REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 226 of 2008

DR. FRANCIS ODONGO ODIYO……………..PLAINTIFF

VERSUS

H.F.C.K. LTD……………….............……….DEFENDANT

RULING

The plaintiff in this case seeks an injunction to restrain the defendant by itself, its agents, servants, employees or otherwise howsoever from selling by public auction or private treaty all that piece of land situate in Nakuru Town and known as **Title No. Nakuru Municipality/Block 15/417**, pending the hearing and determination of this suit. The application is based on one ground: that the defendant has been and is still applying illegal and unconscionable rates of interest to the principal sum contrary to those agreed and Section 44 of the Banking Act.

Relying on the affidavit in support of the application Mr. Konosi for the plaintiff submitted that contrary to the agreement between the parties the defendant has been charging what it calls interest on principal, default charge and interest on arrears which his client finds punitive and illegal. In support of that contention he referred me to a letter annexed to his client's affidavit of 28th April 2009 from one Joe Donde who described himself as an expert "in re-calculating advances and loans" which advised the plaintiff that the interest charged by the defendant is contrary to Section 44 of the Banking Act and therefore illegal. He said his client is ready and willing to pay whatever amount is correctly due to the defendant.

The application is strongly opposed. Mr. Murimi for the defendant referred me to his client's replying affidavit which shows that the plaintiff is hopelessly in arrears of the loan repayment. He further submitted that his client has not violated the Banking Act and urged me to dismiss the application with costs.

I have considered these submissions and carefully read the pleadings in this case. If I understand the plaintiff's case well he is not disputing the fact that he is in arrears in the loan repayment. His case is that the arrears have been brought about by the defendant's application of illegal interest to the amount due. The defendant is demanding from him a sum of Kshs.8,144,334.65 as at January 2008, when according to his advisers he only owes the defendant Kshs.3.2 million.

First, this is a dispute on the amount due. Mr. Murimi submitted and Mr. Konosi quite correctly conceded that a dispute on the amount due does not in law entitle the defendant to an injunction. This proposition is in line with the Court of Appeal decision in **Joseph Okoth Waudi Vs National Bank of Kenya, C.A. No. 77 of 2004 (Mombasa)** in which it stated:-

"**It is trite law that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dipute, or because the mortgagor has began redemption action or because the**

mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive.”

See also **32 Halsbury’s Laws of England 4th Edition at page 725, Lavuna & Others Vs Civil Servants Housing Co. Ltd & Another, Civil Appeal No. 14 of 1995 (CA)** and **Middle East Bank (K) Ltd Vs Miligan Properties Ltd Civil Appeal No. 194 of 1998**. The Justification for this rule was stated by the Court of Appeal in **Ng’ayo Traders Ltd Vs Savings & Loan (K) Ltd Civil Application No. 165 of 2005 (UR. 99/2005)** to be that in such case, under **Section 77(3)** of the **Registered Land Act**, the chargor’s statutory remedy for irregular exercise of the power of sale is only in damages against the chargee. Therefore this ground which is based upon a dispute on the amount due must fail.

That brings me to the main ground in this application which is that the defendant has contrary to Section 44A of the Banking Act, charged the plaintiff illegal interest on the amount advanced.

Section 44A of the **Banking Act** provides that:-

“**(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).”**

(2) The maximum amount referred to in subsection (1) is the sum of the following –

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

(4) This section shall not apply to limit any interest under a court order accruing after the order is made.

(5) In this section –

(a) “debtor” includes a person who becomes indebted to an institution because of a guarantee made with respect to the repayment of an amount owed by another person;

(b) “loan” includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person; and

(c) A loan becomes non-performing in such manner as may, from time to time, be stipulated in guidelines prescribed by the Central Bank.

(6) This section shall apply with respect to loans made before this section comes into operation, including loans that have become non-performing before this section comes into operation:

Provided that where loans became non-performing before this section comes into operation, the maximum amount referred to in subsection (1) shall be the following –

(a) the principal and interest owing on the day this section comes into operation; and

(b) interest, in accordance with the contract between the debtor and the institution, accruing

after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) expenses incurred in the recovery of any amounts owed by the debtor."

With respect the plaintiff and his advisers have misapprehended the import of these provisions. The defendant's repayment of the loan was to say the least whimsical. From the repayment details given in the replying affidavit, it is evident that the loan became non-performing long before the enactment and the coming into operation of Section 44A of the Banking Act.

The relevant subsection in this case is **subsection (6).** Though that subsection admittedly applies to loans that became non- performing before the coming into force of the Act, that provision does not help the plaintiff in this case. The proviso to that **Section** states that the amount that shall be considered when determining whether the mortgagee is in breach of the in duplum rule when a loan becomes non-performing is the principal sum and interest that is owing after the day the Section came into operation which is **1st May 2007**. In respect of an existing loan which becomes non-performing as at the date of commencement the section provides that the maximum amount shall be:-

"**(a) principal sum and interest owing on the day this section comes into operation; and**

(b) interest in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and

(c) **expenses incurred in the recovery of any amounts owed by the debtor."**

It is not clear from the pleadings what the principal sum and interest owing on the commencement date was. It is stated by the first defendant that as at January 2008 the amount due was Kshs. 8,144,332.65. The plaintiff has not stated the amount due on the commencement date, that is 01.05.2007 for me to apply the in duplum rule to this case. This ground must also fail.

For this reasons I find that the plaintiff has not made out a prima facie case to warrant granting him an injunction. Consequently I dismiss this application with costs.

DATED and delivered this 7th day of May 2009.

D. K. MARAGA

JUDGE.