *prima facie* basis, I find that that Statutory Notice did comply with the legal requirements.

31. I note that the plaintiffs' only issue with the said Notice was that because it was served by Registered post, the period of 3 months was indeterminate.

32. First, it is to be noted that in the body of the application, the plaintiffs had not made reference to the Statutory Notice dated 6th July 2005.

33. The plaintiffs case had been that the statutory notice dated 30th July 2003 was defective.

34. The plaintiffs' further case was that the Statutory Notice dated 30th July 2003 was extinguished by the Settlement Agreement dated 28th June 2004. Therefore, it was the contention of the plaintiffs that the defendant could not revert to the non-existent statutory notice.

35. In the circumstances, the submissions contending that the statutory notice dated 6th July 2005, do not derive their foundation from the broad case which the plaintiffs had set out to prove.

36. However, the Notice which the plaintiffs impugn was definitely received by the plaintiffs. The only question is whether the notice was for an indeterminate period because it had been sent by registered post.

37. Of course, the actual date when the plaintiffs received the notice would be unknown to the person who dispatched it. However, the period of 3 months begun to run from the date when, by law, the plaintiffs are deemed to have received the notice.

38. Section 153 (c) of the Registered Land Act, (which was in force as at the date when the Statutory Notice in issue was issued) expressly recognized that Notices under that statute could be sent by registered post, and that such a notice would be deemed to have been served.

39. I therefore find, on a *prima facie* basis, that the assertion that the Notice was for an indeterminate period, was a non-issue. I say so because I cannot see how it can possibly lead to success in the plaintiffs' case.

40. Was the plaintiffs' account debited with illegal interest rates, which therefore placed the loan beyond their reach?

41. That appears to be a serious question. But it must be placed in perspective.

42. First, the plaintiffs relied upon the decision in **GIVAN OKALLO INGARI & ANOTHER Vs HOUSING FINANCE COMPANY of KENYA LIMITED, Hccc No. 79 of 2007,** in which Warsame J. (as he then was) held as follows;

> **"To my mind the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. Prima facie, the loan account would become irredeemable if charges outside the contractual agreement is loaded into the account"**

43. The acts which fell outside the terms and conditions of the charge, in that case, were the debiting of illegal default interest and penalty interest, when the charge instrument had no provision for the variation of the rate of interest.

44. The learned Judge made it clear that;

> **"When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document".**

45. In the present case, clause 5 of the charge instrument expressly provided that the chargee could either increase or reduce the rate of interest. The case is therefore distinguishable from the authority cited by the plaintiffs.

46. In the case of **MOHAMED GULAMHUSSEIN FARZAL KARMALI & 2 OTHERS Vs CFC BANK LIMITED Hccc No. 3 of 2006** I had occasion to express myself thus;

> ***"On my part, I hold the considered view that provided parties to an instrument of charge have a clear Agreement on the interest which is to be charged on the facility, it would not matter if the rate is variable. That is what I understand their Lordships to have determined in FINABANK LTD Vs RONAK LTD [2001] E.A. 54. By implication, it would mean that a charge instrument which provided for variable interest would not be void or voidable simply because it did not specify one rate of interest, or a specified instalment amount".***

47. My said view is still the same todate. Therefore, I find that the plaintiffs have not made out a *prima facie* case with a probability of success, if such case were founded upon the alleged indeterminate period of the Statutory Notice.

48. The assertion that the plaintiffs had paid off the whole debt must have been pegged on the plaintiffs' understanding, that the rate of interest was not variable.

49. Having now come to the conclusion that the charge instrument expressly provided for variations, either upwards or downwards, of the interest rates, it would follow that the calculations put together by the plaintiffs were more probable than not, wrong.

50. Those calculations, which are founded upon a misunderstanding of the provision governing the rate of interest, is unlikely to give rise to a case which has a probability of success.

51. In a nutshell, the plaintiffs have failed to demonstrate any *prima facie* case with a probability of success. That finding is thus sufficient to determine the application for an interlocutory injunction.

52. However, as a matter of abundant caution, I also ask myself whether the failure to grant an injunction would cause the plaintiffs to suffer injuries which cannot be compensated by an award of damages.

53. It is the plaintiffs' case that because they had already over-paid the loan, they would suffer irreparable loss and damage if the suit property was sold.

54. Honestly, I did not get a grasp of the plaintiffs' submission in that respect. I say so because I would expect a party who was asserting that the losses he would suffer would be incapable of monetary compensation, to demonstrate why his said losses cannot be adequately compensated.

55. In terms of monetary ability, the plaintiffs have not raised any doubts about the defendant's capacity to pay compensation.

56. Of course, the mere fact that a defendant has an enormous financial ability is not, of itself, sufficient ground for the court to deny the plaintiff's request for an interlocutory injunction.

57. But when a plaintiff asserts that the award of damages would be unable to adequately compensate him, the plaintiff is obliged to present material information to demonstrate why money, even if it were to be ultimately paid by the defendant, could not accord sufficient compensation to the plaintiff.

58. When a plaintiff offered property as security for a loan advanced to him by the defendant, the plaintiff would ordinarily be deemed to have been aware that if he defaulted, the said property would be sold by the defendant. That being the case, the plaintiff cannot simply suggest that although he was in default, he would suffer irreparable loss if the defendant did the very thing which the plaintiff had anticipated from the time he offered his property as security.

59. If the plaintiffs were so attached to the suit property, because they had lived in it for over 3 decades, and if they could not therefore stand the thought of losing it, they should not ever have offered that property as a security for the loan they were taking from the defendant.

60. And whereas the value of the security may be much higher than the balance of the debt which the lender was claiming, I hold the view that that should be a motivation for the borrower or the guarantor to pay the debt, so as to save its valuable asset.

61. If the lender has given all the requisite notices, I cannot appreciate why he should be compelled to withhold the exercise of his statutory powers of sale just because the security was worth much more than the debt which was still outstanding.

62. In the result, I find no merit in the plaintiffs' application for an injunction. The said application is therefore dismissed. The plaintiffs will pay to the defendant the costs of the application.

63. However, notwithstanding the dismissal of the application, I nevertheless direct that the defendant must issue a fresh Statutory Notice to the plaintiffs. This Direction is based on the exceptional circumstances of this case, in which the application was being determined some 10 years after it was filed in court. It is thus only fair that the defendant make known to the plaintiffs, the current state of the account.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8th day** of **July** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kyalo for the 1st Plaintiff

Kyalo for the 2nd Plaintiff

Mbaluto for the Defendant

Collins Odhiambo – Court clerk.