



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL CASE 538 OF 2007

JACKSON KAMAU NDEGWA.....1ST PLAINTIFF

SARAH KAMAU NJERI.....2ND PLAINTIFF

VERSUS

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

RULING

The Plaintiffs in this case have by a Chamber Summons application dated 1st October, 2007 sought interlocutory injunction against the Housing Finance Company of Kenya restraining the financial institution from collecting rent, selling, alienating and or interfering in any manner with the Plaintiffs' properties and parcel of land Nakuru/Municipality/Block 3/852 until the hearing and determination of this suit. The application has been brought under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules.

There are several grounds cited on the face of the application including the fact that the Defendant has advertised the property for sale on 2nd October, 2007. One of the other grounds are that the Defendant took over the suit property from the Plaintiffs in February, 2006 and has been collecting rent at the rate of Kshs.47,000/- for which no accounts have been made or statements issued despite request. The application is supported by the affidavit of the 1st Plaintiff who sets out the brief history and facts of the case. I have considered the contents.

The application is opposed. The Manager, Legal Services of the Defendant Company, Joseph Kania, has sworn a replying affidavit dated 12th October, 2007.

In brief Mr. Kania has deposed that the Respondent in exercise of its rights under the charge appointed a Receiver Manager over the charge property as evidenced in their letter dated 20th September, 2006 which he annexes as JK3. He deposes further that a Statutory Notice was sent to the Applicant by registered post to their last known address and he annexes JK4 as a copy of the said notice. Mr. Kania deposes that the Applicant filed another suit being **CMCC No. 582 of 2007** in which they applied for an injunction but subsequently withdrew the application and that the case is still pending.

The principles that guide a court in determining whether or not to grant an interlocutory injunction are that the Applicant must show that he has a *prima facie* case with the probability of success upon trial or that he will suffer such damage or injury that is unlikely to be compensated in damages or that the balance of convenience will favour the grant of the injunction sought. See **GIELLA VS. CASSMAN BROWN**

& CO. LIMITED [1973] EA 358. These principles will guide me in determining the Plaintiffs' application.

There are undisputed facts. The first is that the 2nd Plaintiff took a loan of Kshs.160,000/- repayable with interest at 5.5% from the Defendant who was her employer at the time on the 18th June, 1995. It is also not disputed that the 2nd Plaintiff made payments towards that loan over a period of 7 years. It is not in dispute that a dispute has arisen between the Plaintiffs and the Defendant over the sums due which led to the Defendant taking over the Plaintiffs' suit premises in February, 2006 in order to recover rent from those premises to cover what the Defendant says is the interest owing to it from the 2nd Plaintiff. It is not disputed that per month, rents up to Kshs.47,000/- are realized from the suit premises. The Plaintiffs' case is that the loan taken by the 2nd Plaintiff was used to buy a plot. Subsequently the Plaintiffs constructed business premises from which they earn Kshs.47,000/- every month. It is the Plaintiffs' claim that at the time the premises were taken over by the Defendant there was no charge in favour of the Defendant over the suit premises. The Plaintiffs also contend that the time of the take-over the total sum owing to the Defendant was Kshs.49,000/-. The Plaintiffs also contend that the Defendant has not given any accounts of the rent collected between February 2006 to date. The Plaintiffs also contends that the Defendant advertised their property for sale without giving Statutory Notice on the 2nd October, 2007. The Plaintiffs contend further that it is as a result of this advert that they filed the Chief Magistrate's Court case to seek an injunction. The Plaintiffs' position is that they have since withdrawn that suit and that they did so to pave way for negotiations. The Plaintiffs have also annexed an accountant's balance sheet and accounts from Messrs Kago Mukunya & Associates showing that as of 2006 the balance outstanding on the loan was Kshs.47,353.94/-. The note on that statement shows that interest has been calculated on the principal at the rate of 5.5% p.a. over the period of the loan on monthly rates and has also taken into account the insurance premium paid as an addition to the principal when calculating interest.

