



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 296 of 2008

DR. JOSEPH N. KIPRUTOR ARAP NG'OK 1ST PLAINTIFF

ALICE NG'OK 2ND PLAINTIFF

VERSUS

EABS BANK LTD. DEFENDANT

R U L I N G

Chamber summons dated 3/6/2008 and filed on the same date under **Order XXXIX Rules 1, 2 and 3** of the **Civil Procedure Rules, Section 3A** of the **Civil Procedure Act**, and all enabling provisions of the law. The orders sought are that:-

- 1. That a temporary injunction be issued restraining the defendant bank whether acting by themselves, servants, agents, advocates, employees, auctioneers, directors or otherwise howsoever, from interfering with the plaintiffs' right of possession of the suit premises, advertising for sale, disposing off, selling by public auction, private treaty or otherwise howsoever, transferring or completing a conveyance of the suit premises i.e. L.R. No. NAIROBI/72/1032, until the hearing and final determination of this suit and until further costs of this honourable court;*
- 2. That the costs of this application be provided for.*

The application is based upon grounds that the plaintiffs are the

registered proprietors of the suit premises i.e. **L.R. No. NAIROBI/72/1032** which premises were allegedly charged to the defendant bank and now the defendant bank wants to sell the said premises by public auction in exercise of their Statutory Power of Sale. The auction is scheduled to take place on the 5/6/08 (now past).

It is the plaintiffs' case that the auction is illegal in that the defendant's Statutory Power of Sale has not arisen and in any event, the instrument of charge upon which the defendant is exercising its Statutory Power of Sale is incurably defective and cannot be the basis for the exercise of the power.

Further the Redemption Notice served on the plaintiffs by Messrs Valley Auctioneers are all defective as they contravene the mandatory provisions of the Auctioneers Rules and that the plaintiffs have not been served with the Notification of Sale contrary to the mandatory provisions of the Auctioneers Rules. Furthermore, the Statutory Notices of Sale on the plaintiffs are defective and the advertisement placed in the newspaper for sale of the suit premises purportedly under the Auctioneers Rules is equally defective as it contravenes the mandatory provisions of the Auctioneers Rules, 1997.

It is also alleged by the plaintiff that the defendant bank has been capricious, oppressive, unreasonable and high-handed in its behaviour towards the plaintiffs in the whole process of the mortgage transaction. Further, the defendant bank has clogged the plaintiffs' equity of redemption with a provision in the mortgage document barring the defendant from redeeming the suit premises contrary to the provisions of **Section 72 (1)** of the **Registered Lands Act, Cap. 300** Laws of Kenya.

The suit premises are a prime residential property acquired by the plaintiffs using their lifetime savings and it would be manifest injustice and unfair for the bank to sell it illegally as intended. It is stated that the plaintiffs have also paid the defendant all the mortgage money in full and no money is owing. The defendant bank has loaded the plaintiffs' mortgage account with illegal charges, penalties and interest which are not provided for in the mortgage contract.

In the premises, the plaintiffs pray that the equitable remedy of injunction be issued to stop the intended sale. The plaintiffs have shown a *prima facie* case against the defendant in line with the principles set out in the case of **Giella vs. Cassman Brown.**

The application is further supported by the affidavit of **Dr. Joseph Nathaniel Kiprutor Arap Ng'ok** dated 3/6/08 and sworn on the same date. The affidavit shows that after negotiations a letter of offer to lend money was issued by the defendant offering a loan in the sum of Kshs.330,000/= at initial rate of interest at 16% p.a. for a period of 20 years. The applicants accepted the offer on 7/11/1983.

The property to be purchased was Nairobi Block 72/1032 which was charged to secure the amount lent Kshs.330,000/=. The rate of interest was 16% with a proviso that the Board would vary in its absolute discretion that it is in the interest of the defendant may vary the rate of interest subject to provisions of **24 (6)** of the **Building Societies Act.**

“Provided that Notice of intention to vary the rate shall be served in writing on the chargor and the varied rate of interest shall be payable as from the expiry of seven days after the date of service of such notice.”

The plaintiffs say that the interest was varied but the defendants never notified the plaintiffs of such variations and this acted as a clog to the plaintiff's right to redeem their property. In addition, the defendants unlawfully charged the plaintiffs unlawful charges:-

- Penalties
- Interest on interest
- Insurance premiums

- Legal expenses
- Auctioneers' fees
- Valuation fees
- Ledger fees

And other charges not provided for. These charges are exorbitant, oppressive and unconscionable and are meant to unfairly enrich the defendant.

The plaintiff's complaint about Clause 10(b) which demands redemption of all moneys secured in favour of the defendant. They also complain about unlawful clog of equity of redemption contrary to provisions of **Section 72 (1), Registered Land Act**. The other complaint raised is that the provisions of **Section 74** of the **Registered Land Act** was not explained to the plaintiff before signing the charge.

