REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Suit 747 of 2012

ST ELIZABETH ACADEMY- KAREN LIMITED..PLAINITFF

VERSUS

HOUSING FINANCE CO OF KENYA LIMITED..DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 4th December 2012 has been brought under the provisions of Order 40 Rules 1(a), 2, 4 & 10, Order 51 Rule 1 of the Civil Procedure Rules Cap 21, The Land Act No 6 of 2012, the Land Registration Act No 3 of 2012 and all other enabling provisions of the law. I will not deal with prayer nos. 1 and 2 as the same are spent. The application seeks the following remaining orders:-

a. THAT this Honourable Court be pleased to grant a temporary order of injunction restraining the Defendant whether by itself, its employees, servants, agents or auctioneers from doing any of the following acts that is to say from advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or transfer of any sale concluded by auction or private treaty, leasing, letting, charging or otherwise howsoever interfering with the Plaintiff's ownership or title to parcel of land known as Land Reference Number L.R. No 195/208 Karen pending the hearing and determination of this suit.

b. THAT the costs of and occasioned by this Application be borne by the Defendant/Respondent.

2. The grounds on which the Plaintiff relied on in support of its application were in broad and general terms as follows:-

a. The Plaintiff received a loan facility for the sum of Kshs 30,000,000/= from the Defendant for the purchase of a parcel of land know as Land Reference Number LR. No. 195/208 Karen. The sum of Kshs 30,000,000/= was purportedly secured by a mortgage document, otherwise withheld by the Defendant, on the Plaintiff's parcel of land. The purported Mortgage Instrument as drawn was defective as it was not witnessed in accordance with the provisions of India Transfer of Property Act (I.T.P.A) (repealed).

b. The agreed rate of interest ranged between 13%-14% and there was no reservation of right to vary the same on the part of the Defendant. The Amortisation scheme agreed upon was based on a fixed interest rate. The clause purporting to vary interest by Defendant was erroneous, unenforceable, illegal and contract statute and was therefore inapplicable to the transaction herein.

c. The Defendant varied the interest rate and other charges contrary to the contractual letter of offer and without getting the approval of the Minister for Finance which was contrary to the Banking Act or informing the Plaintiff of the variations. This was a fraudulent act on the part of the Defendant.

d. The loan term was for a period of 10 years with effect from 1st December 2010 repayable at the sum of Kshs 528,397/= per month all inclusive. The sum of Kshs 30,339,630.90 demanded by the Defendant vide a Statutory Notice dated 21st December 2011 was not due and owing as the Defendant recalled the loan prematurely. The subsequent action by the auctioneers to sell the property to recover a sum of Kshs 32,413,177.65 had clogged the Plaintiff's equity of redemption.

e. The suit premises were of a unique character and the Plaintiff could not be adequately compensated by damages in the event the said premises were disposed of by the Defendant.

f. The Defendant did not stand to suffer any prejudice since the suit premises were charged in its favour and it was still holding the title documents.

3. The Plaintiff's application was supported by the Affidavit of Anne Wanjiku Wado, a director of the Plaintiff company and it was sworn on 4th December 2012. Mr Migui Mungai, the Defendant's Legal Affairs Manager Litigation swore a Replying Affidavit on 6th December 2012 on behalf of the Defendant.

4. The first question that begs an answer is whether the Mortgage Instrument dated 31st May 2010 was defective on the ground that it was not witnessed in accordance with the provisions of I.T.P.A (repealed) as this goes to the very root of whether there was a valid and binding contract between the Plaintiff and the Defendant.

5. The Defendant submitted that the Mortgage Instrument was duly executed by the Mortgager and witnessed by two persons in line with Section 59 of the I.T.P.A (repealed). I have looked at the said Mortgage Instrument and find the same to have been duly executed as has been rightly pointed out by the Defendant's counsel.

6. The Plaintiff has not adduced any evidence to show that it executed the said Instrument by mistake, under duress, under coercion or under misrepresentation which would in itself have vitiated the contract between the Plaintiff and the Defendant. I do not therefore wish to belabour this point as I am satisfied that the said Mortgage Instrument complied with the mandatory provisions of the I.T.P.A (now repealed) as far as the execution of the same was concerned.

7. Be that as it may, it is important to consider the Plaintiff's averments that the said Mortgage Instrument was also defective for the reason that it did not have a fixed rate of interest over a fixed repayment period as provided under Section 100 A of the I.T.P.A (now repealed) and that it deviated from the agreed terms between the Plaintiff and the Defendant in relation to the rate of interest payable on the mortgage account

8. It was the Plaintiff's case that the Defendant made various unilateral decisions to charge different rates. It argued that these decisions were non-contractual and illegal and made the statement of accounts to appear in arrears when that was not the position.

