**Desai and others v Fina Bank Ltd**

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 21 June 2004

**Case Number:** 1308/01

**Before:** Emukule J

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Bank – Interest – Whether bank interest rates ought to comply with the Banking Act – Whether issue of compliance will defeat statutory power of sale of charge under a legal charge when the rate was contractual – Section 44 – Banking Act (Chapter 485). [2] Civil Procedure – Interlocutory injunction – Exercise of statutory power of sale – Land under charge – Applicant failing to settle despite provision of accounts – Allegation that interest charges illegal and usurious – Whether bank interest regulated by the Banking Act – Whether court can interfere with contractual rates of interest – Whether* prima facie *case for interference with statutory recovery had been made – Where would the balance of convenience lie – Order XXXIX – Civil Procedure Rules. [3] Land – Charge – Statutory power of sale – Dispute as to legality of interest charges – Whether question of interest charges raises* prima facie *case at the interlocutory stage.*

**RULING**

**EMUKULE J:** The application herein was filed on 24 August 2001 and was brought by way of a chamber summons under Order XXXIX, rules 1, 2, 3 and 9 of the Civil Procedure Rules, inherent powers of the Court, and all enabling provisions of the law. The application was supported by the affidavit of Ranjnikant Jashbhai Desai sworn on 24 February 2001. The plaintiff sought the following material orders: (1) That the defendant, whether by its servants or agents or advocates or advisers or any kind or otherwise howsoever be restrained from doing the following acts or any of them, that is to say further advertising for sale selling by public auction or private treaty or otherwise howsoever at any time or by completing the conveyance or transfer of any sale concluded by private treaty or otherwise howsoever of all that property known as land registration number 7750 situated in Nairobi together with any improvements thereon pending the hearing and determination of this suit. (2) A true statement of account commencing the year 1994 to date in respect of banking facilities granted to the plaintiff by the defendant be provided by the defendant; This being initially an *ex parte* application the plaintiff was granted these orders on 29 August 2001. This situation persisted until the 3 February 2003 when the following consent orders were recorded: (a) That the intended sale be and is hereby put off on account of the defective auctioneers notices; (b) That the parties wish to examine accounts; and (c) That the matter be mentioned on 27 February 2003. When the matter was mentioned on 27 March 2003, the defendant had replaced the illegible copies of the statement of account with legible ones. Thereafter the plaintiff seems to have gone into hibernation until woken up by the orders made in Milimani Commercial Court case number 513 of 2003 (OS) between the defendant, *Fina Bank Ltd v Desai and another* in which Mwera J granted the defendant access to the suit property and to sell it by private treaty. Following these orders the plaintiff filed a further application in this cause on 23 December 2003 and obtained orders *ex parte* restraining the defendant from dealing with the suit property whether by way of sale or otherwise pending the hearing and determination of the application dated 24 August 2001. The plaintiffs were also ordered to re-serve the said application for hearing on 6 January 2004. However, before the hearing of the said application on 6 January 2004, the defendant also filed a further application on 5 January 2004. When the matter came up for hearing on 6 January 2004 the *ex parte* orders of injunction granted to the plaintiffs on 23 December 2003 were vacated. Thus when this matter was urged before me on 16 January 2004, 21 January 2004, 3 February 2004 and 17 February 2004 there was in fact no injunction in place against the defendant who could thus have proceeded to sell the suit property but was because of these proceedings prudent enough not to sell. I think both counsel overlooked the final sentence of the ruling of Kasango J on 6 January 2004. Secondly Kasango J said: “In regard to the *ex parte* orders granted by this Court on 23 December 2003, the Court finds its hands tied by Order XXXIX, rule 3(2) which states that an *ex parte* order cannot be extended and accordingly the *ex parte* order granted hereof is not extended. The plaintiff’s application dated 24 August 2001 is hereby adjourned to 16 January 2004”. Thus when I ordered after the hearing of 16 January 2004, that the *status quo* be maintained until 21 January 2004, and again on 21 January 2004 to 3 February 2004, all that was really meant is that the defendant would not in any way deal with the suit property until determination of this application. There was however no order to stop the defendant from dealing with the property by way of sale, for instance. The defendant is to be commended for maintaining this position. When this matter was urged before me by both counsel for the plaintiff and the defendant for a good part of three mornings and two afternoons, seven