



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU**

Civil Case 96 of 2007

RISPER SUSAN OWENGA PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA DEFENDANT

RULING

The plaintiff Risper Susan Owenga filed this suit against the defendant Housing Finance Company of Kenya Limited on the 24th July 2007, praying for a declaration that she has fully serviced the loan advanced to her by the defendant inclusive of interests and a permanent injunction restraining the defendant either of its own, agents, servants and/or employees from selling, alienating, entering and/or taking over the management of the property known as **KISUMU /MANYATTA/A/3559** or in any other way, interfering with her quite and lawful ownership of the said property.

At about the same time, the plaintiff took out a chamber summons dated 24th July 2007, seeking the following orders:-

- (i) That the application be heard ex-parte in the first instance.**
- (ii) That pending the hearing and final determination of the application there be a temporary injunction restraining the defendant of its own agents, servants and/or employees from selling, alienating, entering and/or taking over the management of the property designated as KISUMU/MANYATTA/A/3559 or in any other way howsoever interfering with the plaintiff's quite and lawful ownership of the demised said property.**
- (iii) That pending the hearing and final determination of this suit, there be a temporary injunction restraining the defendant of its own, agents, servants and/or employees from selling, alienating, entering and/or taking over the management of the property designated as KISUMU/MANYATTA/A/3559 or in any other way howsoever interfering with the plaintiff's quite and lawful ownership of the said property.**
- (iv) That the costs of the application be provided for.**

The grounds in support of the application are that:-

- (i) The plaintiff has a suit with overwhelming chances of success.**

- (ii) The plaintiff would suffer loss that would not be repaired by way of costs.**
- (iii) The balance of convenience in this transactions tilts in favour of the plaintiff**
- (iv) The defendant is in breach of the terms and conditions of the Agreement**
- (v) The defendant's threat to take over the management of the suit property is illegal.**

These grounds are enhanced by the facts contained in the plaintiff's supporting affidavit dated 24th July 2007.

The issue arising for determination at this juncture is whether the plaintiff is entitled to an order of injunction against the defendant pending the hearing and final determination of the case. The principles for the grant of a temporary injunction were set out in the favours case of **Giella =vs= Cassman Brown Ltd [1973] E. A. 358** and are the following:-

- (i) An applicant must show a prima facie case with a probability of success.**
- (ii) An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.**
- (iii) When the court is in doubt it will decide the application on the balance of convenience.**

With regards to the first principle, the plaintiff in her supporting affidavit avers that on the 20th March 1998, a mortgage agreement was entered between herself and the defendant whereupon she was advanced a loan of Kshs. 620,000/= to construct a business premises within Kisumu Municipality designated as **KISUMU/MANYATTA/A/ 3559** (herein the suit premises). A charge (Annexure marked "RSO1") was registered on the said property as security for the repayment of the loan within a period of ten (10) years on terms and conditions spelt out in the charge instrument and the letter of offer.

The plaintiff avers that it was agreed that any variations in the interest rate shall be effected upon mutual agreement by both parties and upon sufficient notice in compliance with the terms set out in the letter of offer, the charge instrument and the Banking Act (Cap 488) Laws of Kenya). She avers that she diligently liquidated the loan amount as agreed and has fully paid the entire amount and beyond. She avers that she has so far paid the sum of Kshs. 1,806,861/= as demonstrated in her own statement of accounts (Annexure marked "RSO 4") but that the defendant is claiming the sum of Kshs. 2,417,136/20cts which she disputes. She avers that the defendant in purported exercise of its power contained in the charge took over the management of the suit premises through M/s Crystal Valuers Limited for purposes of collecting rent towards the clearance of the alleged outstanding balance. She contends that the defendant's computation of her account is premised on wrong principles and based on variation of interest without any notice contrary to the provisions of the Banking Act and therefore illegal. At the hearing of the application, Mr. Ouma for the plaintiff reiterated the plaintiff's averments and argued that the computation and variation of the interest rates was unilaterally undertaken by the defendant and that its action of taking over the suit premises was unlawful with intent to prejudice the plaintiff's interest. He argued that there was no provision for the defendant to seize the suit premises and employ it to charge rent. He further argued that there is a serious dispute as to how the amount claimed by the defendant was arrived at. He contends that the very nature of the application and the documents annexed thereto sets out a prima facie case for the plaintiff.

