**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.*

**RULING**

**ONYANGO-OTIENO J:** This application brought under Order 39, Rule 1, 2 and 3 of the Civil Procedure Rules and under section 3A of the Civil Procedure Act is seeking mainly two orders. First it is seeking injunction orders to issue restraining the Defendant/Respondent, its servants and/or agents in particular Palomino Enterprises Limited Auctioneers, from in any way selling, disposing, auctioning howsoever all that parcel of land known as LR No 7751/2 Lower Kabete and LR No 336/10 Ruaraka until the full and final determination of this suit or until further orders of this Court. Second order sought is that the public auction by the Defendant of the two pieces of land earlier on set to be due on 12 February 1998 be stopped. The second prayer to stop the sale which was set for 12 February 1998 has been overtaken by events as it was stopped when this matter came up for the first time. No grounds were set out in the same chamber summons as is required by Order 50, Rule 7 of the Civil Procedure Rules but there is an affidavit sworn by Haithai Haji Abdi which was sworn on 11 February 1998 in support of the same application. There are also annexures to the same affidavit, all in support of the same application. The Applicant filed a further affidavit sworn on 7 May 1999 and filed on 19 May 1999 and annexed further exhibits to the same affidavit and lastly the Applicant filed a further supplementary affidavit sworn by its accountant, one Joseph Adongo Alima on 4 June 1999 annexing further affidavits. I will refer to all these affidavits and annexures in this ruling whenever necessary. The Respondent opposed the application maintaining that the application is frivolous, vexatious and is otherwise an abuse of the court process, that the application is fatally defective as it does not conform to the mandatory provisions of Order L, Rule 7 of the Civil Procedure Rules (Chapter 21) of the Laws of Kenya; that the Plaintiff’s and its sister companies’ indebtedness to the Defendant stood at KShs 316 637 410-15 as at December 1997; that the Plaintiff’s case has no *prima facie* chances of success at all and an order of injunction will overwhelmingly prejudice the clear rights of the Respondent and will heavily tilt against the balance of convenience; and that the rate of interest applied on the subject loans was contractual and lawful. These grounds of opposition were supported by an affidavit sworn by one George J Okungu sworn on 17 March 1998 and a further affidavit sworn by F Wachira Wamae, assistant manager on 1 July 1999 plus several annexures. I will refer to these in this ruling whenever necessary. I have also heard and considered the able submissions by the learned counsels. First I do agree that this application offends the provisions of Order 50, Rule 7 in that no grounds were set out as required by that Rule. That Rule states as follows: “7. Every summons shall state in general terms the grounds of the application being made and shall be heard in chambers and, where any summons is based on evidence by affidavit, a copy of the affidavit shall be served”.. The application before me merely states that the application is grounded on the annexed affidavit of HH Abdi and on other and further grounds to be adduced at the hearing hereof. In my humble opinion, that does not meet the requirements of Rule 7 quoted herein above. This rule is to a large extent similar to Rule 42(i) of the Court of Appeal Rules. The Court of Appeal in the case of *Echaria v Echaria* [1997] LLR 2532 (CAK) which came up before the Court of Appeal on 19 May 1998 in which the grounds of the application were not set out in the notice of motion and the Honorable Court had this to say: “The Respondent has applied that his appeal be struck out as incompetent. Dr *Kamau* for the Appellant objected to the notice of motion as being incurably defective for failing to comply with Rule 42(i) of the Rules of Court. That Rule states that all applications to the Court shall be by motion, which shall state the grounds of the application. He submitted that this requirement being mandatory in its language it is not enough for the grounds to be given only in the supporting affidavit. The Respondent should know the case he/she has to answer. Ms *Karua* for the Appellant/Respondent submitted that the ground is stated in the body of the application ‘as incompetent’, and if that is not sufficient she asked to be granted leave to amend the application. We agree that the notice of motion is defective but the defect is curable and, for that reason, and Ms *Karua* having applied for leave to amend the notice of motion, we grant leave for the Respondent to amend the notice of motion so as to comply with the requirement of Rule 42(i) of the Rules of Court”.

