



Marple Brooks Projects Company Limited & another v I & M Bank Limited (Civil Case 1 of 2019) [2024] KEHC 13800 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 13800 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL CASE 1 OF 2019
SN MUTUKU, J
SEPTEMBER 30, 2024**

BETWEEN

MARPLE BROOKS PROJECTS COMPANY LIMITED 1ST PLAINTIFF

ESTHER DOREEN ODHIAMBO 2ND PLAINTIFF

AND

I & M BANK LIMITED DEFENDANT

JUDGMENT

The Plaintiff

1. The Plaintiffs filed a claim on 17th January 2019 against the Defendant through a Plaint dated 15th January 2019. They have stated that the 1st Plaintiff is the registered owner of parcels of land known as Kajiado/Kaputiei North/31755, 31756, 31757, 31758, 31759, 31760, 31761, 31962, 31763 and 31764 (hereinafter referred to as “suit properties”). The Plaintiffs intended to develop the suit properties into a real property estate.
2. To actualize their plan, the Plaintiffs obtained a loan facility from the Defendant for Kshs 42,000,000 and secured it through a charge on the suit properties. The principal amount and interest were payable every seventh day of every month and thereafter the Plaintiffs were to pay on demand all the monies and discharge all obligations and liabilities whether actual or contingent owing and incurred to the Defendant. The Plaintiffs paid a total of Kshs 28,000,000
3. The Plaintiffs claim that sometimes in 2015 they became aware that the Defendant had not been debiting their account in respect of the Charge and that the interest rates that were being applied were exorbitant and contrary to what the parties had initially agreed upon; that the Defendant promised to rectify the anomaly but in March 2018, the Defendant served the Plaintiffs with Statutory Notice demanding payment of the Charged amount of Kshs 42,060,459.12.



4. It is claimed that on 26th June 2018, the Defendant served the 1st Plaintiff 40 days' Notice with the outstanding loan amounting quoted as Kshs 44,612,713.12; that on 25th October 2018 the Defendant through its auctioneers served the Plaintiffs with a 45 days' Notice and Notification for sale of the suit properties where the outstanding amount was quoted at Kshs 46,579,377.17 and that despite the Plaintiffs attempting to negotiate a workable solution with the Defendants, the latter ignored the requests by the Plaintiffs.
5. It is the Plaintiffs' claim that they obtained an audit report dated 14th January 2019 indicating the overcharged interest of Kshs 15,245,123 by 30th August 2018. They claim that the Defendants breached the contract by failing to update the accounts to reflect that amount paid by the Plaintiffs. They particularized the breach of contract under paragraph 19 of the Plaintiffs.
6. The Plaintiffs seek the following reliefs:
 - a. An order of injunction stopping the advertisement and auction or sale of the suit properties pending the hearing and determination of the suit.
 - b. An order compelling the audit of the Defendant's financial statements in relation to the Plaintiff's account to determine the Plaintiff's indebtedness, if any.
 - c. General damages for breach of contract.
 - d. Kshs 16,500,000 being specific damages for breach of contract.
 - e. Costs of the suit.
 - f. Interest on (c) and (d) at court rates until payment in full.
 - g. Any other relief that this Honourable Court will deem fit.

The Defence

7. The Defendant filed its Statement of Defence dated 4th July 2019 on 8th July 2019. The Defendant had denied the claim contained in the Plaintiffs. In response to the claim, the Defendant has stated that by a letter of offer dated 12th April 2012, it offered the 1st Plaintiff a home loan facility for the principal sum of Kshs 42,000,000 upon the 1st Plaintiff's request. The terms of the loan were that the principal sum was to be utilized to construct four ten bed roomed maisonettes on the suit properties and that the sum was to be repaid by way of lumpsum payments within a period of six (6) months commencing after an initial moratorium period of eighteen (18) months from the date of the first draw down subject to the Defendant's right to demand immediate payment of the facility at any time and interest would be serviced regularly during the moratorium period.
8. It is stated that a charge was registered on 11th December 2014 in favour of the Defendant against the suit properties. It is stated that the 1st Plaintiff was a habitual defaulter and has failed to adhere to the mode of repayment set out in paragraph 6 of the Defence causing the Defendant to issue the Plaintiffs with statutory letter dated 9th March 2018 in respect of the Plaintiff's loan account number 01200560351210, 01200560351211 and 0120056035401200 demanding for loan arrears which stood at Kshs 10,415.15, 15,713.65 and 42,060,459.12 respectively.
9. It is stated that by a letter dated 26th June 2018, the Defendant issued the 1st Plaintiff with a forty (40) days' notice demanding for the outstanding sum of Kshs 44,612,713.12 together with interest failure to which the Defendant would proceed to exercise its statutory power of sale.