In opposing the application the defendant raised no dispute with regard to the existence of the material agreement entered between itself and the plaintiff. However, it avers that the plaintiff failed to disclose to the court that in addition to the loan of Kshs. 620,000/=, she also did apply for and obtain a further Kshs. 360,000/= on the security of the same property and for which a further charge was registered. The defendant went on to aver that the charge and other documents forming part of the transactions clearly spelt out the rate of interest and the manner of its variation. It avers that as at 7th May 2001, the plaintiff acknowledged default in repayment of the loan and requested for re-scheduling of the same. It avers that the plaintiff in purported repayment of the loan issued cheques, which were dishonoured, and at one time on the 27th April 2001, sought the intervention of her member of parliament prompting a meeting between itself and the plaintiff who failed to honour the resolutions reached.

Further, the defendant avers that the plaintiff has not fully repaid the loan and her allegation that she has so far paid a sum of Kshs. 1,806,861/= is false. It avers that as at 31st May 2004, the outstanding balance was Kshs. 2,306,112/= which was expressly and unequivocally acknowledged by the plaintiff.

The defendant also avers that the plaintiff's account was operated in accordance with the agreement and that the interest was charged as agreed. The defendant contends that the plaintiff has no basis to dispute the outstanding amount. It further contends that it was within its rights in moving to appoint a receiver for the suit premises i.e. M/s Crystal Valuers Limited.

Mr. Ragot for the defendant reiterated the foregoing averments and argued that the plaintiff had already admitted owing the defendant more than Kshs. 2 Million even before the suit was filed. Her analysis of what she owed the defendant as depicted in her exhibit (annexture "RSO4") was therefore not genuine and an afterthought. Mr. Ragot argued that the plaintiff is not sincere in alleging that she overpaid the loan. He argued that the charge instrument allowed the defendant to vary interest at its own discretion so long as a notice to that effect was issued to the plaintiff. He argued that the plaintiff was advised of changes in the interest chargeable by letters written to her. Mr. Ragot also argued that the charge instrument gave the defendant the option to appoint a receiver to collect rent towards the service of the loan. He contended that the plaintiff has failed to demonstrate that she has a prima facie case. She is therefore not entitled to the orders sought in the application.

In that regard, Mr. Ragot referred to the case of **ESSO (K) LTD =vs= MARK MAKWATA OKIYO KISUMU CIVIL APPEAL NO. 69 OF 1991**. He also referred to the case of **DAVID KAMAU GAKURU =vs= NATIONAL INDUSTRIAL CREDIT BANK LTD NBI C/APP 84 OF 2001** and contended that the plaintiff has shown bad faith by admitting defaults and the outstanding balance and yet comes to court alleging that she fully repaid the loan. He argued that the defendant cannot be restrained from exercising any of the available option's merely because of a dispute over the amount due. In that regard, he referred to the case of **J. L. LAVUNA & OTHERS =vs= CIVIL SERVANTS HOUSING CO. LTD AND SAVINGS & LOANS (K) LTD NBI C/APP NO. 14 OF 1995**.

A consideration of the aforementioned averments and contentions by both the plaintiff and the defendant calls upon the court to tread with care to avoid making a final determination on the matter. The role of the court at this point is to try and avoid unnecessary interference with an agreement made between two persons of sound mind and rule on whether or not a prima facie case has been established for the grant of a temporary injunction order in favour of the plaintiff. The agreement was founded on the charge instrument dated 7th May 1998 (Annexture marked "RSO 2") and the further charge dated 16th April 1999 (Annexture marked (HF1 (b))).

The charge and further charge were executed over the suit premises and related to separate

advancements of money to the plaintiff. However, it is notable that the plaintiff struck to the original charge for the advancement of Kshs. 620,000/= and tactfully avoided the further charge for the advancement of an additional Kshs. 360,000/=. Be that as it may, the chargor (plaintiff) in both instances acknowledged that she had freely and voluntarily executed the charge instruments and understood their contents. To that effect, she bound herself to repay the loan inclusive of interest and other charges that may be imposed in accordance with the agreed and covenanted terms and conditions. She contends herein that in compliance with the said terms and conditions she repaid the entire amount and more. She said that she made a total payment of Kshs. 1,806,861/= and therefore the defendant claim of Kshs. 2,417,136/20cts as at 31st March 2007 is not justified.

