



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 733 of 2008**

DAVID NJUGUNA KARANJA
PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD DEFENDANT

RULING

The brief background of the matters that gave rise to the present application are; on or about September 1999, the plaintiff applied for a loan from the defendant for a sum of Ksh.1.440,000/- which was to be repaid in monthly installments of Ksh.40,139/- over a period of 6 years. The plaintiff executed a mortgage over his property LR36/111/952 as security for the loan. The plaintiff defaulted, and sometimes in July 2005, the defendant appointed a receiver manager by a letter dated 19th July 2005. The receiver manager commenced collection of rent from 1st November 2005, until the receivership was terminated on or about 12th August 2008.

On 22nd May 2008, the defendant informed the plaintiff that he was in arrears and the balance of the loan still outstanding was Ksh.2.287, 898.15. The plaintiff instructed a professional accountant to scrutinize the loan account.

He was given a report showing that he had paid a sum of Ksh.3.407,045/= and he did not owe any money to the defendant. The plaintiff therefore filed the present suit in which he is seeking inter alia, for a declaration that the defendant intended sale of his property is wrongful and invalid. A declaration that the plaintiff was not served with a proper notice as required by section 44 of the Banking Act and a temporary injunction restraining the defendant from selling anything or transferring the plaintiff's property.

This suit was followed by a chamber summons application dated 4th December 2008 where the plaintiff sought for interim orders of injunction restraining the defendant from selling or transferring the plaintiff's property. This is the subject matter of this ruling. The application is based on the grounds that the plaintiff has fully repaid the loan. The defendant has not issued a statutory notice and it is faulted for relying on its wrong doing to invoke its statutory powers of sale. The defendant is also accused of levying wrongful and non contractual interest rates and for appointing an official receiver who failed to give a report to the plaintiff.

This application is also supported by the affidavit of the plaintiff sworn on 4th December 2006. He has given a chronology of how he applied for a loan in 1999 and offered his property LR36/111/952 Nairobi as security. By a letter dated 19th July 2005 the defendants appointed a receiver manager who collected rents from the suit premises from 1st November 2005. The plaintiff claims that

he was never informed of the amount of rent collected by the receiver manager, but when he used to collect rent by himself, he used to collect a minimum of Ksh.45, 000/- per month which was enough to cover monthly installments.

On 22nd May 2008 he was informed by the defendant that he still owed them Ksh 2.284,160.50/=. The plaintiff requested IRAC to advise him on the interest charges and the penalties charged on his account, according to the report prepared by IRAC; he claims he overpaid his account. Moreover the plaintiff claims he was not served with a notice as required under section 44 of the Banking Act.

These arguments were further elaborated by the submissions filed by counsel for the plaintiff who submitted that the plaintiff has established a prima facie case with a probability of success by showing that the defendant charged excessive interest outside the statutory provisions that is section 44 (6) of the Banking Amendment Act. The plaintiff paid over Ksh.3.4 million. The defendant did not inform the plaintiff the amount of money he owed, before the appointment of the receiver, and even after the appointment of the receiver; the account of rents collected was never given to him. Counsel was of the view that her client, who is now aged over 70 years, will suffer irreparable damage, if his property is sold in exercise of a statutory power, when the loan was fully paid. Counsel cited several authorities, but in the interest of time and space, it is not possible to analyze them in this ruling save to state that I have read them.

This application was opposed by the defendant. They relied on a replying affidavit sworn by Joseph Karia sworn on 2nd February 2008. According to the defendant, the plaintiff applied, and was granted a loan of Ksh 1.440, 000/= which was secured by a mortgage over the suit premises. The plaintiff was supposed to pay the loan with interest at 25% per annum. The plaintiff however defaulted in repayment. He was issued with demand letters and the plaintiff wrote several letters acknowledging default and making offers to settle the outstanding arrears, however despite several indulgencies, he failed to settle the arrears. The plaintiff is claiming to have repaid the loan but he did not produce any documents to support that he has paid the loan. He has not annexed any documents supporting the alleged payments.

The defendant attached copies of the letters written by the plaintiff seeking indulgence and also showing payments made by the plaintiff by a cheque for ksh100, 000/- meant to settle the arrears but the cheque was dishonored. They annexed copies of the statutory notices issued on; 9th July 2001, 31st July 2001 and 3rd September 2008 to the plaintiff. The defendant also rescheduled the outstanding loan and the plaintiff duly executed a contract dated 20th January 2004. At the time the outstanding debt was Ksh.2.104, 923.45. It was to be payable by monthly installments of Ksh.35, 000/- with effect from 31st January 2004.