broad issues emerged. These are: (1) The reconciliation of accounts by the defendant. (2) Rate of interest application to the moneys advanced under the charge and further charge. (3) The validity of consideration for the charges. (4) The identity and value of the suit property. (5) The marking of exhibits made under the Oaths and Statutory Declarations Act (Chapter 5) Laws of Kenya. (6) The validity of the notices. (7) The issue of *res judicata*. I now take each of these broad issues. By the consent order made on 3 February 2003, the parties expressed a wish to examine accounts. This order was curiously worded parties “wished”. This wish was followed by the defendant furnishing the plaintiff with a statement of account twice as the first copies were said to be illegible. Nothing turned on these accounts at the hearing of the application and I take it that the amount as expressed in the legible statement supplied by the defendant is the proper amount. The question of the applicable rate of interest generated more heat. Counsel for the plaintiff opined that the rates of interest charged by the defendant were contrary to the provisions of section 44 of the Banking Act (Chapter 488) Laws of Kenya *vis-à-vis* section 39 of the Central Bank of Kenya Act (Chapter 491) before its repeal by Act number 4 of 2001. Until its repeal section 39 of the Central Bank of Kenya Act (CBK Act) empowered CBK in consultation with the Minister for Finance to determine and publish the maximum and minimum rates of interest which specified the amounts banks or specified financial institutions may pay on deposits and charges for loans or advances. CBK again in consultation with the Minister could also determine different rates of interest for different types of specified bank and financial institutions. These restrictions had been introduced by section 9 of the Finance Act of 1980, (number 10 of 1980), to regulate interest rates by specified banks and financial institutions. By virtue of this section 39, the Governor of CBK published *Gazette* notice number 1617 dated 2 April 1990 which fixed the minimum rate of interest payable by specified banks and specified financial institutions on deposits on savings and also the maximum rate of interest which specified banks and specified financial institutions may charge for loans or advances granted for a term not exceeding 3 years. Following the repeal of this Act by Act number 4 of 2001, *Gazette* number 1617 of 1990 was revoked by *Gazette* notice number 3348 of 23 July 1991. This effectively ended the regime of interest rate controls by the CBK on specified banks and specified financial institutions. Those charged with the regulation of specified banks and/or financial institutions must have had good reasons for removing power to fix interest rates on banks and financial institutions, but retaining the identical powers of control of interest rates and penalties charged by building societies. For under section 39A of the Central Bank of Kenya the CBK may in consultation with the Minister: “(*a*) determine and publish the maximum and minimum rates of interest which building societies registered under the Building Societies Act may pay on deposits and charge for loans, advances and mortgages. (*b*) determine the maximum or vary deposit, financial or other charges, including penalties and forfeitures which may be imposed by a society on a member or borrower”. The greater control is of course the provisions of section 44 of the Banking Act (Chapter 485) (Rev 1991) which imposes restrictions on increases in Bank charges. It says: “44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister”. The question which begs an answer is what is the meaning of “institution” under this section. The second question is what is meant by “its rate of banking or other charges”? The first question is easily answered because the expression “institution” is defined under the Banking Act as a “bank or financial institution”. Both are licensed under section 3 of the Banking Act, and in the case of a financial institution there is also a declaration by the Minister by notice in the *Gazette* that it be a financial institution. There is a secondary question which may be posed before we tackle the question of the meaning of its “rate of banking or other charges.” It is this, is section 44 of the Banking Act a secret weapon by the Minister for Finance to be applied at some time on banks and financial institutions if their rates of banking or other charges are in the reasonable opinion of the Minister excessive? If this is so, “the rate of banking and other charges” must logically include interest rates (and also other charges – “commitment fees, late payment fees, miscellaneous charges” which banks and financial institutions charge on daily basis). Section 44 above-mentioned must however be read together with the provisions of section 45(1) and (2) of the Act which provide as follows: 45 (1) The Minister shall consult with the Central Bank in the exercise of his functions under this Act, ( 2) w here approval of the Minister is required under any provision of this Act, the application for such approval shall be submitted through the Central Bank. In a supplementary affidavit