The thrust of the plaintiff's case is that the defendant breached the terms and conditions of the agreement by firstly, wrongly computing her account and varying the rate of interest without due notice and secondly, purported to exercise its powers under the charge for purposes of collecting rent. She contends that the actions are illegal and a breach of the agreement.

It is not difficult to decipher from the foregoing that the plaintiff's complaint is in relation to the amount payable by herself and/or the interest charged without notice. She thus disputes the amount claimed by the defendant and its right to appoint a receiver to take over the management of the suit premises.

However, a perusal of the defendant's annexures marked "HF2", HF3", HF 4", HF 5", HF 6" shows that the plaintiff defaulted in the repayments on several occasions. The mortgage statement at page 66 of the annexure marked "HF 7" shows that the plaintiff was indebted to the defendant in the sum of Kshs. 2,516,927/70cts as at 22nd August 2007. Annexure "HF 8" is an acknowledgement by the plaintiff that she was indebted to the defendant in the sum of Kshs. 2,306,112/= as at 31st May 2004. Annexure "HF 9" are letters from the defendant to the plaintiff notifying her of the variation in interest rates.

Pages 6 and 7 of the charge (Annexure "RSO 2") provides for the mode of calculation of interest and for the variation of interest rate with appropriate notification to the chargor. Similar provisions are repeated at pages 6 and 7 of the further charge (Annexure "HF1 1(b)"). The remedies available to the defendant in the event of default by the plaintiff are provided for at page 10 of the charge (Annexure "RSO 2") and also at page 10 of the further charge (Annexure "HF1 1(b)"). The remedies include:-

- (a) **Appointment of a receiver of the income of the charged property or**
- (b) **Sale of the charged property**

The defendant's alleged application of interest rates not agreed or varied without notification and its alleged illegal appointment of a receiver to manage the charged property are factors not supported by evidential material available from the plaintiff.

Consequently, this court is not satisfied that the plaintiff has established a prime facie case to enable exercise of discretion in her favour. In the case of **J. L. LAVUNA & OTHERS =vs= CIVIL SERVANTS HOUSING CO. LTD & ANOTHER (supra)** the Court of appeal quoted Halsbury's laws of England Vol. 32 (4th Edition) and stated that the law is that a court should not grant an injunction restraining a mortgagee from exercising its statutory power solely on the ground that there is a dispute as to the amount due under the mortgage. The charge instrument (Annexure "RSO 2") and the further charge (Annexure "HF1 (b)") were made under the Registered land Act (Cap 300 Laws of Kenya) which caters for the chargee's remedies including appointment of a receiver of the income of the charged property. (See Section 74 (2) of the RLA).

With regard to the second principle for the grant of a temporary injunction, it is settled law that in cases where an award of damages could be adequate compensation, an injunction should not be granted (See **ESSO (K) LTD =vs= MARK MAKWATA OKIYA**) (supra).

Mr. Ouma, for the plaintiff, argued that the nature of the plaintiff's business is not one that may be repaired by an award of damages. The nature of the said business was however, not specified but it would appear to be rental business. Mr. Ragot, for the defendant, argued that damages incurred by the plaintiff are capable of quantification and would be refundable by the defendant.

In the court's view, the success or otherwise of a business is measured in monetary terms meaning that a person operating any type of business is capable of being compensated by an award of damages.

With regard to the balance of convenience, Mr. Ouma argued that it would be more convenient for the plaintiff to be allowed to carry out her business until the final determination of the suit. The court's thinking is to the contrary, it will be more convenient for the defendant to manage the income of the plaintiff's business for purposes of eventual discharge of her financial obligation under the charge than for her to continue operating the business when it has clearly been demonstrated that she is experiencing difficulties in repaying the outstanding balance of the loan. In that way, not only does she save her proprietary interest in the property but also avoids the pain and agony that comes with pondering where the next instalment payment shall come from.

All in all, the plaintiff has failed to pass the test for the grant of a temporary injunction in her favour pending the hearing and final determination of this suit. Her application is therefore dismissed with costs.

Dated, signed and delivered at Kisumu this 26th day of June 2008.

J. R. KARANJA

JUDGE

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