



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 54 OF 2013

KHALID YAMIN KHAN & ABDUL

WAHEED KHAN T/A HIGHLAND

DISRIBUTORS VENTURES.....PLAINTIFFS

-VERSUS-

EQUITY BANK LIMITED.....1STDEFENDANT

ANTIQUA AUCTION AGENCIES.....2ND DEFENDANT

RULING

What is before me is the plaintiffs' application brought by way of Notice of Motion dated 8th January, 2013 in which the plaintiffs are seeking a temporary injunction restraining the defendants by themselves or servants, agents or auctioneers or any of them or otherwise from alienating, selling or interfering with peaceful and quiet ownership or howsoever interfering with the plaintiffs ownership of title and or/interest in all that property known as House Number 3 on Land Reference Number 209/9771 situated at Kileleshwa estate in Nairobi (hereinafter referred to as the "the suit property") pending hearing and determination of this suit. The application is opposed by the defendant through a replying affidavit sworn on 26th July, 2013.

The plaintiffs' case:

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of ABDUL WAHEED KHAN sworn on 8th January, 2013. The plaintiffs have contended that on 21st December, 2010 they approached the defendant for a bank loan facility of Kshs 18.4 million to purchase of the suit property. The defendant considered their request and gave them an offer in writing on 21st December, 2010 for the said loan facility of Kshs. 18.4 million which they considered and accepted. The plaintiffs have averred that it was a term of the said letter of offer that the amount borrowed would be repaid in 120 monthly installments comprising of both the principal and the interest in the sum of Kshs 291,248/-. The plaintiffs averred that it was a term of the letter of offer that the facility shall attract interest at a rate of 14.5 % per annum on reducing balance from the date of draw down. The plaintiffs have averred that following the acceptance of the terms of the said loan facility, a charge was prepared and registered against the title of the suit property in favour of the 1st defendant to secure the facility. The plaintiffs have averred that few months from the date of the draw down the defendant increased from 14.5% to between 22% and 24% which had the effect of increasing their monthly loan repayment amount from Kshs. 291,000 to Kshs. 445,000/-. The plaintiffs have averred that this adjustment of interest upwards was arbitrary and unjust. The plaintiffs have averred that the said adjustment in the interest rate affected their ability to repay the loan which they continued to pay nevertheless. The plaintiffs have averred that they could not afford the monthly repayment sum as they were running small scale business which was severely affected by the 1st defendant's continuous fluctuation of the interest rate.

The plaintiffs have averred that in early 2012, the 1st defendant served them with two notices. The first notice was asking them to consider selling the suit property by private treaty while the other was a statutory notice. The plaintiffs have averred that on receipt of these letters they wrote several letters to the 1st defendant raising the issue of regular fluctuation of interest rate and appealed to the 1st defendant for a reasonable adjustment on monthly repayment sum and the rate of interest. The plaintiffs averred that they also made a request to the 1st defendant to allow them to redeem the suit property so as to stop the auction thereof.

The plaintiffs have averred that the 1st defendant did not respond to their letters. The plaintiffs have averred that following their numerous complaints, they were advised to continue paying a sum of Kshs. 400,000/- per month in repayment of the loan which they started paying in September, 2012. The plaintiffs have averred that they were to see an advertisement in the Daily Nation Newspaper of 17th December, 2012

that the suit property was to be sold on 9th January, 2013 through public auction by the 2nd defendant. The plaintiffs have averred that similar notices were affixed on the suit property for the general public to see. The plaintiffs have contended that they have paid a sum of Kshs. 4,493,429/- towards the loan repayment and that if the rate of interest had not been increased they would have paid kshs 4,368,720 in the same period. The plaintiffs have averred that they have overpaid the 1st defendant and as such the 1st defendant's right to exercise its statutory power of sale had not arisen. The plaintiffs have averred that the intended sale of the suit property by public auction is wrongful and if the defendants were not restrained from proceeding with the sale of the suit property, the plaintiff's rights as chargors will be grossly violated and they will suffer irreparable loss.