It is clear from this authority that omission to set out grounds for such an application makes the same application defective. In *Echaria*’s case, the learned counsel for the Applicant applied for leave to amend the notice of motion and the court felt obliged to have the notice of motion amended before the court could hear it. In short without the amendment it remained defective. In this case, the same situation arises and as the defect has not been cured by any amendment it stands defective. That would have been enough to dispose of the application before me but certain matters were raised during the submissions in this application, which I need to consider as well. I will first deal with the question of whether or not requisite statutory notice had been sent to the Applicant. The Applicant says at paragraph 8 of the affidavit of HH Abdi that the Plaintiff companies have not been served with the statutory notice as required by law. In response to that the Respondent has annexed copies of statutory notices forwarded to the Applicant in July 1993 in respect of three properties. Both notices were dated 2 July 1993 and were addressed to “the Managing Director H.H. Abdi and sons, Transporters (K) Limited”, the Second Applicant herein. The address used in both notices is the same as the address Haithai Haji Abdi has used in the affidavit he did swear in support of this application and that is P O Box 10276, Nairobi. The Applicant in his further affidavit sworn on 7 May 1999 stated at paragraph 2 that he understood Respondent’s replying affidavit sworn on 17 March 1998 by George J Okungu. He however did not reply to this allegation by Okungu that the statutory notices were sent to it in July 1993. Thus although HH Abdi, the chairman and major shareholder of the Applicant companies, at first, alleged that he never received statutory notices, yet when faced with this allegation that the same notices were forwarded to his companies, he has not denied the receipt of the same notices. I do hold therefore, that the Applicant has not sworn to my satisfaction, a *prima facie* case as to the allegation that the Respondent did not serve statutory notices upon it. In any case, this point was not canvassed in the learned counsel’s submissions. The next matter raised by the Applicant/Plaintiff is that the Plaintiff has been servicing the subject loan with the Defendant. This allegation is found in paragraph 3 of the Plaintiff’s affidavit. The Respondent denies this and has annexed several letters annexed as GJO 11, all of which clearly do admit indebtedness to the Respondent. I have also seen letters marked as GJO 12 and GJO 13 and also bank statements annexed by both parties. Joseph Adongo Alima annexed documents and statements which showed that between the years 1987 and 1991 the Applicant had paid KShs 36 million to the Defendants. Mr Wachira Wamae, the assistant manager with the Respondent’s Harambee Avenue Branch, says this is false and explains at paragraph 6 that the entries made into the Applicant’s accounts are automatic credits into the loan account as a result of the automatic debiting of the Applicant’s current account which is done in accordance with the operations of the banks. Be that as it may, even if I were to accept that KShs 36 million has been paid to the Respondent by the Applicant (and I have no good reasons to accept the same in view of Mr Wamae’s clear explanation in his affidavit) still that amount is alleged to have been paid between 1987 and 1991 which would give credit to Wamae’s allegation at paragraph 5 of his affidavit that the Applicant’s accounts have been dormant since 1992 whereas as a result of interest charged (whatever rate) the loan amount has obviously been increasing.