by Francis Robert Kinyanjui a senior relationship officer of the defendant sworn on 30 January 2004 and filed in court on the same day the said deponent says in paragraphs 4 of the affidavit: “That the provisions of section 44 have been addressed by the Central Bank which has advised the defendant that interest rate is not included among charges covered by the provisions of that section”. Annexed to the said supporting affidavit are two circulars, one dated 17 June 2003, entitled “Banking Circular number 03 of 2003, addressed to all chief executives, commercial banks non-bank financial institutions and mortgage finance companies. The circulars encapsulates broad areas of the CBK jurisdiction over financial institutions. The concern here is with two of those segments, namely compliance with section 44 of the Banking Act and savings deposit and lending rates. With regard to compliance with section 44 of the Act, the circular requires: (1) “all institutions licensed under the Banking Act to submit to the Minister through the Central Bank the list of all current banking or other charges. This information must be forwarded to the Central Bank on or before 30 June 2003. (2) Institutions licensed under the Banking Act shall ensure that they comply with the provisions of section 44 of the Banking Act”. On savings, deposit and lending rates, the circular provides: (3) “Commercial Banks, non-bank financial institutions mortgage finance companies and building societies will be required to maintain savings rates positive against the annual average underlying rate of inflation”. In their own circular number 62 of 2003, reference KBA/Ch/12/2003 which sadly lacks a date of issue, but is receipt dated 24 June 2003, the Association’s Chief Officer, I think, with respect, correctly advising its members to comply with the Act, Central Bank Circular (issued in terms of the Banking Act) and to submit their tariffs before 30 June 2003 for approval of the Minister adds the following paragraph: “Current Banking and other charges” as stipulated in the circular refers to direct banking charges that attract levies for services a bank directly provides. Third party charges or interest are not included”. This unfortunately is an interpretation by the Kenya Bankers Association. The Central Bank Circular is silent on the issue of lending rates. Perhaps this is deliberate or is merely an omission to elaborate on the title to that particular subject. All the circular, however does is to enclose a revised form (Table F CBK BS (M)-Return) leaving it to the banks and financial institutions to fill in their rates. I am not called upon to give any interpretation to the Central Bank Circular number 3 of 2003, and in particular the item dealing with savings deposits and mortgages but I think what it conveyed to the banks or financial institutions is that they are free to pay for deposits and charge any interest rate, on loans and advances but such interest paid on deposit received and interest on loans or advances made, shall be such as would maintain a savings rate and an interest lending rate that is positive against the annual average underlying rate of inflation. This is clearly so from an examination of revised table F of CBK BS (M) Return on money market transactions and covers both inter-bank transactions savings and deposit rates and lending rates divided into local currency and foreign currency and covering maturities of 0 year to over 10 years. Thus in litigated cases, the Courts have, started with the case of *Pelican Investment Ltd and another v National Bank of Kenya Ltd* [2000] 2 EA 488, consistently held, and quite correctly if I may so, that courts will not interfere on matters of interest charged arising from contract. Onyango Otieno J as he then was posed the question whether courts should intervene in such matters, and this was his answer at page 10 of his ruling in this case: “Should the Court intervene in such matter? I do believe that where it is plain to the Court that fraud existed when such contracts were entered into or where one party used its superior position to force another into such contractual obligations the Court may intervene and ensure justice to the oppressed, but here there is no evidence of such fraud or oppression”. In *Fina Bank Ltd v Spares and Industries Ltd* [2000] 1 EA 52, Tunoi, Shah and O’Kubasu JJA after considering the allegations of high and onerous rates of interest by the bank and criticising the trial Judge for failling into the serious error of being a sympathiser although it is human to so feel Shah said in his judgment: “... the function of the Court is to enforce what is agreed between the parties and not what the Court thinks ought to have been fairly agreed between the parties. I agree with what was stated by Rimer in the case of *Clarion Ltd and others v National Provident Institution* [2000] 2 All ER 265 at 281: ‘Thrust of NPT’s complaint is simply that it made a bad bargain from which it now wants to be released. It is, however, of the essence of business transactions that each party is bargaining in its own interest, and for his own benefit and that each has to look after his own interests and that in most cases neither owes any duty of care