**Pelican Investment Ltd v National Bank of Kenya Ltd**

**Division:** Milimani Commercial Courts Kenya

**Date of judgment:** 18 February 2000

**Case Number:** 570/98

**Before:** Onyango-Otieno J

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Civil Procedure – Interlocutory application – Proper form – Absence of grounds in the application –*

*Whether application will be struck out – Order 50, Rule 7 – Civil Procedure Rules*

*[2] Civil Procedure Rules – Injunction – Order 34 – Civil Procedure Rules.*

*[3] Land – Mortgage/charge – Statutory power of sale – Penalty interest – Dispute as to the amount due*

*– Whether mortgagee will be restrained from exercising statutory power of sale – Consideration of SA*

*Duplum Rule.*

**Editor’s Summary** Pelican Investment Ltd (“the Applicant”) instituted suit, seeking relief against the exercise by National Bank of Kenya Ltd (“the Respondent”) of its statutory power of sale arising from a mortgage executed by the Applicant in the Respondent’s favour. The Applicant then made an application by chamber summons for interlocutory relief against the auction of the subject property. When the application came up for *inter partes* hearing, it was contended that the same was defective for lack of grounds in the body of the application. Further, it was contended by the Respondent that the application was an abuse of the process of the court because it sought to restrain the valid exercise of a statutory power of sale. The Applicant alleged that negotiations were in progress to have the property sold at a higher price by private treaty, and that there existed a dispute as to the amount which the Respondent had failed to settle. The Applicant further alleged that the interest charged was excessive and unconscionable and expressed surprise that a KShs10 million loan could escalate to KShs316 million.

**Held** – Failure to specify the grounds of an application in the body of the same makes the application defective. Without amendment the application remains defective. A court should not grant an injunction restraining a mortgagee whose power of sale has arisen from exercising his statutory power solely on the ground that there is a dispute as to the amount due under the mortgage. *Lavuna and others v Civil Servants Housing Co Ltd and another* [1995] LLR 366 (CAK) followed. *Per curiam*: Unless it is plain that fraud or oppression existed, the courts will not interfere with the terms of a contract or the provisions as to interest. *Pipe Plastic Samkolit v National Bank* HCCC 1076 of 1996 disapproved. In any case, even if the interest charged was unconscionable, the same would only be a dispute as to amount which is not a proper ground for granting an injunction. Duplum Rule (SA) considered. Application dismissed.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Echaria v Echaria* [1997] LLR 2532 (CAK)

*Lavuna and others v Civil Servants Housing Co Ltd and another* [1995] LLR 366 (CAK) – **F**

*Pipe Plastic Samkolit (K) Ltd and another v National Bank of Kenya* [1996] LLR 62 (CCK) – **D**