The defendant's case:

The defendants opposed the application through a replying affidavit sworn by the 1st defendant's head of debts recovery, Purity Kinyanjui sworn on 26th July, 2013. The defendants averred that the plaintiffs offered the suit property as security to secure a bank facility of Kshs 18.4 million and a charge was registered against the title of the property in favour of the 1st defendant for the said amount. The defendants have averred that the plaintiffs were issued with a facility letter dated 21st January, 2010 which stipulated the terms upon which the facility was made available to the plaintiffs. The defendants have averred that contrary to the plaintiffs' claim that the interest rate was fixed at 14.5% per annum, the letter of offer aforesaid and the charge instrument (hereinafter referred to as "the security documents") provided that the interest was to accrue on the facility at the rate of 14.5% per annum on a reducing balance or at such other rate as may be determined by the 1st defendant from time to time. The defendants have averred that the security documents provided further that the event that the plaintiffs defaulted in making monthly payments, a default interest rate of 6% per annum would be imposed above the normal rate. The defendants averred further that the security documents gave the 1st defendant the right to amend interest rate charged without prior notice to the plaintiffs. The defendants averred that the plaintiffs failed to adhere to the terms of the security documents. The defendants averred that if there was any variation in the monthly repayment amount that was payable by the plaintiffs, it was as a result of the plaintiffs failure to service the loan facility as a result of which default interest rate was imposed.

The defendants have averred that the suit property was advertised for sale as a result of the plaintiffs' default in repaying the loan and that a property offered as security is offered at the risk of it being sold by the lender if default in loan repayment is made. The defendants have averred that there is no irreparable loss that can be suffered by the plaintiff should the 1st defendant proceed and exercise its statutory power of sale under the charge. The defendants have averred that the plaintiffs have refused to service the loan facility in the manner that was agreed and as such they cannot seek the courts intervention in the contractual relationship.

The defendants have averred that upon obtaining the interim injunction herein, the plaintiffs declined to service the loan for a period over 8 months. The defendants have averred that the court can only intervene in private contracts by interpreting and enforcing the terms thereof and not in renegotiating the same. The plaintiffs have averred that injunction cannot be issued where there is an admission of indebtedness and urged court to dismiss the application.

The submissions:

The application was argued on 21st September, 2017. The plaintiffs' advocate submitted that the 1st defendant varied the interest rate for the loan facility without notice. He submitted that the plaintiffs were entitled to be notified of the variation in the interest rate. He submitted further that the 1st defendant had admitted the interest rate was varied in accordance with the terms of the charge. In support of his submission, the plaintiffs' advocate cited the case of Bhalvinder Pal Singh S/O Surji Singh & Another vs. Equity Bank Limited (2015) eKLR. He submitted that under the Constitution of Kenya, 2010, a borrower is entitled to notice before interest rate is varied. The plaintiffs' advocate submitted that the plaintiffs have come to court with clean hands and that they are willing to pay the debt.

In reply, the defendants' advocate submitted that the plaintiffs' were granted a loan by the 1st defendant to purchase the suit property and that the plaintiffs' case is that the variation of the interest rate was unconscionable. He submitted that the plaintiffs' stopped paying the loan that was advanced to them in 2012. He submitted that the charge that was executed by the plaintiffs in favour of the 1st defendant provided that the 1st defendant had a right to vary the rate of interest that was being charged on the loan. He submitted that the court cannot be asked to create another contract for the parties. He submitted that the plaintiffs willfully entered into a contract with the defendant and as such cannot complain about the terms thereof. He urged the court to dismiss the application. He submitted that in the unlikely event that the application is allowed, the order should be conditional on the plaintiff continuing to pay the loan.

Determination:

I have considered the application together with the affidavit that was filed in support thereof. I have also considered the affidavit that was filed by the defendants in opposition to the application and the parties' respective submissions. The principles upon which this court exercises its discretion in applications for temporary injunction were set out in the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E. A. 358. An applicant for a temporary injunction must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable harm unless the order sought is granted. In case the court is in doubt as to the above, the application would be determined on a balance of convenience. Injunction is a discretionary remedy. The court has the discretion to grant the order with or without conditions. The court also has the discretion to refuse the order even if the conditions for grant of such order have been met if the court forms the view that it would not be equitable to do so.

The plaintiffs have brought this suit to challenge the exercise of the 1st defendant's statutory power of sale. The plaintiffs have challenged the exercise of the 1st defendant's statutory power on a single ground namely; that the 1st defendant varied the rate of interest without notice to them thereby increasing the monthly repayment sum and the total loan balance. The plaintiffs have contended that as at the time they were served with the statutory notice, they had overpaid the 1st defendant based on the contractual interest rate and as such the 1st defendant's statutory power of sale had not arisen.