9. On the other hand, the Defendant submitted that it issued the Plaintiff with an offer letter dated 19th March 2010 which showed variable interest rate of fifteen point five zero per centum (15.50%) per annum. Clause 6.1 of the said Offer Letter stipulates as follows:-

"The Applicant shall pay the interest on the loan at the rate specified in the Schedule or <u>such other rates</u> as may be determined by Housing Finance from time to time."

10. Clause 2 of the Mortgage Instrument showed the interest was to be at the rate of fifteen point five zero per centum (15.5%) per annum variable with the penalty interest pegged at sixteen point seven five per centum (16.75%) per annum**.** TheInstrument provided that the interest would be determined as follows:-

(a) **Until service of such notice as is hereinafter referred to or as otherwise provided under Sub-Clause 2 (e) below interest shall be at fifteen point five zero per centum (15.50%) per annum;**

(b) **The Mortgage reserves the right to vary the rate of interest… and the decision of the Mortgagee in this behalf shall not be questioned whatsoever."**

(c) **…**
(d) **…**

(e) **If any amount (including interest) required by this Mortgage to be paid shall not**

be paid by the day on which the same shall have become payable then without prejudice to any or all of the rights and remedies accruing to the Mortgagee consequent on such default and without rendering such amount other than overdue and immediately payable without demand so in arrear shall thenceforth bear interest) default interest) at the rate of sixteen point seven five per centum (16.75%) per annum.... "

11. It is clear from the documentation before me that the rate of interest both the Plaintiff and the Defendant had contracted to had a variation of interest. The decision to vary the interest herein would not be questioned whatsoever. It is therefore not true that the Defendant made unilateral decisions to vary interest as had been alleged by the Plaintiff.

12. I have carefully considered the Plaintiff's submission on the defectiveness of the Mortgage Instrument on the second ground of variation of interest. All evidence placed before me shows that the interest was not fixed. It did not range between 13%-14% but in fact there was reservation of right by the Defendant to vary the interest. Accordingly, I find that the Plaintiff's argument that the Mortgage Instrument was defective on the ground of variation of the interest does not hold water and the same falls through.

13. Turning to the point that the Defendant purportedly increased interest without the Defendant seeking approval from the Minister for Finance amounted to an illegality, the Plaintiff argued that Section 44 of the Banking Act Cap 488 (laws of Kenya) provides that "**no institution shall increase its rate of banking or other charges except with the prior approval of this Minister"**.

14. I would agree with the holding of Hon Emukule J in **HCCC No 261 of 2006 Daniel Kamau Mugambi vs Housing Finance** at page 13 when he said"-

" **… the question as to whether or not the provisions of Section 44 of the Banking Act limit the interest rates chargeable by banks and other institutions, appears to be uncertain."**

The key words in this Section are "**rate of banking or other charges**" with no specific mention of **"interest"**.

15. As has rightly been pointed out by the Defendant's counsel, Section 52 of the said Act is clear that no contravention of the provisions of the Act shall affect or invalidate in any way any contractual obligation between an institution and any other person. In this regard, I find that there was no contravention of the Banking Act when the Defendant varied the interest rates without approval from the Minister. The Minister could not interfere with the contractual obligations between the Plaintiff and the Defendant when Clause 2 (b) of the Mortgage Instrument had clearly spelt out the effects of variation of interest by providing that:-

"**….the decision of the Mortgagee in this regard shall not be questioned on any account whatsoever."**

16. I have considered the cases cited by the Plaintiff in support of this point to wit **HCCC No 74 of 2000 Joseph Mbugua Gichanga vs Co-operative Bank of Kenya Limited** and **HCCC No 319 of 2003 Anthony Athanas Ngotho t/a Ngotho Architects vs National Industrial Credit Bank Limited** but do not find the sameto have been of any assistance to its case as the same are clearly distinguishable from the facts of this case.

17. Having settled that the Mortgage Instrument was not defective, I now turn to the question of whether the Plaintiff is entitled to any injunctive orders. The Plaintiff argued that it fell into arrears when the Defendant increased the monthly repayments from Kshs 528,397/= to Kshs 569,266.98 without giving it notice thereby creating hurdles for it to service the mortgage. The Mortgage Instrument required that the Defendant issue it with notices when it was to increase interest.

18. Clause 2 (b) of the Mortgage Instrument provided as follows:-

" … The Mortgagee…may from time to time serve on the Mortgagor notice forthwith requiring payment of interest …."