or disclosure to the other. It is inherent in such a system that there will be those who will make bad bargains but that is the risk which in my view each bargaining party must be assumed to be willing to take and which the law must be regarded as having allocated to him, and also later said: ‘At the risk of repetition I must say that the Court must leave parties to their bargain good or bad’.” Yet again in *Mrao Ltd v First American Bank of Kenya Ltd and others* [2002] LLR 3801 (CAK), (Kwach, Bosire and O’Kubasu JJA) Kwach JA said: “I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences, I have seen in recent times, for instance challenging the contractual interest rate, banks will be crippled out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.” And this is what Ringera J had to say on the subject of interest rates in the case of *Morris and Co Ltd v Kenya Commercial Bank Ltd and others* [2003] 2 EA 605: “As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be”. In the letter of offer of 24 September 1999 addressed to Messrs Kimana Lodge Limited at page 2 item (iii) is entitled rate of interest after giving various rates of interest the offer letter says: “Such interest shall be computed on a daily basis with monthly rests and would be payable by you at end of every month. The rates are subject to change at any time without prior notice, and at the absolute discretion of the bank”. At end of he said letter is endorsed a memorandum of acceptance which is in these terms: “We Messrs Kimana Lodge Limited PO Box 30139, Nairobi agree to accept, on the terms and conditions set out above the offer facilities contained in this letter. We enclose our cheque for July interest”. It is thereafter signed by two directors of Kimana Lodge and is dated 25 September 1999. The second plaintiff’s board resolutions passed on 25 September 1999, duly certified by its chairman are attached and forwarded to the defendant together with accepted letter of offer. The credit agreement dated 18 November 1999 for the borrowing of US$ 300 000 together with further charge of the suit property were duly approved and sealed, and so were personal guarantees of the first plaintiff, Rajnikant Jashbhai Desai, and Nila Rajnikant Desai. Under clause 1 of the further charge the second defendant committed to pay interest very much like clause 1(*b*) of the charge made on 30 November 1994. The plaintiffs were thus bound to pay the interest in accordance with respective contractual terms which they entered into with their eyes wide open. This will also dispose the other point that there was no valuable consideration or that the consideration was past for the defendant to enforce its security under the charge and further charge. This is not so. They acknowledge the letter of offer of 22 September 1999 for a current loan of US 300 000-00 and overdraft of KShs 25 000 000 and proceeded to offer a further charge over the suit property. They cannot be heard to say that the consideration was past to defeat the defendant’s enforcement of the security. The fourth issue was the identity and value of the suit property. The first valuation made by Bagaine Karanja Mbuu Limited gave the property on the basis of six separate plots over 2 acres each, and open market value of KShs 65 million, and a mortgage value of KShs 52 million, without any improvements thereon. A subsequent valuation by Syagga and Associates revealed that there was no matrimonial home in the suit premises, nor was the property sub-divided. The property consisted of natural vegetation. These valuers gave it a value of KShs 24.8 million on open market value, KShs mortgage value of KShs 20.5 million, and a forced sale value of KShs 13 800 000. Without approved sub-division plans and deed plans in relation thereto, it is doubtful the property would attract any of the values set out in the valuation of Bagaine Karanja Mbuu Limited. The negotiated or proposed private offer of KShs 20 million or other higher sum would be as good as any the parties would get for the suit property comprising the two valuations. The attestation of exhibits was rectified by filing with leave of the Court of the entire replying affidavit of Francis Robert Kinyanjui, sworn on 3 February 2003, and filed on the same day in court. This disposes of the fifth issue. The exhibits now complied with the provisions of the Statutory Declaration Act (Chapter 15) and the rules made hereunder. The sixth issue was the validity of the notices and whether this particular issue of the matter was now *res judicata*. There were two types of notices. Firstly, there were notices under section 69A of the transfer of property being the three months’ notice to the plaintiffs before the defendant could exercise its statutory power of sale. In his ruling of 28 August 2003, in Milimini Commercial Courts civil case number 513 of 2003 (OS), *Fina Bank Ltd v Desai* Mwera J said this at page 6 of his ruling: “On the issue of notices, the consent order of 3 February 2003 specifically termed the auctioneers notification(s) as defective. Nothing was said of the statutory notice(s) of sale and so it can safely be said that since the bank conceded that the notification for sale (by the auctioneers had been