



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT KISUMU
(CORAM: OMOLO, TUNOI & KEIWUA, JJ.A.)
CIVIL APPEAL NO. 139 OF 2000
BETWEEN**

**KENYA COMMERCIAL BANK LIMITEDAPPELLANT
AND
JASON JEVIN MATERE
JOSEPH N. MATERE
MRS. HELLEN MATERE RESPONDENTS**

(Appeal from the Ruling and Order of the High Court of Kenya at Bungoma (Mbitto, J.) given on 8th November, 1999

in

H.C.C.C. NO. 37 OF 1998)

JUDGMENT OF THE COURT

This appeal is from the decision of the superior court (Mbitto, J.) delivered on November 8, 1999 in H.C.C.C. NO. 37 of 1998 in which the learned judge granted a temporary injunction to restrain the defendant ("the appellant), servants and/or agents from selling or disposing of L.R. NO. BUNGOMA/TONGAREN/206 pending hearing and determination of the suit. The appellant had advertised that property for sale under its statutory power of sale.

It had been alleged that the appellant was in breach of an agreement it had entered with the respondents under which KShs.750,000/= was advanced to them on January 13, 1991 repayable with interest at the rates of between 16% and 19% per annum. The appellant is said to have charged exorbitant rates of interest which in 1996 reached 47.5% per annum. The respondents alleged that they had repaid the principal sum in full and admitted that they owed the element of interest, according to them being Kshs.678,000/=. The appellant is alleged to have been varying the agreed rate of interest without notice to the respondents and that any such variation of interest was not catered for by the said agreement.

The respondents say they have on several occasions made demands on the appellant to clarify why the rates of interest had become exorbitant contrary to the provisions of the agreement between the parties. The respondents have also complained that they will suffer irreparable loss if the charged property is sold before the suit is heard and determined.

The appellant in opposition to the application contended that the respondents defaulted in their loan repayment and have made no efforts to clear the outstanding balance. The respondents had not shown any intention to redeem the charged property and are therefore not entitled to the equitable remedy of injunction. As at May 30, 1998 the amount outstanding was Kshs.1,645,476.55. The appellant had

through out the proceedings in the superior court contested the respondents' allegation that it charged interest at the rate of 47.5% per annum and had vehemently denied that the respondents had repaid the principal amount. There appears to have been no evidence showing any payment made toward the loan repayment.

In introducing issues of sections 65 and 71 of the Registered Land Act, the learned judge had gone outside the case pleaded in the pleadings before him by the parties. The temporary injunction granted upon such extraneous matters cannot be sustained.

One other matter which we draw our attention to is that the learned judge ought not to have ordered payment of the outstanding amount of the loan by instalments because there was no application made before him for that purpose. In any event the respondents went to court on the basis that other than interest to be ascertained, there was no sum still outstanding.

Accordingly and for the reasons we have set out hereinabove, we allow the appeal with costs and reverse the ruling dated November 8, 1998 and substitute in its place an order dismissing with costs the respondents' application dated June 11, 1998.

Dated and delivered at Kisumu this 23rd day of November, 2001.

R. S. C. OMOLO

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JUDGE OF APPEAL

P. K. TUNOI

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JUDGE OF APPEAL

M. OLE KEIWUA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR



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