19. The Defendant annexed several letters addressed to the Plaintiff showing that it had issued all the notices for increase of interest in accordance with the Mortgage Instrument. The Plaintiff did not demonstrate that it never received the said notices or that the postal address used by the Defendant was incorrect. In this regard, I am satisfied that the Plaintiff was at all material times aware of the variation of the interest rates and did in fact receive the said notices when they were sent to it by the Defendant. Notably, some of these notices have been annexed in the Plaintiff's Supporting Affidavit.

20. The Defendant also annexed several copies of the Mortgage Account Statements posted to the Plaintiff spread from 2010 to 2012 showing that the Plaintiff was in arrears. The Plaintiff was clearly aware that it was in arrears when it received the Statements showing transactions from 2nd January 2011 to 1st January 2012 as copies thereof were annexed in its Supporting Affidavit.

21. The Defendant's case was that the Plaintiff was truly indebted to it in the sum of Kshs 33,939,758/= as at 31st December 2012. It averred that, the Plaintiff, having admitted being indebted to the Defendant, had approached it with an offer that it be given time to sell the suit premises by way of private treaty to offset the mortgage account.

22. Perusal of the said Bank Statements show that the credits in the Plaintiff's Mortgage account were not consistent with what had been agreed upon by the parties when they both executed the Offer Letter and Mortgage Instrument.

23. From the evidence before me, it cannot be said that the sorry state of affairs arose as a result of the Defendant varying the interest rates as had been alleged by the Plaintiff or because it was not provided with a true, proper and accurate Statement of Accounts on the status of the Mortgage Account. The Plaintiff appears to have been clearly in breach of its contractual obligations for which the Defendant was entitled to proceed to realise its security. The Defendant was right when it issued the Plaintiff with the Statutory Notice on 21st December 2011 under Section 69 (1) of the I.T.P.A.(repealed).

24. Copies of the Mortgage Account Statement attached to the Defendant's Replying Affidavit show that the last payment by the Plaintiff was credited on 14th September 2012. The impression created by the Plaintiff was that it made numerous payments that would lead the Defendant being estopped from exercising its Statutory power of sale on the basis of the Statutory Notice that was issued previously.

25. The Plaintiff argued that the Statutory notice was extinguished as the Defendant continued receiving the monthly instalments. It was therefore estopped from enforcing the rights which were otherwise waived. I will address this issue hereinbelow.

26. The Defendant did not realise its security after the expiry of the notice. There is on record forty five (45) days notice dated 21st September 2012 from the auctioneers and a newspaper notice advertising the sale of the subject property on 27th December 2012. This was after the enactment of the Land Act, 2012 whose commencement date was 2nd May 2012. In this regard, the Plaintiff submitted that the Defendant had to re-issue a fresh Statutory notice in accordance with the new law.

27. To buttress its position, the Plaintiff relied on Section 90(1) of the Land Act 2012 which stipulates as

follows:-

“ **If a chargor is in default of any obligations, fails to pay interest or any periodic payment or payment of any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge and continues to be in default for one month, the chargee may serve on the chargor notice, in writing, to pay the money owing or to perform the agreement as the case may be…”**

28. Further, it stated that the Defendant had contravened the Auctioneers Act as the auctioneers’ notice did not quote a reserve price in contravention with the law. It was the Plaintiff’s submission that the Defendant presented a Valuation Report where the property was undervalued. As a result, the intended sale of the suit premises unlawful.

29. I must point out that the Statutory Notice issued on 21st December 2011 is still in force and it could not be extinguished. A lender is under no obligation to decline a payment made by a borrower who is in default. The Defendant was therefore under no obligation to issue a fresh Statutory Notice after it received monies for payment of the loan from the Plaintiff.

30. I get consolation that this is a position that has been held previously by other superior courts.

31. In **Executive Curtains and Furnishings Limited vs Family Finance Building Society [2007] eKLR,** Warsame J said as follows”-

“I am not aware of any law requiring the Defendant to repeat or re-issue the statutory notice once it is issued and served upon the borrower…”

32. The Plaintiff was less than candid when it filed this application seeking injunctive orders against the Defendant. I wholly concur with Mr Karungo, counsel for the Defendant that there was material non-disclosure by the Plaintiff. It withheld information to the effect that it had admitted that it owed the Defendant the outstanding loan, that it had sought the Defendant’s indulgence for it to dispose of the suit premises by private treaty, that the Mortgage Instrument had been duly executed and attested as required by the law, that the Mortgage Instrument provided for variation of interest and that it had received notices informing it of the variation of the interest rates.

