



REPUBLIC OF KENYA

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

**CIVIL CASE 230 OF 2008**

**POPAT INVESTMENTS LIMITED.....1<sup>ST</sup> PLAINTIFF**

**DAYALAL BHANJI & SONS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT**

**R U L I N G**

This is a Chamber Summons application dated 29<sup>th</sup> April 2008 brought under Order XXXIX Rules 1 and 9 of the Civil procedure Rules, Section 52 of the ITPA as amended by the Indian Transfer of Property Act (Amendment) Act 1959, Section 106 of the Government Lands Act (Cap) 280, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya. It seeks prayer 4 which seeks a temporary injunction to restrain the Defendant from selling, transferring, disposing or otherwise alienating or dealing with the said property pending the final hearing and determination of this suit.

The grounds for the application are that the sale of the suit property has been threatened yet no notice has been issued to the Plaintiff; that the plaintiff does not owe the Defendant anything; that the Banking Act and the Central Bank Act have been breached; the charge documents are defective and finally that there is no valuation as a precondition for the sale of the suit property.

The facts of the case are not in dispute. The Plaintiff mortgaged the suit property on the 24<sup>th</sup> November, 1991 to secure an overdraft of Kshs.6 million. The Plaintiff mortgaged the property by a further mortgage on the 18<sup>th</sup> August 1993 to secure a further 1.3 million. On the 18<sup>th</sup> March, 1996 the Plaintiff took a second further mortgage over the suit property to secure Kshs.3.7 million. On the 26<sup>th</sup> August, 1997 the 2<sup>nd</sup> Plaintiff secured a further Kshs.3 million with a third further mortgage over the suit property.

The Plaintiffs' case is that when the Plaintiff received a demand letter from the Defendant dated 7<sup>th</sup> March, 2008, indicating that the Plaintiffs owed the Defendant Kshs.8,597,988.70/- they immediately wrote back and demanded statements to demonstrate how the sum was arrived at. The statement is 'JVP4'. The Plaintiffs contend that they have not received any reply to their said letter. The Plaintiff contends further that the Defendant is in the process of selling the property by private treaty. They have annexed 'JVP1' a letter dated 18<sup>th</sup> April, 2008 from Ravine Properties Limited to the Defendant in which they offer to purchase the suit property for the sum of Kshs.45 million. The Plaintiffs have also annexed 'JVP2' a letter in which the Defendant wrote to valuers requesting that they undertake valuation of the suit property. The letter is

dated 13<sup>th</sup> September 2006. The Plaintiff has annexed a copy of the Valuation Report 'JVP3' dated 15<sup>th</sup> September, 2006.

In support of the allegation that the Plaintiffs do not owe the Defendant any money, the Plaintiffs have annexed a report from Interest Rates Advisory Centre dated 24<sup>th</sup> June, 2008 showing that an amount of Kshs.11,774,364.50/- as the amount due for refund to the 2<sup>nd</sup> Plaintiff, after adjusting the sum paid against the interest charged. The report shows how the sums are arrived at, after a recalculation of the loan account between the Defendant and the 2<sup>nd</sup> Plaintiff. It further demonstrates that the Defendants were levying illegal charges on the Plaintiffs' account based on some interpretation of the law. Mr. Popat in his supporting affidavit has annexed 'JVP5' which is the account statement of the 2<sup>nd</sup> Plaintiff. In that statement, Mr. Popat draws attention to an entry on the 7<sup>th</sup> December, 2006 there is a debit entry of Kshs.153,120/-, being a charge for valuation, which he deposes was levied without the knowledge or consent of the Plaintiffs. Mr. Popat deposes that there are various other illegal charges levied.

The Defendants have filed a replying affidavit and a supplementary affidavit sworn by Nereah Okanga, the legal counsel of the Defendant. Ms. Okanga has annexed the Statement of Account No. 2 to demonstrate that the 2<sup>nd</sup> Plaintiff is indebted to the Defendant through two accounts; No. 070/500 3254 in the sum of 2, 485,556.85 and account No. 070/501 1230 in the sum of Kshs.6,112,431.85/-, bringing the total to the sum claimed in the demand letter of 8,597,988.70. Ms. Okanga deposes that the 2<sup>nd</sup> Plaintiff defaulted in the loan repayment necessitating the Defendant to send it a demand letter dated 7<sup>th</sup> March, 2008. The deponent avers that the Defendant has no intention to exercise its statutory power of sale and that the demand letter sent to the 2<sup>nd</sup> Plaintiff was not a statutory notice. Ms. Okanga further avers that the valuation or inspection was carried out and that the Respondent's rights under the mortgage agreement that was not in pursuit of sale of the suit premises.