I cannot accept under these circumstances that the Applicant has been servicing the loan granted effectively. I will now consider two other matters raised by the Applicant. These are first the allegation at paragraph 9 of the Applicant’s supporting affidavit which states that the Respondent is aware that negotiations were at advanced stage by the Applicant of the sale of the charged properties by private treaty whereby the proceeds will be much higher and adequate to offset what is lawfully due to the Respondent with a balance over to the Applicant and secondly, the allegation at paragraph 11 that there exists a dispute between the parties as to the exact amount due to the Respondent from the Applicant which the Respondent has failed and/or refused to have resolved. In my understanding, the first allegation of negotiations going on to sell the property by private treaty and to pay the proceeds to the Respondent amounts to an allegation that the mortgagor has started an action to redeem the property and the second allegation that there exists a dispute as to the amount of money due is an allegation on a dispute on the amount due. The law on such issues is now well settled. It is explicitly stated in *Halsbury’s Laws of England* (4 ed) Volume 32, at paragraph 725 as follows: “725. When the mortgagee may be restrained from exercising power of sale. The mortgagee will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has began a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged. He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is the amount which the mortgagee claims to be due to him, unless on the terms of the mortgage the claim is excessive”. This legal stand has been adopted in Kenya in several decisions. In the case of *Lavuna and others v Civil Servants Housing Co Ltd and another* [1995] LLR 366 (CAK), Justice Kwach of the Court of Appeal stated: “I have always understood the law to be that a Court should not grant an injunction restraining a mortgagee from exercising its statutory power of sale solely on the ground that there is a dispute as to the amount due under the mortgage”. That settles the allegations about action to redeem which the Applicant alleges the Respondent ignored and also is an answer to the allegation that the amount in question is still in dispute. However, Dr *Khaminwa*, the learned counsel for the Applicant, says that the rate of interest charged was excessive and unconscionable and illegal. The Applicant raises this question of interest at paragraphs 4, 5, and 6 of the affidavit sworn by HH Abdi, the chairman of the Applicant’s companies and the main shareholder. At paragraph 4, Mr Abdi says that on several occasions he had raised the issue of high interest rates being charged on principal sum but the Respondent has failed to give a satisfactory explanation as to how the figures are arrived at. That allegation cannot reflect the whole truth for he never attached even a single letter he wrote to the Respondent on the issue of interest. On the contrary, the Respondent has annexed letters dated 6 September 1994, 18 September 1997 and 10 July 1997, addressed to the Respondent by the Applicant, but none of them has anywhere touched on interest. Paragraph 5 and 6 of the same Applicant’s affidavit are emphasizing surprise at a situation where a loan given of KShs 10 000 000 has, because of interest escalated to an enormous amount of KShs 316 637 410-15 and concluding that such a situation is impossible. The last sentence of the *Halsbury’s Law of England* I have quoted above states:“He will be restrained, however, if the mortgagor pays the amount claimed into Court, that is the amount which the mortgagee claims to be due to him unless on the terms of the mortgage, the claim is excessive”. To my mind, this means that if the court looks at the terms of the mortgage and finds that the claim is excessive then the court can interfere or restrain the mortgagee in the exercise of his power of sale. This then takes me to the mortgage documents so as to enable me know if on the terms of the mortgage the interest charged is excessive or not. In the Applicant’s supporting affidavit, the Applicant does not state the offending rate of interest but in the further affidavit at paragraph 4, the Applicant states the rate of interest as being 34%. In the letter of offer dated 2 December 1986, the provision for interest states: “Interest: To be at the rate of 14% p.a. on monthly rests for the time being, calculated on daily balances. The bank, however, reserves the right to give notice and thereafter vary the rate of interest charged as may be required”. The Applicant accepted these terms and signed the acceptance stating: “I have read and understood the terms and conditions set out above and append my signature in acceptance thereof. Signed Date: 2 December 1986”. The other letter of offer for KShs 7 000 000 dated 26 June 1990 stated interest rate of 19% with the same conditions that the bank reserved the right to increase the same interest rate. There are provisions conveying the same sentiments in the charges that the Applicant did execute. It would appear then that the provisions as in interest were matters covered by the contract between the two parties herein. Should the courts intervene in such matters? 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 courts may intervene and ensure justice to the oppressed, but here there is no evidence of such fraud or oppression. Indeed as I have stated herein earlier on, there is no complaint that was raised by the Applicant before its properties were threatened with sale. Dr *Khaminwa*, the learned counsel for the Applicant, says that the question of interest in this case and in many other cases in this country is such that the courts should interfere to ensure justice. He has referred me to the Ruling of Justice O’Kubasu (now judge of Appeal) in the case of *Pipe Plastic Samkolit (K) Ltd and another v National Bank of Kenya* [1996] LLR 62 (CCK). That case with every respect did not make any new proposal on which way to go on the question of interest. At page 8 and 9 of the typed copy, the Learned Judge says: “We have already noted that the principal amount borrowed by the Plaintiff was KShs 21 million. We also note that the rest of the amount over and above KShs 21 million is interest charged. We cannot say this was punitive since the Defendant bank was entitled by law and business practice to charge this interest on monthly basis. There was nothing illegal about this mode of charging interest. However, taking the usual business practice in which the banks waive same interest on loans advanced, I am of the view that having calculated the interest charged, I find that as the bank had indicated willingness to rescheduling of the repayment it would not be unreasonable to conclude that the bank would be willing to waive some interest charged”. And it is upon that background that the Learned Judge ordered waiver of interest. One easily sees that no legal principles were involved in that exercise. That case, with every respect, does not help in this matter before me. Neither is *Thomson Dictionary of Banking* at 330 of great help to me as the passage cited by Dr *Khaminwa* deals with interest in a judgment for mortgage. Willies *Principals of South African Law* (7 ed) on area of interest not to exceed capital found at 443, I agree would be excellent law but I cannot apply it here because it is a legal proposition that has arisen from the legislation in South Africa. Here in Kenya we have no such code and I cannot apply that code here under the pretence of interpreting our laws to ensure justice where there is no similar provision in our law to enable me apply the liberal approach to the interpretation of it. Dr *Khaminwa* referred me to the judgment of Gillespie J in the South African case where the application of the *in duplum* rule was discussed. I do agree with the reasons for the rule and I would it were the law in this country. Unfortunately, it is applicable under ancient Roman and Dutch Law and is applicable in South Africa, but not in this country. Under that rule, interest cannot accrue after the amount of the double is reached. Thus the financial institutions have to be on their guard to ensure that the debt is paid within the period for which it was to be repaid. If a creditor extends credit to a hard risk or fails to call up his debt at a proper time when the loan is being serviced, then such a creditor stands to suffer. I do agree that such a legal proposition might be ideal in this country as it would ensure that the debtors do not suffer the requirements upon them to pay extra-large interests caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect the debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy. However, to introduce this Dutch law by way of a judgment or a ruling into the common law country will in my opinion be too drastic a step to take as it will not be based on any existing legal authority or statute whatsoever in our country. It is law that had better be introduced by way of legislation. I do agree that liberalisation of interest rates in this country in 1991 may have done more harm to the economy and something should be done about it but I do not think a decision such as in a judgment would be a proper one. From all the above, I am satisfied that the Applicant has advanced a *prima facie* case with a probability of success for even if I were to find that interest charged was unconscionable, still it would in the end be no more than a dispute as to the amount due which in law as I have stated is not a proper ground for granting injunction. As I had found that no evidence was advanced to satisfy me that no statutory notice was served, the Respondent’s power of sale has arisen. On the question of irreparable damage, the Applicant himself has said that it was negotiating selling the property by private treaty. Thus sentimental loss is non-existent. Quantifiable loss through sale of the property can be compensated by the Respondent – a bank which I have not been told is bankrupt and would be unable to compensate the Applicant in case of the Applicant’s eventual success in this case. As the amount due is a big one, balance of convenience favours its being recovered. Thus the requirements under *Gielle*’s case have not been satisfied by the application.The upshot of all these is that this application cannot succeed. It is hereby dismissed with costs to the

Respondent.

Orders accordingly.

For the Applicant:

*Information not available*

For the Respondent:

*Information not available*