



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1759 OF 1999

DAVIS NATHAN CHELOGOI.....PLAINTIFF

versus

DIAMOND TRUST BANK LTD.....DEFENDANT

R U L I N G

On 11th November, 1999 I gave an order of Injunction to restrain the defendant herein from selling alienating or disposing of by public auction or private treaty or in any other way parting with title for property known as L.R. NO. KITALE MUNICIPALITY BLOCK 2/130 belonging to the plaintiff.

I reserved my reasons therefore due to want of time and now give the same hereunder.

I stated then that, the defendant was out to exercise its statutory power of sale after the plaintiff defaulted in payment of the loan advanced to him by the defendant.

The plaintiff was required to establish a prima facie case with a probability of success, that damages would not be adequate compensation in the event the order was not granted and that if the court is in any doubt the matter be decided on a balance of convenience.

The plaintiff has shown that the principal sum advanced by the defendant has been repaid. This has not been controverted by the defendant.

The plaintiff on the other hand does not deny that he is in default. However, his computation leaves a very big difference between what he is ready to pay and what has been demanded by the defendant.

For sometime now, the courts have held that a dispute as to how much is payable in respect of the principal sum or interest cannot avail a litigant in the plaintiff's position the remedy of an injunction. However, the Court of Appeal in C.A NO. 82 of 1998 Daima Bank & Others -vs K.H. Osmond upheld a decision of Kuloba J. where the learned Judge found that the interest charged on the principal sum was not only unreasonable but also unconscionable and manifestly excessive.

In the present case the defendant has charged interest on arrears in addition to interest due. Indeed, the said interest on arrears forms the highest figure of what is being claimed by the defendant. It has been submitted on behalf of the plaintiff that, the charge relating to this property did not provide, inter alia, that interest be payable on arrears as claimed by the defendant.

That is, with respect, a very contentious issue considering the figures reflected in annexures before the court.

It has also been submitted that some charges levied against the plaintiff are against the Banking Act and procedures. This is also a contentious issue.

I have seen some correspondence and evidence that the plaintiff from time to time reached an arrangement with the defendant to liquidate the sum due and owing. That may be so but that cannot deny the plaintiff a right to come to court in the event that the defendant appears to be oppressive as is apparent in this case.

As the main suit is yet to be heard, it may be prejudicial to the parties if more is said than is only necessary at this stage.

For these reasons, the order given shall remain in place until this suit is heard and determined and/or further orders of this court.

It is so ordered.

Dated and delivered at Nairobi this 30th day of November, 1999.

A. MBOGHOLI MSAGHA

JUDGE