33. In addition, the Plaintiff also failed to disclose that it had promised to pay the Defendant a sum of Kshs 2,000,000/= by 29th November 2012 but it had failed to do so. I am not entirely convinced by the Plaintiff’s submissions that it could not pay the said sum when advertisements indicating the intended sale of the property by public auction had been splashed in all the newspapers.

34. The Defendant argued that the Plaintiff was not entitled to the equitable relief sought. It relied on **Re: Daniel Kamau Mugambi** case at page 18 where the Court of Appeal cited therein held that:-

“ **A Plaintiff should not be granted an injunction if he does not have clean hands, and no court of equity will aid a man to derive advantage from his own wrong, for the Plaintiff seeks this court to protect him from his own default. He who seeks equity must do equity...”**

35. The issue of non-disclosure of material facts goes into the very root of court’s discretionary powers to grant injunctive orders as this is an equitable relief. I accept the Defendant’s submissions that the Plaintiff came to court with unclean hands and he cannot therefore enjoy the relief sought.

36. I must hasten to add that whereas a party is not obliged to disclose any information that would prejudice its case, it risks not enjoying equitable reliefs if the opposing party discloses such information to its determent.

37. A legal position has been taken that a Mortgagee will not be restrained from exercising its power of sale because the amount was in dispute. I wish to reiterate the position espoused in the Halsbury’s Laws

of England 4th Edition Vol 32 at page 725 cited in **HCCC No 10 of 2010 Scholastica Nyaguthii Muturi vs Housing Finance Co of Kenya Limited** on **page 8** that"-

" **The mortgagee will not be restrained from exercising his power of sale because the amount 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 into court, that is, the amount the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive."**

38. In this case, however, the amount is not in dispute. In its letter dated 24th November 2012 to the Defendant, the Plaintiff acknowledged that it owed the Defendant money and admitted that the loan was in arrears. The said letter was in acknowledgement to the Defendant's letter of December 2011. There was no mention of any particular figure but from the couching of the Plaintiff's letter, it is evident that both parties were of the same mind regarding the amount that was actually due and owing to the Defendant.

39. While the court empathises with the predicament that the Plaintiff it finds itself in, it must be remembered that a chargor cannot fail to meet his obligations and when the amount is insurmountable, seek protection from the court. In **Re: Daniel Kamau Mugambi case**, Honourable Justice Ochieng observed as follows:-

" From the foregoing, it is abundantly clear that the Plaintiff is hopelessly in arrears. Of course, he is blaming the arrears on charges which he deems as unlawful or illegal. However, until and unless a court of law was to make a ruling to the effect that the said charges were unlawful, illegal or unreasonable, it would be presumptuous of the Plaintiff to make presumptions. It is not for a borrower to choose to stop making payments because he had reason to believe that his account had been debited with unwarranted charges. He ought to continue remitting payments whilst prosecuting his case. And it is only when the court makes an adjudication that the borrower would know whether or not his beliefs had gained judicial recognition."

40. I am alive to the fact that I am not being called upon at this stage to make a final determination of this case. However, I wish to point out the unique character and in a peculiar location in an up market suburb of the suit premises cannot be a consideration for a court to make while deciding this nature of applications. The Plaintiff must make out a *prima facie* case with probability of success and satisfy the court that it would suffer irreparable damage which would not be adequately compensated if the court did not grant the injunction. If the court is in doubt, then it should decide the case on a balance of convenience.

41. These main principles were encapsulated in **Geilla vs Cassman [1973] EA 358 at page 360** where Spry J held that:-

" **The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."**

42. Mr Kingara persuaded me to disregard the principles of granting an injunction found in **Re: Geilla vs Cassman.** He submitted that the case was no longer good law following the enactment of the new land laws. I am, however, of the opinion that the said principles have not been rendered irrelevant. I would only wish to add that in my view, a party who succeeds in defending an application for a temporary injunction pending the hearing and determination of a matter must have during such hearing demonstrated his ability to compensate the party who is seeking injunctive orders at the interlocutory stage. It is not enough that the injury must be one which can be compensated by way of damages; such party must demonstrate ability to financially compensate the winning party at the final hearing.

43. Courts should be very slow to interfere with contracts. Doing so would render the need to enter into contract voluntarily a waste of time as it would amount to courts re-writing contracts for parties. If parties consent to the defaulting party selling the mortgaged property by private treaty, the court should not interfere with such arrangement. If there is no such consent and the court is called upon to resolve the dispute, it must look at the terms and conditions agreed upon by the parties and determine the matter accordingly.