I have perused the letter of offer dated 21st December, 2010 and the instrument of charge dated 14th February, 2011. On interest, clause 4 of the letter of offer provides that:

“All advances made under the proposed facility shall attract interest from the date of draw down (as well as after and before any demand or judgment or liquidation of the borrower) at the rate of 14.50 per cent (14.50%) per annum on the reducing balance basis or such other rate as may be determined by the lender from time to time. The Lender reserves the right to amend interest charges without prior notice to the Borrower.”

Clause 6 of the letter of offer provides that if the plaintiffs failed to pay any sum payable under the loan facility on its due date, the plaintiffs were to pay interest on such sums from the date of default to the date of actual payment at the rate of 6% per annum above the rate specified in clause 4 mentioned above. The foregoing provisions of the letter offer were incorporated in clause 2 of the instrument of charge dated 14th February, 2011.

It is not disputed that the 1st defendant varied the interest rate that was being charged on the loan that was advanced to the plaintiffs. In view of the provisions of the letter of offer and the charge that I have referred to above, I am not persuaded that the variation of the interest rate was illegal. On the issue of service of notice before such variation was effected, again I have noted that the letter of offer and the charge permitted the 1st defendant to vary the rate of interest without notice. I am not convinced therefore that failure to serve notice upon the plaintiffs was a violation of the terms of the loan contract that the plaintiff had entered into with the 1st defendant. I have noted from the documents attached to the replying affidavit that the plaintiffs had admitted their indebtedness to the 1st defendant and made several proposals to settle the same. What the plaintiffs are contesting in my view are accounts. In the case of, Priscillah Krobought Grant vs. Kenya Commercial Finance Co. Ltd. and 2 Others, Court of Appeal at Nairobi, Civil Application No. Nai 227 of 1995 (108/95 V.R.), the court stated as follows:-

“Finally, it will bear repetition, we think if we were to state that a court does not normally grant an injunction to restrain a mortgagee from exercising its statutory power of sale solely on the grounds that there is a dispute as to the amount due under the mortgage – see Barmal Kanji Shah & Another Vs. Shah Depar Devji (1965) E. A. 91, 32 Halsbury’s Laws of England (4th Edition) paragraph 725 and Uhuru Highways Development Ltd. Vs. Central Bank Kenya and 2 Others, Civil Application No. Nai 140 of 1995 (unreported) per Kwach J. A.”

In the Court of Appeal case of Fina Bank Ltd. v Ronak Ltd, [2001] 1 EA 54 the court stated that a dispute on accounts was not a basis for grant of an injunction. The court stated as follows on the issue of disputed interest rate:

“...As the charge documents which were in evidence before the High Court expressly reserved, in favour of the Appellant, the right to charge interest at variable rates at its absolute and sole discretion, the contractual relationship between the parties could not be impeached because the exact rate or rates had not been specified. Accordingly the Respondents had not made out a case for injunctive relief in their favour and the order of the High Court had no sound basis.”

Due to the foregoing, I am not satisfied that the plaintiffs have established a prima facie case against the defendants with a probability of success. The plaintiffs were also required to demonstrate that they would suffer irreparable injury if the orders sought are not granted. In the case of Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Limited & 2 Others [2009] eKLR the court observed that where a property, even a residential property is charged to secure a loan, it is converted into a commodity for sale and where there is failure to pay the charge debt or loan, no sentimental value or attachment to the mortgaged property, however great, would operate against the exercise of the statutory power of sale by the mortgagee. The plaintiffs have not demonstrated that damages would not be adequate remedy in the event that the suit property is sold and it is found at the trial that the sale was wrong. The plaintiffs have also not shown that the 1st defendant would not be able to pay damages.

The upshot of the foregoing is that the Notice of Motion application dated 8th January, 2013 has no merit. The application is accordingly dismissed with costs to the defendants.

Delivered and Signed at Nairobi this 12th day of April 2018.

S.OKONG’O

JUDGE

Ruling read in open court in the presence of:

Mr. Were for the Plaintiffs

Mr. Obok for the Defendants

Catherine Court Assistant