



**Kenya Commercial Bank Limited v Massey (Civil Appeal E026 of 2019)
[2023] KEHC 21770 (KLR) (Commercial and Tax) (28 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E026 OF 2019
JWW MONG'ARE, J
AUGUST 28, 2023**

BETWEEN

KENYA COMMERCIAL BANK LIMITED APPELLANT

AND

ANNE SANAIPEY MASSEY RESPONDENT

*(Being an appeal against the Judgment of Hon. Obura, Senior Principal
Magistrate, in Milimani CMCC No. 6100 of 2018, delivered on 15/10/2019)*

JUDGMENT

1. A brief background of this matter is that the Appellant issued a loan facility of Kshs 400,000/- to Scorpino Glassmart (the Principal Debtor). The Respondent charged her property being LR No Nairobi/Block 72/109 as security for guaranteeing the loan facility to the Principal Debtor. A Charge Instrument dated January 12, 1993 and a Deed of Guarantee and Indemnity dated February 4, 1993 were executed to that effect.
2. Subsequently, the facility went into default and the Appellant made a demand from the Respondent and issued a notification of sale of the charged property in accordance with the law. In her defence, the Respondent claimed that she had already paid the sum guaranteed and even overpaid the same as per the Deed of Guarantee and Indemnity. The Respondent being aggrieved by the demand from the Appellant sought the intervention of the lower court by filing case CMCC No 6100 of 2018 before the Chief Magistrates Court in Milimani Law Courts at Nairobi.
3. The Magistrate's court rendered its judgment on October 15, 2019 and found that the Plaintiff had discharged her payment obligations, under the Deed of Guarantee and Indemnity, to the Respondent and that she had proved her case before the court on a balance of probabilities. The lower court entered



judgment in favour of the Respondent and ordered that the Appellant do execute a discharge in respect of the Respondent's property which was the charged property.

4. By a Memorandum of Appeal dated November 14, 2019, the Appellant appealed to this court against the said Judgment on the following grounds:
 - 1) 1) The learned trial Magistrate fell into error and misdirected herself in law and in fact in completely failing to consider the pleadings, evidence and submissions tendered by the Appellant and proceeded to make a finding based entirely on the Respondent's pleadings, evidence and submissions.
 - 2) The learned trial Magistrate erred in failing to consider and find that the Respondent executed the Deed of Guarantee and Indemnity dated February 4, 1993 in favour of the Appellant whereby she undertook interest and other bank charges on the account of the borrower Messrs. Scorpio Glassmart, and that by a Charge Instrument dated 12th January 1993 which was not a supplemental security, the Respondent agreed to and guaranteed a loan of Kshs 400,000.00 advanced to Messrs. Scorpio Glassmart ("Borrower") by the Appellant on the strength of her title number Nairobi/Block/72/ 109 as security for the said loan.
 - 3) The learned trial Magistrate fell into error and misdirected herself in fact and in law in failing to appreciate that the Deed of Guarantee and Indemnity dated February 4, 1993 and executed by the Respondent was not limited to a maximum of Kshs 400,000.00/-. The learned trial Magistrate did not consider that under the terms of the Charge and Deed of Guarantee and Indemnity aforesaid, the Respondent undertook to repay any amount outstanding on the borrower's account as and when it fell due and as such fell into error.
 - 4) The learned trial Magistrate fell into error and misdirected herself by failing to make a finding that the Respondent and/or the Borrower defaulted during the subsistence of the account in the repayment of the loan outstanding to the Appellant and other related charges and the Appellant recalled the entire debt by issuing the requisite demand letters and statutory notices in compliance with the terms of the Charge Instrument and Deed of Guarantee in place.
 - 5) The learned trial Magistrate fell into error and misdirected herself in fact and in law by failing to consider and find that no simple interest was applicable on the Borrowers account or at all, that the interest levied on the Borrower's account was not above the contractual sum as alleged, that the Borrower had not overpaid the sums by Kshs 103,944.37/- as alleged, and that the Respondent was not entitled to a refund of Kshs 103,944.37/- as alleged or at all.
 - 6) The learned trial Magistrate fell further into error by failing to make a finding that the sum of Kshs 790,480.70/- together with interest was due and owing to the Appellant on the account as at May 30, 2000 and that the Appellant was not in any breach of any or any express covenants of the Charge and Deed of Guarantee and Indemnity by demanding payment of the said sum. The learned trial Magistrate erred by failing to make a finding that by the said demand, the Appellant did not clog or fetter the Respondents right to redeem the property Title Number Nairobi/Block 72/109 either as alleged or at all.
 - 7) The learned trial Magistrate was wrong in failing to make a finding that the Appellant complied with all the conditions precedent to the exercise of the statutory power of sale reserved under the Charge Instrument and therefore its intention to sell the security property Title Number/ Block72/109 by way of public auction was lawful.
 - 8) The learned trial Magistrate fell into error and misdirected herself in principal by failing to consider and find that the Charge and Deed of Guarantee & Indemnity duly executed by the



Respondent were continuing securities and the Respondent was therefore bound to repay the principal amount and/or any amount of outstanding interest and other charges on the account as and when the same fall due.