The Defendant on the other hand as stated earlier, contend that they exercised their right over the suit premises under a charge to appoint a receiver to recover rents from the premises in order to pay itself for the interest that is owing to them arising out of the loan, the subject matter of the suit. The Defendant contends that they have not been able to recover much from the suit premises on account of the fact that $\frac{3}{4}$ of the tenants have vacated the premises and contends that the Plaintiff is aware of this fact as evidenced by the letter from the 1st Plaintiff to the Defendant which is exhibit JK2. The Defendant has also annexed a statement which they call a Redemption Statement issued on the 7th December, 2007 which shows that the outstanding amount on the loan is Kshs.1,175,484.60/- as of 7th December, 2007. I have looked at this statement and I do not note any acknowledgment of any payment received by the Defendant from the 2nd Plaintiff for the entire period between 1985 to 2007. The statement however shows that interest on arrears is Kshs.489,776.55/-; loan fees outstanding Kshs.208,796.70/-; pending charges outstanding 208,796.70/-; outstanding insurance of 34,597.70/-.

Mr. Joseph Kania who swore the replying affidavit and annexed this statement as JK1 did not give any explanation regarding the amounts stated in the statement. All he did was to state in paragraph 3 of his affidavit;

“That the plaintiffs herein are in default in repayment of the amount of Kshs.1,175,484,60 as at 31st July 2007. Annexed hereto and marked JK1 is a copy of the Plaintiff's redemption statement up to 31st July 2007.”

After carefully considering the pleadings for and against this application, and the submissions by Mr. Mariaria for the Applicants and Mr. Mungai for the Respondent, I have formed the following view of this matter. I do find that the Plaintiffs and the Defendant are in agreement that a loan of Kshs.160,000/- was advanced to the 2nd Plaintiff by the Defendant who was the 2nd Plaintiff's employer in 1985 with the interest payable at 5.5%. It is not disputed that payments were made by the 2nd Plaintiff towards the loan for a period of 7 years. The 1st Plaintiff's averment that he made a lumpsum payment of Kshs.100,000/- in an attempt to clear the 2nd Plaintiff's loan is also not denied. I also note that the Plaintiffs' contention

that the Defendant has failed to supply her with any statements of the account at all or to explain how the amount owed of Kshs.1,175,484.60/- as per their statement of December 2007 was arrived at. I note that the Defendant has avoided giving a statement to account for the sum claimed of Kshs.1.1 million neither has it given any statement of loan account held by the 2nd Plaintiff with itself. I have considered that the amount of loan advanced to the 2nd Plaintiff was Kshs.160,000/- at the rate 5.5%, 23 years ago. I have noted that, in the only statement issued by the Defendant to the 2nd Plaintiff referred to as the redemption statement, it claims payments for interest far in excess of the loan advanced and also claims loan fees and other charges far in excess of the loan amount. The Defendant has been economical in explaining how these sums have been arrived at or why they came to the figures claimed. I have also considered that the Defendant has taken occupation of the Plaintiffs' business premises in what they claim is their right of receivership under the charge. No charge has been annexed by the Defendant to show that they indeed had a charge over the suit premises and secondly that the charge gave them the right to appoint a receiver over the suit premises. The Plaintiffs' contention that there is no charge over the suit premises in favour of the Defendant has not been controverted.

In the case of **MUIRURI VS. BANK OF BARODA (K) LIMITED [2001] KLR** page 183, **Kwach, Bosire and Keiuwa JJA** granted an injunction on the grounds that from the evidence in the case, there was nothing to show how much of the sum demanded by the bank, the interest constituted and how much constituted the principal sum. The Court of Appeal also observed that disputes over land in Kenya evoke a lot of emotion and that except in very clear cases it cannot be said that damages will adequately compensate a party for the loss of the land. The Court of Appeal held as follows:

***“But will the appellant suffer such damage as may not be compensated in damages unless she is granted an injunction. The suit property is land. Mr. Nyamu submitted before us that the said property is commercial and therefore its loss is compensatable in damages. We have no clear evidence on the status of the land. Consequently, there is no proper basis for holding that it is commercial property. Besides disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss.*”**