Mr. Muli argued the application on behalf of the Applicant while Mr. Munyu represented the Defendant. Mr. Muli argued that the Plaintiffs had pleaded particulars of illegality in the plaint which included the levying of interest, illegal charges and penalties and that those particulars needed to be proved during the trial. Counsel submitted that under the Mortgage Agreement 'JVP1' in Mr. Popat's supporting affidavit, at page 3 thereof, interest was provided for and was to be charged within the limits provided for under the law. Mr. Muli submitted that the interest and other charges levied on the 2<sup>nd</sup> Plaintiff's account were illegal and were not provided for. Mr. Muli relied on the case of **GIVAN OKALLO INGARI & ANOTHER VS. HOUSING FINANCE CO. (K) LIMITED**, Civil Case No. 79 of 2007 where Hon. Warsame, J. ruled as follows:

***“The question is whether the defendant is entitled to debit or charge the various charges and varying rate of interest in the plaintiffs account without any legal basis. To my mind the legality of the charges debited or loaded into the plaintiffs account is a prima facie issue which must be determined by the court upon hearing of all the evidence by the parties. When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document.*”**

***In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression, until there is a proper determination of the dispute. The court is empowered to hear the circumstances that made the defendant to behave in the way it acted against the plaintiffs. The question that the court would ultimately have to answer is the amount due and payable by the plaintiffs. And pending that determination, I think it is illegal to alienate, sell or dispose the central thread that joins the parties to this suit.”***

Mr. Muli submitted that since the Plaintiff had raised the issue of illegality in his defence, it has

established a *prima facie* case and that once a court finds that a *prima facie* case has been established it should grant an interim injunction and should not trade the Plaintiff's right to the injunction even where the Plaintiff would adequately be compensated by an award of damages. I do agree with that proposition that once a *prima facie* case has been established, even if an award of damages could adequately compensate the applicant for damage or loss it could suffer, the injunction should still be issued. That was the position taken by Warsame, J. in the cited case, **Givan Okallo Ingari**, supra. It is also a position that was taken by Hon. Ringera, J. (as he then was) in the case of **Waithaka vs. ICDC [2001] KLR at page 374** where he held:

***“It is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If the adversary has been shown to be high handed or oppressive in its dealings with the applicant this may move a court of equity to hold that one cannot violate another citizen's rights only at the pain of damages.”***

Having said the above, I should close that point by stating that it is still imperative on the Applicant to demonstrate that it has a *prima facie* case with a probability of success at the trial and that the onerous duty cannot be discharged by the mere listing of particulars of illegality in the plaint.

Mr. Muli cited the case of **PROF. DAVID MUSYIMI NDETEI VS. DAIMA BANK LIMITED CIVIL SUIT NO. 2198 OF 2000** for the proposition that the duty to prove that interest rates charged were proper lies on the bank. He also relies on the case of **ZACHARIAH MOENGA MAANGI VS. HOUSING FINANCE COMPANY (K) LIMITED CIVIL SUIT NO. 598 OF 2007** for the proposition that a report from the Interest Rates and Advisory Centre should not be trashed. In the latter cited case, the court relied on such a report and made the following observation:

***“Even though the Respondent has trashed the report from the Interest Rate Advisory Centre, the report demonstrates one thing. That prima facie, the Respondent may have charged usurious interest rates on the Applicant's loan. It also demonstrates that the Applicant has paid more than double the sum advanced and that what is outstanding, and which the Respondent claims as due, is more than double the sum loaned. There is prima facie proof that the sum claimed may be oppressive, and excessive. The Applicant has therefore established that he has a prima facie case with a probability of success.”***

The case of **Prof. Ndetei**, supra, and the case of **Zachariah Moenga**, supra, are both persuasive authorities. I agree with the judges exposition in these cases relevant to the points that they were concerned with in the case before them. There is however a distinction to make in the case of **Zacharia Moenga**, supra that the observations were made after a trial and may not be applicable at an interlocutory application such as the instant one.