10. The Defendant denied overcharging interest and maintained that the Plaintiffs' accounts have always been properly managed contrary to the assertions by the Plaintiff. It was stated that the audit report is false representation of the Plaintiffs state of accounts and ought to be totally disregarded. The Defendant terms the claim by the Plaintiff as frivolous, vexatious and without merit and that the Plaintiff is not entitled to the reliefs sought in the Plaintiff.

Plaintiffs' evidence

11. The 2nd Plaintiff adopted her witness statement dated 3rd July 2019 as her evidence in chief. According to her, the loan amount was Kshs 42,000,000 but only Kshs 32,000,000 was disbursed to the Plaintiffs; that Kshs 10,914,062 was disbursed to the Plaintiffs' loan account number 01200560351210; that the Plaintiffs made several repayments amounting to Kshs 1,202,504.92 to this account; that Kshs 16,000,000 recovered from the sale of the Plaintiffs' property known as Nairobi/Block 103/466; that Kshs 16,590,417 was deposited into the 2nd loan account fully paying off the 2nd loan; that the sum of Kshs 21,000,000 was disbursed to the Plaintiffs' loan account number 0120056035401200 in different instalments as shown in paragraph 10 of the witness statement and that a total of Kshs 28,090,417 leaving a balance of Kshs 3,909,583 to make a total of Kshs 32,000,000 disbursed to the Plaintiffs.
12. It is her evidence that the Plaintiffs discharged their obligation to repay the amount; that despite no repayments being made, the Defendant continued to disburse the loan monies to the Plaintiffs yet the account should have been deemed to be non-performing from 12th February 2013 and that despite being in arrears and the account being dormant, it continued earning interest.
13. It is the Plaintiffs' case that they tried to negotiate with the Defendant in vain and the Defendant served the Plaintiff with notices demanding payment in the sum of Kshs 42,060,459.12 which keeps on increasing. They claimed that the Defendant failed to update the account to reflect the amount paid to them, which amount was reflected in the statutory notice.
14. It is the Plaintiff's case that the Defendant breached the agreement by increasing the interest rates exorbitantly and without notice and that according to the audit conducted by Welink Consultants on 14th January 2019, there has been surcharge of interest on the account up to 9.8% above the normal interest rates and that the Plaintiffs have expended Kshs 16,500,000 for purchase of land, transfers, legal fees, professional fees to architects, construction of foundations for the first units and other expenses specified in paragraph 23 of the witness statement and this is the amount they are asking as compensation for the loss incurred together with costs of the suit and interest.
15. On cross-examination, the 2nd Plaintiff testified that she was aware of the 24% per annum interest clause when she was signing for the loan and that she is seeking damages because she incurred financial and emotional losses and loss of family house. She admitted that she did not have documentary evidence of the losses. She also confirmed having been served with three (3) months' and forty (40) days' notices.
16. The Plaintiffs called John Wigwa Odus, a consultant and former banker. He produced a report dated 4th January 2019 (PEx.1). He told the court on cross-examination that he holds bachelor's degree in commerce, Auditing and Accounting, and an MBA but that he did not include in the report his certificates. He testified that he was told that the Plaintiff was having problems in repaying the loan; that he was given letter of offer and bank statements from the bank after introducing himself as the Plaintiffs' advisor. He admitted that he could not recall the interest rate and that if there is default, it attracts default interest. He testified that there was overcharge of interest and that it was not clear how the bank worked out the default interest.



Defendant's evidence

17. The Defendant called Jeremiah Emmanuel as its witness. He adopted his witness statement dated 6th September 2023. He testified that the letter of offer refers to Kshs 42,000,000 but only Kshs 32,000,000 was disbursed; that the bank realized that there was a gap in construction and disbursed only Kshs 32,000,000 instead of Kshs 42,000,000; that had the Plaintiffs complied with the conditions in the letter of offer, they would have received Kshs 42,000,000. He testified that the interest rate was 24% per annum and the default interest rate was 10% per annum and that the amount disbursed does not affect the interest rate.
18. In cross-examination, the witness stated that the loan was in default in February 2018 and that the bank continued to charge interest; that it was frozen in September 2020 as the matter was in court and that the bank zero rated the interest. He stated in re-examination that it was not necessary to issue an addendum to the letter of offer because it assigned a limit; that the customer was at liberty to utilize the amount offered and that interest accrues even at default.