44. The Plaintiff was aware of the implications of default in payment of the loan it had taken from the Defendant when it executed the Mortgage Instrument. I am must therefore caution myself from interfering with the foreclosing rights of the Defendant which had accrued following default by the Plaintiff. In my considered opinion, if the Defendant is restrained from exercising its Statutory Power of sale until the suit is heard and determined, there is a very high risk that the loan amount will spiral out of control.

45. From the Plaintiff's documents placed before me, I note that the Plaintiff continues to be in default. With interest and penalties continuing to accrue, there is a high likelihood of the outstanding loan exceeding the value of the charged premises to the detriment of the Defendant.

46. In **Andrew Muriuki Wanjohi vs Equity Building Society Limited & 2 others [2006] eKLR,** Justice Ochieng was similarly apprehensive when he stated as follows:-

"**Whenever the applicant offered the suit property as security, he was fully conscious of the fact that if the borrower did not meet his obligations, the suit property could be sold off… In my considered view, if the 1st and 2nd Defendants were restrained from selling off the property until the suit was heard and determined, there is a very real risk that the debt may outstrip the value of the property as the borrower has not made repayments for more than three years…"**

47. If it were found at the final determination of this matter that the suit premises should not have been sold, the Defendant would be able to compensate the Plaintiff as it is a solid financial institution. I do not have before me anything that would suggest that the Defendant would not be able to compensate the Plaintiff in the event the Plaintiff succeeded in this suit. The balance of convenience in this case tilts in favour of the Defendant which should be permitted to realise its security provided that it complies with all the legal requirements in that regard.

48. Having said the above, it is important for me to consider the Plaintiff's contention that the Defendant ought to issue a fresh Statutory Notice so as to comply with the new law. The Defendant's right to foreclose the suit premises commenced in 2011 when it issued and served its Statutory Notice upon the Plaintiff. The Plaintiff contended that the Defendant could only proceed to realise the security according to the Land Act 2012 and Land Registration Act 2012.

49. I find the transitional clause in Section 162 of the Land Act 2012 useful in determining whether or not the Defendant ought to issue a fresh Statutory Notice.

50. The Statutory **power** of sale that **accrued** to the Defendant as envisaged in Section 162 of the Land Act 2012 was one that would continue being governed by the law applicable before the commencement of the Land Act 2012. Section 162 (1) of the said Act states that:-

(1) Unless otherwise is specifically provided in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it prior to the commencement of this Act."

51. The facts of this case are clear that the Defendant had initiated steps to foreclose the charge before the commencement of the Land Act 2012 and the Plaintiff very well has a right to apply to this court for an injunction to stop the continuation of any step in accordance with Section 162 (4) of the said Act which provides as follows:-

4. If a lessor or lender had initiated steps to forfeit a lease or to foreclose a charge, as the case may be, a court on the application of the lessee or the chargor may issue an injunction to the lessor or, to the lender to stop the continuation of any step.

5. If a court had issued an injunction under subsection (4), the lessor or lender to whom the injunction has been issued may commence any action under this Act to terminate the lease or bring that charge to an end."

52. However, an injunctive order cannot be a blanket one. This could explain why the drafters of the Act stated that the court "**may**" but not "**shall**" issue an injunction. While the section therefore gives the court wide and unfettered powers to issue an injunction where foreclosure has commenced, it must be remembered that this is anchored on the principle of non-discrimination.

53. The provision of Article 27 (1) of the Constitution, 2010 protects every person from any type of discrimination when it provides that:

"**Every person is equal before the law and has the right of protection and equal benefit of the law".**

54. Certain procedures must be followed in cases where properties are to be sold pursuant to the Land Act 2012. Since the Defendant did not proceed with the sale of the subject property before the commencement of the Land Act 2012, the Plaintiff must therefore enjoy the equal benefit of the law as other persons whose properties are being sold after the commencement of the said Act.

55. In conclusion therefore, I find that the Plaintiff's Notice of Motion application dated 4th December 2012 is not merited as the Plaintiff has not made out a case for a grant of a temporary injunction pending the hearing and determination of this suit. The said application is hereby dismissed with costs to the Defendant.

56. However, to enable the Plaintiff enjoy the benefit of the law currently in place as provided for in the Constitution of Kenya, 2010, I hereby grant the Plaintiff an injunction as provided for in Section 162 (4) of the Land Act. For the avoidance of doubt, I direct that the Defendant do commence action to realise its security as stipulated under Section 162(5) of the Land Act, 2012.

57. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 7th day of March 2013

J. KAMAU

JUDGE