Mr. Munyu has opposed the application and stated that it is both premature for the fact that no Statutory Notice had been served upon the Plaintiffs and for the reason that even though the right to sell the suit property has arisen the Plaintiff has not commenced the recovery process. Mr. Munyu continued to submit that under Clause 2(e) of the agreement between the parties, the chargor has power to commission inspection or valuation of the suit property at any time. Mr. Munyu trashed the letter of offer annexed to the Plaintiff's supporting affidavit on the ground that the authenticity of that letter was questionable. The issue of the authenticity of this letter, Mr. Muli submitted, ought to have been raised in an affidavit sworn by the firm of Advocates alleged to have written the letter to the Defendant's Advocate, to deny the authenticity of the letter. Mr. Muli submitted that it was not enough for Mr. Munyu to make submissions regarding the authenticity of the letter without such an affidavit. I agree with Mr. Muli on that point. The only person who can challenge the authenticity of the letter of offer is the person who is alleged to have written it. We do not have any affidavit denying that the alleged author of the letter of offer wrote it. The authenticity of the letter cannot be raised in the way proposed by Mr. Munyu's approach.

Mr. Munyu has continued to submit that there was no *prima facie* case since the application for the injunction is based on a dispute as to the amount due. For this proposition Mr. Munyu relied on the case of **JOHN KARARI GITHINJI T/A LIMPOPO SNACKS VS. KENYA COMMERCIAL FINANCE CO. LTD [2001] eKLR**. At the last page of the ruling, Onyango Otieno, J. (as he then was) observed:

***“The sum total is that there is some money outstanding even by the allegation of the Applicant himself. In law, I cannot restrain the mortgagee from exercising his power of sale simply because the Applicant is disputing the amount due. The legal proposal in Halsbury’s Laws of England, Volume 32, 4<sup>th</sup> Edition at paragraph 725 is clear on that. It states as follow.***

***“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 into 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; but where he was, at the time of the mortgage, the mortgagor’s solicitor, the court will fix a sum probably sufficient to cover his claim. The mortgagee will also be restrained if, upon a subsequent incumbrancer offering to pay off the first mortgage, the mortgagee denies his title to redeem.”***

I agree with the general principles enunciated in this case.

Mr. Munyu submitted that the allegation that the Defendant’s action contravened sections 44 of the Banking Act and Section 39 of the Central Bank Act, with regard to the issue of interest charged by banks, Mr. Muli submitted that Central Bank no longer had control over interest charged by banks for contracts entered into after July 1991. I have no quarrel with that position. After the repeal of the Central Bank Act, Chapter 491 Laws of Kenya, section 44 of the Banking Act remained a regulatory provision restricting increase of rates of banking without prior approval of the minister. However, after subsequent circulars from the Central Bank of Kenya, banks were allowed to charge any interest rates on loans and advances as agreed between them and their borrowers. Mr. Munyu is therefore right to say that Central Bank no longer controls interest charged by the Banks. The only caution I would add is that a bank may charge any interest contractually agreed between itself and the borrower, and the banks would not interfere with contractually agreed rates of interest. There are however, exemptions to this general rule as has been demonstrated severally by the Court of Appeal. For instance in the case of **MUIRURI VS. BANK OF BARODA [2001] KLR** at page 183, the Court of Appeal granted an injunction and made the following observation:

***““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 chargeabe 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.”***

Mr. Munyu, in opposition to this application for injunction, relied on the case of **CHRISTOPHER MUGWIMA MUROKO VS. HOUSING FINANCE COMPANY OF KENYA & ANOTHER [2006] EKLR** for the proposition that the Applicant must demonstrate the loss that he stands to suffer if

the injunction is not granted. Mr. Munyu submitted that no such demonstration has been made nor any allegation made that the Applicant may suffer any loss not compensatable by an award of damages.

Regarding the amount of money which is due, we have statements from both parties. We have a simple statement from the Defendant bank account No. 070/500/3254 for the period between 29<sup>th</sup> June, 2006 to 28<sup>th</sup> May, 2008 showing a debit balance of 2,128,737.10/-. The Defendant has also annexed the statement of account No. 070/5011/230 for the period between 29<sup>th</sup> June, 2006 and 26<sup>th</sup> May, 2008 showing a debit balance of 6,517,201.74/-. No statement was provided for the period prior to 2006. The Plaintiffs on the other hand have annexed a report from IRAC. In the report, the maker of the report indicates that he did a recalculation of the interest on both the overdraft and the loan account and came up with a credit balance in favour of the 2<sup>nd</sup> Plaintiff in the sum of Kshs.11,774,364.50/-.

Mr. Munyu has trashed the report saying that it is a mere allegation which the court ought not to consider. At this interlocutory stage this court cannot make a final determination of the evidence adduced by the parties as this is the province of the trial court. As far as that evidence is concerned it gives the Plaintiff's position in support of their case which needs not to be approved by the Defendant at this stage. The basis upon which the figures in the report were arrived at would be subject of the scrutiny of the trial court and of cross-examination by the Defendant/Respondent.