The other issue raised is that the plaintiffs have paid in full all amounts of money lent with interest as agreed. Having paid total Kshs.1,945,151/75 which is almost 3 times of the loan advanced. The plaintiffs pray for a discharge of their properties.

Regarding the issue of statutory notices, the plaintiffs say they are null and void and contrary to **Section 74 Registered Land Act**. The notices have not been served upon plaintiffs. The provisions of **Auctioneers' Act** are not complied with. The defendant has caused an affidavit in reply to be sworn by one Michael Githinji Tanui in which it is agreed that the loan was granted payable for a period of 20 years. However, the repayments were irregular and loan account was in arrears and in some years the plaintiffs did not make payment of any arrears at all.

The defendant has exhibited statement of loan account since the accounts inception marked "MGT 3". This exhibit shows on the amount of principal advance of Kshs.330,000/=. Interest charged is Kshs.2,075,716/=. repayments Kshs.2,339,088/70. It is to be noted the repayments exceed the interest by Kshs.263,372/70 leaving an unpaid balance of Kshs.66,628/=.

On the issue of varied rate of interest the defendant has exhibited a bundle of notices of interest charges exhibit "MGT 4". The defendant denies having charged unlawful charges. Not penalties but additional interest on arrears of monthly installments or for non payment of monies on due dates pursuant to **Rule 32 (a)** of the defendant's rules. The right to charge additional interest is a contractual entitlement of the defendant when the plaintiff failed to pay monthly installments on time.

Regarding the issue of the charge document, the exhibit page 31 of the charge, it is certified that:-

"They had freely and voluntarily executed this instrument and understood its contents."

The certificate is signed by an advocate and therefore they were explained the charged. However, this is a matter of evidence. It is denied that the money agreed to be paid is still outstanding to the extent of Kshs.706,150/64 as it is shown above it was Kshs.66,628/= without additional charges. Exhibit No. "MTG 6" is a copy of Statutory Notice with certificate of posting.

Therefore, it is clear as on 1/1/2008, the principal plus interest charged had already been paid. These other extra charges for instance, auctioneers' charges, valuation charges are disputed and deducting the same, the loan amount of Kshs.2,405,716 has been paid in full as at 1/1/2008. It is confirmed by the auctioneer that only Kshs.860,656/79 is unpaid. It is not clear where he has obtained such information.

However, the notice issued indicates that outstanding sum as at 7/9/2007 – principal and interest amounted to Kshs.706,150/64. It is therefore to be noted that the plaintiffs have paid substantial if not all the principal and interest charged and what is outstanding is extra charges which are disputed.

It is my view that for this reason alone, the plaintiffs have demonstrated a *prima facie* case to warrant issue of interlocutory injunction. If the property was to be sold for the alleged disputed charges, the plaintiffs would lose their house where they have resided for many years and the money paid being principal and interest would be lost.

In his submissions the plaintiff refers to **Section 44A Banking Act** and the DUPLUM Rule and the case of **Mohamed Gulam Hussein, Farzal Karmali & others vs. C.F.C Bank Ltd. – HCC No.3 of 2006.** In that case the court was of the view that the loan transaction was after the amendment of the law and therefore there was a limit of the amount that could be recovered. For loans which become non performing before the proposed amendment came in operation the additional interest is not to exceed the total principal and interest owing at commencement date.

It is to be remembered the present loan was advanced in 1984. However, it is to be noted that in the present case the plaintiff is challenging not only interest charged unlawfully but the other unverified charges for instance, the auctioneers' charges. In the above **Karma case**, the judge, Hon. Fred Ochieng said:-

“To my mind demand that demand of (Kshs.21,289,324/85 while the facility was only Kshs.10,500,000) raises a very serious issue as the sum sought was in excess of double the amount which was secured by the charge executed by the plaintiffs.

That would imply that the interest charged was probably in excess of the principal loan amount.”

In this case the amount paid was three times the loan advanced and the amount now claimed is quite small.

It is my view therefore, the plaintiffs have demonstrated a *prima facie* case with a good chance of success. If their property was sold they would suffer irreparable loss not compensated in damages and the balance of convenience tilts in their favour as they are in possession.

I therefore allow application and grant injunction to restrain the defendant, their agents, servants and others from advertising, disposing, selling by public auction or by private treaty, leasing or in any other manner howsoever, interfering with the plaintiff's occupation and ownership of plot No. Nairobi Block 72/570 Unit A153, now Nairobi/Block72/1032 pending the hearing and determination of this suit.

Costs shall be in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 4th day of November, 2009.

JOYCE N. KHAMINWA

JUDGE