Plaintiffs' submissions

19. The Plaintiffs raised the following issues:
 - a. Whether it was conscionable for the Defendant to continue levying interest and penalties on non-performing loans as well as on accounts that were dormant?
 - b. Whether any reconciliation of accounts was ever done?
20. It was submitted that the Defendant took long before attempting to claim what was allegedly owed to them and that there is no justification for this delay. They relied on *Habib Bank A.G Zurich v Rajnikantkhetshi Shah* [2018] eKLR where it was held that delay by a bank in exercising its rights under a legal charge could amount to laches and result in estoppel. It was submitted that it is unconscionable for the bank to watch a debt grow while charging interest when such account has become dormant. The Plaintiffs urged that the court applies the principle enunciated in the *Habib* case and find that there is no outstanding debt.
21. On the second issue, it was submitted that from the evidence adduced in court, it is clear that no reconciliation was ever conducted jointly by the parties. The Plaintiffs urged this court to grant the reliefs sought in the *Plaint*.

Defendant's submissions

22. The Defendant argued the following issues:

Whether the order of injunction should issue

23. It was submitted that this prayer has been overtaken by events.

Whether the 1st Plaintiff has repaid the loan as per the terms and conditions set out in the letter of offer dated 12th April 2012?

24. It was submitted that the Plaintiff applied for a loan facility of Kshs 42 million but only Kshs 32 million was disbursed; that Clause 3 of the letter of offer, the term loan facility was to be repaid by way of lumpsum payments within six (6) months commencing after an initial moratorium period of 18 months from the date of the first draw down subject to the Defendant's right to demand immediate



payment of the facility at any time and that interest would be serviced regularly even during the moratorium period and after.

25. It was submitted that the Plaintiffs fell into significant arrears prompting service of the 90 days' notice dated 9th March 2018 which reflects an outstanding amount of Kshs 42,060,459.12, the 40 days' notice dated 26th June 2018 reflecting arrears of Kshs 44,612,713.12 and notification of sale dated 15th August 2018 reflecting outstanding loan amount of Kshs 46,579,377.77 and that the amount continues to accrue interest at the rate of 13% per annum with 10% additional interest in the event of default until payment in full.
26. It was submitted that due to the failure of the Plaintiff to pay the outstanding loan amount in full and final settlement as demanded in the statutory notices, the Defendant caused the property to be advertised for sale by public auction and that the Plaintiffs have failed to demonstrate payment of the principal amount. It was submitted that due to the default in repayment, there is default interest at 10% per annum.
27. The Defendant relied on *Sammy Japheth Kavuku v Equity Bank Limited & 2 others, Mombasa Civil Case No. 84 of 2013* in which the Court cited with approval *Maithya v Housing Finance Co. of Kenya & another* [2003] 1 E.A 133 and submitted that by availing the suit property as security for the term loan facility, the Plaintiff knew that it would run the risk of losing it in the event it failed to service the loan. It was submitted that the Plaintiff owes the Defendant the sum of Kshs 46,579,377.77 which is yet to be settled and the Plaintiff should be estopped from frustrating and/or preventing the Defendant from exercising its statutory power of sale.

Whether the in duplum rule is applicable herein and whether it is necessary to conduct reconciliation of accounts

28. It was submitted under this heading that the IRAC Report prepared by the Plaintiffs' witness failed to appreciate that the interest rates applicable are 14% which was well within the capping provided by law and that the additional 10% per annum was to be utilized in the event of default; that it failed to analyze the amount repaid by the 1st Plaintiff, during the months when there was default in repayment, which months there was excess payment of 14% per annum and failed to appreciate that the default interest of 10% per annum only arises when there was default and that the report cites amount charged over and above the in duplum rule in the sum of Kshs 15,245,123 but failed to demonstrate in detail how the figure was arrived at.
29. The Defendants doubted the credibility of the report and submitted that as at June 2017, the Plaintiffs, through their letter dated 29th June 2017, had an outstanding loan of Kshs 35,211,381.12 which was a few months prior to the issuance of 90 days' notice and that the issue of unconscionable computation of interest was never an issue and therefore in view of the acknowledged debt, the IRAC Report has no basis whatsoever. The Defendants relied on *Nairobi Court of Appeal Case No. 96 of 2016 Jose Estates Limited v Muthumu Farm Limited* [2019] eKLR to support their submissions.