defective), the respondents on their part conceded the statutory notices were valid, hence the consent order being recorded as they were. The respondents cannot be seen to introduce that aspect here now”. I accept this position. The last, and perhaps most important issue is whether the applicant is entitled to an interlocutory injunction in terms of prayer (*a*) in its plaint filed on 24 August 2001 and prayer 3 of the application dated 24 August 2001 and filed in court on the same day. For the applicant to succeed in its prayer, the applicant must fulfil the principles for granting this relief, as set out in the often cited case of *Giella v Casman Brown and Co Ltd* [1973] EA 358. These principles are: (i) An applicant must show a *prima facie* case with a probability of success. ( ii) The applicant will suffer irreparable loss unless the injunction is granted. (iii) When in doubt, the Court will decide the matter on a balance of convenience; On the first principle that the applicant must show a *prima facie* case with a probability of success, the Court has established that there is a valid charge and further charge on the suit property. The applicants have defaulted in payment. The applicants have made completely untrue unsubstantiated and unfounded averments knowingly designed to mislead the Court that the suit property had a building and other improvements thereon (paragraph 6) of the supporting affidavit of Rajnikant Jashbhai Desai sworn on 24 August 2001, while knowing that the entire suit property had only natural vegetation thereon, and no improvements at all. The applicant had also obtained a loan facility on the basis of approved sub-division of the suit property whereas there was no such sub-division. The applicant was given an update of accounts to which it has not responded. In any event it is now settled judicial precedent, that a dispute as to amount is not a basis for an injunction to restrain a mortgage from the exercise of the statutory power of sale, and courts will not interfere with the terms of contract as to interest. In the circumstances, I do not think the applicant has any *prima facie* case at all with a probability of success. Will the applicant suffer irreparable loss unless the injunction is granted? I do not think so. The applicant has deposed to a material untruth that the suit property is developed whereas the contrary is the position. By that material misstatement the applicant has attempted to give a value to the suit property which it does not have. The applicant admits owing the defendant a debt which is far in excess of the probable value of the suit property. Assuming however that the applicant may be successful in his suit, could the injury caused by refusal of an injunctive order be compensated in damages. I think so. The defendant appears to be a stable bank, and there is no suggestion that it has used its superior position in any overbearing or oppressive manner against the applicant. The defendant remains a substantial creditor to the plaintiff, and if the plaintiffs were successful in its claim against the defendant the debt or part of it owed to the defendant by the plaintiff could be applied to set off the whole or part of the damages arising from the successful ending of the plaintiff’s suit. Until that happens however, the plaintiff remains a debtor to the defendant. The balance of convenience will for similar reasons tilt in the defendant’s favour. Kimana Lodge Limited the principal debtor to which the plaintiff were guarantors and charged the suit property as security to secure the loan and advances to the principal debtor, by the defendants, was placed under receivership, not by the defendants but by another creditor, Delphis Bank Limited and has been under receivership since 10 November 2000. Interest on the defendant’s loan is still accruing, and the plaintiffs have made or offered no proposals for payment, and the prospects for the defendant recovering its loan appear to be receding with each day since this application was filed on 24 August 2001. The only sensible thing for the defendant as lender is to cut down its losses and start recovering some money by selling the assets securing the loan and advances. To maintain a *status quo* where the plaintiffs retain both the loan, and the suit property would be patently unjust, and this Court would not be party to it. In the circumstances of the plaintiffs it would not even be prudent to ask them to offer an undertaking to pay the loan and damages in the event of their losing the case. Every prospect suggests that the plaintiff will be unable to raise a bank or such cash deposit in the amount of the debt to secure the defendant if an injunction were granted. To bring my ruling to an end I would say this, the plaintiff’s application dated 28 August 2001 has been a long journey to delay the defendants from recovering the loans advanced to the plaintiff’s enterprises called Kimana Lodge Limited. It is an unsuccessful journey. The application is incompetent, and without merit at all. It is dismissed with costs to the respondents, and if there were any interim orders previously granted the same are hereby dissolved. For the plaintiffs:

*Information not available*

For the