



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: TUNOI, O’KUBASU & GITHINJI, JJ.A.)**

**CIVIL APPLICATION 108 OF 2005(UR.58/2005)**

**BETWEEN**

**FRANCIS J. K. ICHATHA.....APPLICANT**

**AND**

**HOUSING FINANCE COMPANY OF KENYA LTD.....RESPONDENT**

**(An application for an injunction pending an intended appeal from  
the ruling and order of the High Court of Kenya at Milimani  
Commercial Court, Nairobi (Emukule, J) dated 3rd March, 2005**

**in**

**H.C.C.C. NO. 414 OF 2004)**

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**RULING OF THE COURT**

The applicant seeks an order of injunction under Rule 5 (2) (b) of the Court of Appeal Rules to restrain the respondent:

***“from selling and/or disposing of by way of public auction and/or private treaty ... Land reference number 13689 Langata pending the hearing and determination of the intend appeal”.***

In August, 1991 the respondent advanced Shs.1,200,000/= to the applicant for the construction of a residential house on the applicant’s plot – LR No. 13689. The money was repayable in 15 years time at a variable interest rate of 18% p.a. The monthly repayment rate was Kshs.19,332/=. The loan was secured by a legal charge on L.R. No. 13689 dated 7th August, 1991. In 1992, the applicant borrowed a further sum of Shs.300,000/= from the respondent. The terms and conditions of the loan were the same as the 1991 loan except that the 1992 loan was repayable at a variable interest rate of 19% p.a. The 1992 loan was secured by a further legal charge on the same property dated 19th November, 1992. The full monthly repayment was Shs.26,273/=.

The applicant fell into arrears and defaulted in the loan repayment over a long period. The respondent ultimately by a statutory notice dated 31st December, 2003 demanded full payment of the whole balance and arrears amounting to Shs.13,779,841/75 and gave notice that it would exercise its statutory right of sale if the sum demanded was not paid within 3 months. In response, the applicant filed *H.C.C.C. NO.414*

of 2004 in the superior court complaining that the respondent had breached the contract by unilaterally and unlawfully increasing the interest rates and by charging “penalty interest/interest on arrears”, which charges erroneously increased the applicant’s indebtedness and frustrated his efforts to redeem the loan. The reliefs sought in the plaint include a permanent injunction and a prayer that the accounts of the loan amount be taken by the Department of Mathematics of the University of Nairobi.

The applicant filed an application for interlocutory injunction together with the plaint to restrain the respondent from selling the charged property. The application for injunction was dismissed by the superior court (Emukule J) on 3rd March, 2005. The superior court found, inter alia, that the applicant had persistently defaulted in the payment of the loan. The court stated:

***“Even looking at the figures prepared by the Interest Rates Advisory Centre (IRAC), which is the plaintiff/applicant’s agent, and therefore the work of the plaintiff, the monthly repayments is indicated as Shs.19,325/05; the plaintiff/applicant defaults from the very first instalment. He does not pay the contractual sum of Shs.19,325/05. He pays Shs.4,222/55 only. For the next nine months he pays the full repayment instalment only once. In other words, he consistently defaults. The default situation persists for most of the duration of the mortgage”.***

***The superior court then concluded that:***

***“He (applicant) has failed to establish a case with any probability of success. He owes the money to the defendant/respondent. He so admits.***

***His plea that he would suffer irreparable loss this being his only residential home will not succeed. The property was by his own admission erected with the funds advanced for the purpose by the defendant/respondent. It is almost a cliché that any property put in the market place as a security becomes a commodity for sale, and no amount of emotive sentiment or attachment would alter that position”.***

The applicant intends to appeal against the refusal by the superior court to grant an injunction. He has filed a Notice of Appeal.

Before the court can grant the order of injunction sought the applicant is required to show that he has an arguable appeal and secondly, that the appeal, if successful, will be rendered nugatory unless the order of injunction is granted – see ***Githunguri v. Jimba Credit Corporation Ltd*** (No. 2) [1988] KLR 838.

The applicant has both in the draft memorandum of appeal and in the supporting affidavit shown the grounds on which he will be asking the appellate court to interfere with the exercise of discretion by the superior court. We appreciate that an appellate court does not normally interfere with the exercise of discretion by the trial judge unless such discretion is not exercised judicially. Nevertheless, we are satisfied that the intended appeal raises arguable questions of law particularly on the legality of “Penalty Interest/ Interest on arrears”, imposed and on the variation of the interest rates. However the applicant’s case in the superior court was not that he was not in arrears of the loan or indebted to the respondent at the time the statutory notice was issued. Rather, his case was, if we have correctly understood it, that the levying of penalty interest/interest on arrears and the application of high interest rates of up to 26% p.a. erroneously inflated his indebtedness thereby frustrating his efforts to redeem his property. There was correspondence in the superior court showing that applicant had admitted both his inability to service the loan and the arrears on the loan.

Indeed, Mr. Kahonge, the learned counsel for the applicant told us that there is no dispute that there was default and that the dispute is on the illegal charges, and that the arrears and the debt are admitted. The dispute is essentially on the quantum of the arrears and of the loan at the time the statutory notice was issued. The applicant recognized in the plaint that the dispute was of “Mathematical nature”. Thus, this is truly a dispute on the accounts. The existence of such a dispute is not a valid ground for restraining the respondent from exercising its statutory power of sale. (See – ***Shah v. Devji*** [1965] EA 91.

It is true that if an order of injunction is not given, the charged property will probably be sold before the appeal is heard. It is however, admitted that the residential house on the property was built with the loan from the respondent. The applicant has not said or shown that the respondent has no financial means to compensate the applicant if the appeal ultimately succeeds.

It is for those reasons that we decline to grant an injunction pending appeal.

The application is accordingly, dismissed with costs to the respondent.

**Dated and delivered at Nairobi this 3rd day of June, 2005.**

**P. K. TUNOI**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**