***This apart, the evidence before us shows that a relatively small amount of money was borrowed. What is being claimed from the appellant presently is a whopping Kshs.90 million odd. The appellant complains that the respondent is charging, what, in ordinary parlance, appears to be usurious interest rate. In the circumstances, the balance of convenience favours the grant of an injunction to maintain the status quo, so as to give the appellant an opportunity of proving her case. We appreciate that parties to a contract may, as here, agree on the interest chargeable in a financial transaction. It is however, arguable whether it is fair for a party to such an agreement to arbitrarily vary upwards such rate of interest without prior notice to the other party or parties to the agreement.*”**

***For the foregoing reasons, we are minded to interfere with the trial judge's exercise of discretion in the present matter. Accordingly, we set aside the order made on 20th December, 2000 dismissing the appellant's injunction application dated 19th October, 2000, and substitute therefore an order restraining the respondent either by itself, its agents, assigns or otherwise from disposing the suit property pending the hearing and determination of High Court (Milimani Commercial Courts) Civil Case No. 1857 of 2000 or until further order of this court. The costs of the appeal and of the motion before the superior court shall be in the cause pending in the superior court.”*”**

In the instant application, I find no clear evidence to support the Defendant's mere verbal allegation that it had a charge over the suit premises. In absence of the charge I am unable to agree with the Defendant that it had a right to place the suit premises under receivership or a right to exercise statutory power of sale over the suit premises. I am not satisfied that the Defendant has any right whatsoever to act as it did in this matter both in regard to the receivership and also the intention to sell the suit premises.

There is also another matter which I have considered; the fact that the loan amount taken by the 2nd Plaintiff was a very small amount and that what is being claimed from her by the Defendant is an astronomical sum which has not clearly been explained. Considering the diversity of the sums claimed of

KShs.1.1 million as compared to the amount loaned, and considering that more than half this sum is composed of interest, arrears and other miscellaneous charges all which have not been explained by the Defendant, that this facts and circumstance of the case dictate that an injunction should be granted in order to reserve the suit property and the rights of both parties. This is a matter that should be determined at a full trial in order to give an opportunity to both parties to present their case before the court with all the evidence both verbal and documentary to support their claims.

I am satisfied that the Plaintiffs have established a *prima facie* case with a probability of success at the trial. I am also satisfied that the Plaintiffs stand to suffer irreparable damage if the injunction is not granted which may not adequately be compensated by an award of damages. Even if I was to apply the principle of the balance of convenience I still find that the balance tilts in favour of granting an injunction in this matter. In view of the evidence that has been placed before me in this case, and in exercise of the inherent powers and discretion, I think that this is a case where accounts should be taken and a report filed in court before the suit is heard. I therefore allow the application by the Plaintiffs dated 1st October, 2007 in the following terms:

- 1) **An injunction be and is hereby issued against the Defendant restraining it by itself, its servants, agents or employees from collecting rent, selling, alienating and/or interfering in any manner whatsoever with Parcel No. Nakuru/Municipality/Block 3/852 until the final hearing and determination of this case.**
- 2) **That accounts of the 2nd Plaintiff's loan and overdraft facility with the Defendant be referred to two referees, appointed one each by each party, for taking of accounts and the filing of a joint report if possible, within 90 days from the date of reference.**
- 3) **Each party has 30 days to appoint one Certified Public Accountant of their choice to sit as their referee in (2) above at their own expense.**
- 4) **In case of default in (2) and or (3) above the parties to have the matter mentioned in court for directions.**
- 5) **The costs of this application will be to the Applicants.**
- 6) **This matter be mentioned for further directions after expiry of the time given in (2) above on a date to be taken at the registry by the parties.**

Dated at Nairobi this 3rd day of October, 2008.

LESIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Mariaria for the Applicants

Mr. Mungai for the Respondent

LESIT, J.

JUDGE