Regarding the issue whether or not the applicants have established a prima facie case that would justify an order for injunction to be made, it was Mr. Munyu's submission that there was no such case established. Mr. Muli on the other hand has persuaded the court to find that paragraph 9 of the supporting affidavit of Mr. Popat shows the loss that the Plaintiff may suffer. I have considered the content of this paragraph. Mr. Popat deposes that the income from the suit premises are paid directly to the widow of one of the deceased director's of the Plaintiff Company and is the sole source of her livelihood and that if the suit properties are disposed off, the said widow will be left with no means of her livelihood.

I have taken into consideration all the submissions by the counsels. It has been submitted that there is no imminent danger to the suit property because the Defendants have no intention of exercising their statutory power of sale and that no statutory notice has been issued and therefore no sale can take place and in the circumstances, this application is premature. The question then arises, when can it be said that a chargor has commenced the exercise of his power of sale over the charge property. It is not disputed that the Respondent issued a notice to the Plaintiffs demanding payment of outstanding sums on the loan and the overdraft facilities held by the 2<sup>nd</sup> Plaintiff. Even though the Defendant has belittled this act, it has not denied that it has already sought for and obtained a valuation and an inspection report on the suit property. It has also been shown that a letter of offer has been sent to the Defendant by a firm of advocates on behalf of their clients declaring their interest to purchase the suit property for the sum of Kshs.45 million.

In an application for an injunction pending an appeal in the case of **MUA PARK INVESTMENTS LIMITED VS. KENYA NATIONAL ASSURANCE CO. (K) IN LIQUIDATION Civil Appl. No. NAI 32 of 2006**, the Court of Appeal held that where it is clear that an appeal would be rendered nugatory and where the Respondent wishes to, and would be rendered likely to enforce its rights by the sale of suit property if no injunction is granted, then an injunction should issue.

This ruling would have been of great help to the Applicant in this case if the Applicant was able to meet the requirements for the granting of an interim injunction. The Applicant has shown that it has not been served with any statutory notice for the sale of the property. I do note however that certain steps have been taken by the Defendant towards that end including the clear

indication in the demand letter that the Defendant would institute processes to recover what is owed to it if the amount demanded was not paid. It is also clear that the Defendant has obtained a valuation Report over the suit property but it is bent at denying that fact is a demonstration of the subtle manner in which the Defendant is handling this issue. That aside, apart from the IRAC report which needs to be tested in a full trial, there is no cogent evidence before this court to show that the Defendant is not owed money by the Plaintiffs/Applicant. Going by the statements of accounts before me, there is clear evidence that the 2<sup>nd</sup> Plaintiff is not servicing the loans and the overdrafts it has with the Defendant. For instance, in the Statement for the account No. 070/500/3254 for the entire period between June 2006 and May 2007, the 2<sup>nd</sup> Plaintiff has made only two credits into that account and both these credits were made in January, 2008 and February, 2008. The deposits were made within four months to the date this suit was filed. The situation in the other account is much more different in that no credits have been made into the account for the period covered in the statement. I am not satisfied that the Applicant is deserving of the orders of injunction it seeks in this matter. It has been shown that not only is the Applicant indebted to the Plaintiff but that no payments have been forthcoming for a long period of time. Even though this application may have been brought to court prematurely, nonetheless, the Plaintiff is undeserving of the orders it has sought. The Applicant has offered to meet any condition the court may set as precondition for the injunction order. I do not think that there will be any justification to grant an injunction in the face of the clear evidence of default on the Applicant's part.

I have formed the opinion that the Plaintiff's application should fail as it is not merited. I will not conclude the matter before I make an observation, that it is clear from the conduct of the Defendant that there may be an intention to dispose off the suit property through private treaty, without notice to the Plaintiffs. For that reason, I find it necessary to make the following orders for the ends of justice to be met.

- 1. The Plaintiff's application dated 29<sup>th</sup> April, 2008 be and is hereby dismissed.**
- 2. The Plaintiff will pay the costs of this application to the Defendant.**
- 3. The Defendant should not exercise its statutory power of sale over the suit property before giving the requisite notice to the Plaintiffs as required under Section 52 of the ITPA unless otherwise directed by this court.**

**Dated at Nairobi this 3<sup>rd</sup> day of October, 2008.**

**LESIIT, J.**

**JUDGE**

**Read and signed in presence of:**

Ngachu holding brief for Mr. Muli for the Plaintiffs

N/A for Mr. Munyu for the Defendant

**LESIIT, J.**

**JUDGE**