Whether the Plaintiffs are entitled to general damages for breach of contract

30. On this issue, the Defendant relied on *Peter Umbuku v Henry Sitati Mmbasu* [2018] eKLR where the Court stated that damages are not recoverable in cases of alleged breach of contract; that such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved.



Whether the Plaintiffs are entitled to specific damages for breach of contract in the sum of Kshs 16,500,000.

31. It was submitted that the term loan advanced to the 1st Plaintiff was for construction of ten 4-bedroom maisonettes on the suit properties and therefore it is not clear on what basis the Plaintiffs are making the claim based on expending that amount for purchase of land, transfers, legal fees, professional fees to architects, construction of foundation, etc. It was further submitted that special damages claim is subject to strict proof as stated in *Hydro Water Well (K) Limited v Sechere & 2 others* (Sued in their representative capacity as the officers of Chae Kenya Society) (Civil Suit E212 of 2019) [2021] KEHC 22 (KLR) (Commercial and Tax) (10 August 2021) (Judgment).
32. The Defendant urged the court to dismiss the suit with costs to the Defendant.

Analysis and determination

33. I have considered the pleadings of the parties, evidence in court, submissions of the parties and authorities cited by each party. The case belongs to the Plaintiff. She is the one who bears the burden of proving the case against the Defendant. This is the command of section 107 of the *Evidence Act*. It provides that:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
34. The Plaintiffs blame the Defendant for breach of contract, inter alia, in that they did not update the Plaintiff's accounts to reflect the amount paid, altering the interest rate and issuing a defective statutory notice that does not specify the extent of the default. They claim that the Defendant overcharged interest by Kshs 15,245,123. In response to those allegations, the Defendant has denied them and stated that the Plaintiff's accounts have always been properly managed contrary to what is alleged and that the audit report prepared by the Plaintiffs' witness is false representation of the Plaintiffs' account and ought to be disregarded.
35. I have considered the defence of the Defendant and the submissions. The Defendant took issue with the Audit Report prepared by Plaintiffs' witness that it did not appreciate that the interest rate applicable is 14% which was within the capping provided by the law and that the additional 10% per annum was to be utilized in the event of default; that the Report did not capture the analysis of the statement of account, that is the amount repaid by the 1st Plaintiff, the months when there was default in repayment, additional default interest and the outstanding amount; that the Report does not cite the months when there was an excess payment of the 14% per annum and failed to appreciate that the default interest of 10% per annum only arises when there was default as captured in the letter of offer dated 12th April 2012 and fails to demonstrate details of the alleged amount charged over and above the in duplum rule in the sum of Kshs 15,245,123.
36. The Plaintiff did not tender evidence negating the above assertions by the Defendant. She did not address the issue raised by the Defendant that she was all along aware of her indebtedness as shown in the letter appearing on the 1st Plaintiff's letterhead signed by the 2nd Plaintiff.
37. It is my considered view, after careful review of the evidence that there is no dispute that the loan amount was Kshs 42,000,000 but only Kshs 32,000,000 was disbursed to the Plaintiffs. The reasons for this have been explained by the Defendants. It is also not disputed that the Plaintiffs defaulted in



loan repayments leading to service of statutory notices by the Defendant although the Plaintiffs are not forthright about it.

38. For the Plaintiffs to get damages claimed, they must demonstrate that a contract existed between the parties; that the Defendant breached the contract and that the Plaintiff suffered loss as a result of the breach. As was held in *Hydro Water Well (K) Limited v Nelson Mukara Sechere & 2 others* [2021] eKLR, the test to be applied was whether there was evidence upon which a court, applying its mind reasonably to such evidence, could find for the Plaintiff.
39. The evidence of John Odus, Plaintiffs' witness on cross-examination is that he could not recall the interest rate at the time. He stated that default of payment attracts default interest.
40. In my considered view, the evidence of the Plaintiff is not one upon which this court, applying its mind reasonably, could find for the Plaintiff. I find that the evidence by the Plaintiff does not explain clearly how the alleged overcharging amount of 15 million was arrived at.
41. After reviewing all the evidence presented to the court, I arrive at the conclusion that the Plaintiff has failed to discharge the burden of proof. She has failed to present before this court evidence upon which this court, applying its mind reasonably to that evidence, could find in favour of the Plaintiff. Consequently, the Plaint dated 15th January 2019 is hereby dismissed with costs to the Defendant.
42. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