The plaintiff was also notified of the interest adjustment which was actually downwards. Due to the plaintiff's persistent failure to honor the mortgage repayment, the defendant appointed a receiver manager to collect rent, which are reflected in the plaintiff's statement of account. The defendant challenged the calculations done by Interest Rate and Advisory Centre (IRAC). The charges are based on the interest chargeable according to the contract but not according to non existing terms.

In further arguments, counsel submitted that the mortgage document stipulated the interest payable as 25% per annum. She made reference to the case of **FINA Bank Limited v Lonak Limited I EA page 65 2001** where the Court of Appeal held that the contractual relationship between the parties cannot be impeached merely because the rate of interest has not been specified. Thus a dispute over the charge of the interest is not a ground for granting an injunction. The calculation by IRAC was also faulted for relying on the Banking Act 2000, which was declared null and void in **Misc. civil App. No.908 of 2001**.

According to the defendant, the plaintiff has not established a prima facie case with a probability of success. He admitted borrowing the money and no evidence has been tendered to show the loan was fully paid. He has not also disputed having been served with a statutory notice thus he cannot be entitled to an equitable relief.

Having set out the summary and the background of this matter including the rival submissions by both counsel for the plaintiff and the defendant, the following issues as I see them fall for determination; whether the plaintiff has established a prima facie case with a probability of success and whether the remedy of injunction is available in a dispute involving the calculation of interests.

It is not in dispute that the plaintiff borrowed a loan of Ksh.1.440.000/- from the defendant and offered his suit premises as security. It is determinable from the facts on record that the plaintiff fell in arrears. There are correspondences, written by the plaintiff where he is seeking indulgence from the defendant to enable him organize payments of arrears. The plaintiff even executed an additional contract to reschedule the loan; this was on 20th January 2004. This is followed by the appointment of a receiver manager on 19th July 2005.

The plaintiff instructed Interest Rates Advisory Centre (IRAC) to audit his account, they recalculated the interest and by a letter written by the plaintiff on 16th October 2007 he contended that the correct balance owing to the defendant as at 31st July 2007 is Ksh.383,014.58/-. The defendant by a letter dated 6th November 2007 disputed this recalculation and contended that the plaintiff's account was properly maintained and the interests charged was in accordance with the contract.

The principles of granting order of injunction are well settled in the oft cited case of ***Giella v Cassman Brown & Co. Ltd.*** The conditions are that the applicant must demonstrate a prima facie case with a probability of success. Secondly, irreparable harm which would not be compensated for in damages would arise and if in doubt then the court will determine the matter on a balance of convenience. Applying those principles to the present case, the main concern for me is to be satisfied that the plaintiff has actually repaid the loan. The plaintiff firstly, contends that he was over charged interest, penalties and other illegal charges which are against the provisions of the Banking Act. The defendant maintains that the interests charged and penalties were according to the contract.

The plaintiff alleged that he has fully repaid the loan; however, he did not annex documentary evidence to show the amount of loan he claims to have paid to the defendant. From the plaintiff's own admission, he defaulted in repayment. If the plaintiff could empirically demonstrate the amounts he paid and when he paid it, that would have assisted this court to determine the bonafides of his claim. The plaintiff is relying on a report by IRAC but the report does not show where they extracted the schedule of payment made by the plaintiff. To that extent I find the report incomplete.

There is also a dispute over the applicable interest rates, the plaintiff entered into a contract and executed a letter of offer that made provisions of the interest's rates chargeable and other charges, surely the court cannot rewrite this contract. There are correspondences annexed to the defendant's replying affidavit where the plaintiff is notified of the variation of interest rates. The statements also show the outstanding balances. These are the same statements which the plaintiff took to IRAC for the recalculation of interest. Therefore, the plaintiff cannot claim that he was not aware of the outstanding balance. There are also statutory notices attached to the replying affidavit. They are addressed to the plaintiff by a post office box number which the plaintiff has also used in his letters addressed to the defendant. The plaintiff does not claim that he never received these statutory notices addressed to him.

From the foregoing, I am not satisfied prima facie case with a probability of success has been established. In the case of ***Mlao Ltd v First American Bank of Kenya Ltd. and 2 others 2003 KLR page 125*** the Court of Appeal has defined what is a prima facie case. The court of Appeal also cited with

Approval a text set out in ***Halbury Laws of England Vol 32 (4th Ed).***

“Para 725 When mortgagee may be restrained from exercising power of sale.

The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began 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 claimed in court, that is, the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage, the claim is excessive”

The plaintiff has not provided any evidence of how and when he repaid the mortgage, in the circumstances he has not satisfied the applicable conditions for this court to exercise its discretion and grant him an equitable relief by way of an injunction. The application is hereby dismissed with costs to the defendant.

RULING READ AND SIGNED THIS 3RD DAY OF JULY 2009 AT NAIROBI

M.K. KOOME

JUDGE