- 9) The learned trial Magistrate fell into error by failing to make a finding that the Respondent was properly served with the requisite statutory notice(s) and notification of sale in full compliance with the provisions of the *Registered Land Act* and Auctioneer's Act respectively. In doing so, the learned trial Magistrate fell into error and misdirected herself in law and in fact by failing to apply the correct principles in determination of whether the Appellant's statutory power of sale had accrued and was properly exercised thus resulting in an excessive, unreasonable and manifestly unfair decision.
 - 10) The learned trial Magistrate fell into error by failing to make a finding that the Respondent cannot be discharged from her obligations under the Charge and Deed of Guarantee & Indemnity until all monies due and owing to the Appellant on the account of the Borrower are fully repaid.
 - 11) The learned trial Magistrate fell into error and misdirected herself in fact and in law by failing to correctly consider or to consider at all, and as a result dismissing the Appellants Counterclaim for Kshs 906,293.60 as at September 20, 2000 together with interest at the rate of 42% per annum from 1st October 2000 until payment in full, the same being the amount due and owing to the Appellant from the Respondent on account of loan advanced to the Borrower by the Appellant and guaranteed by the Respondent.
 - 12) The learned trial Magistrate erred and misguided herself in failing to appreciate the glaring inconsistencies and variances between the Respondent's allegations and the Respondent's own documents on record.
 - 13) The learned trial Magistrate erred by ignoring binding judicial precedent cited by the Appellant and as a result arrived at conclusions in clear contravention of the principle of stare decisis.
 - 14) The learned trial Magistrate fell into error and misdirected herself in law and in fact in arriving at conclusions detrimental to the Appellant without the benefit of credible evidence.
 - 15) As a result of the foregoing errors, the decision of the trial Magistrate of October 15, 2019 was manifestly unjust and wrong in law."
5. Based on the grounds above, the Appellant prayed to have the appeal herein allowed and to have the judgment of the lower court varied, reviewed and/or set aside. Further, the Appellant prayed for judgment to be entered in favour of the Appellant against the Respondent for a sum of Kshs 906,293.60/- as at September 30, 2000 together with interest at the rate of 42% p.a from 1/10/2000 until payment in full.
6. Both parties herein filed their respective submissions which I have carefully considered. In my view, the grounds of appeal as set out in the Memorandum of Appeal can be condensed to the following issues for determination: -

Issue 1: What amount was the Respondent bound to pay under the Charge Instrument dated January 12, 1993 and a Deed of Guarantee and Indemnity dated February 4, 1993?

Issue 2: Whether the Respondent paid the amount that was owing under Charge Instrument and the Deed of Guarantee and Indemnity and therefore ought to be discharged.



Issue 1: What amount was the Respondent bound to pay under the Charge Instrument dated January 12, 1993 and the Deed of Guarantee and Indemnity dated February 4, 1993?

7. It is the Appellant's submissions that the Respondent agreed to be bound by the terms of the Guarantee in making payment of the outstanding loan amount plus incidental charges and interest as demanded by the Appellant at the rates charged by it. Further that the statement of accounts as provided by the Appellant would serve as the Principal Borrower's evidence of indebtedness.
8. On the other hand, the Respondent submitted that her limit was Kshs 400,000/- plus an addition of interest on this principal and legal charges. The Respondent argued that her liability did not cover all the accrued debt of the Principal Borrower but was limited to the above sum of Kshs 400,000/- as set out in instrument of Guarantee and Indemnity she had executed.
9. The Guarantee and Indemnity Agreement is found on page 161-166 of the record of appeal. Clause 3 thereof states:-

“The amount of my liability under this Guarantee and Indemnity shall at all times be subject to the following provisions:

- (a) The principal amount recoverable from me hereunder (being the total amount recoverable from me hereunder excluding legal charges and interest accruing after demand upon me) shall be limited to Kenya Shillings: Four Hundred Thousand Only.
 - (b) Legal charges and interest accruing after demand upon me shall be recoverable from me in addition to the principal amount notwithstanding that such addition may result in the total amount recoverable from me being an amount in excess of the limit specified in paragraph (a) of this clause.”
10. My understanding of this clause is that the Respondent was liable, upon default of payment by the principal debtor, to pay the sum of Kshs.400,000/- plus any legal charges and interest accruing after the demand even though such additions may exceed Kshs 400,000/-.
 11. On interest chargeable, I note that the relevant clause is clause 1 of the Charge instrument which states:-

“...together with commission and other usual bank charges and expenses and other costs charges and expenses and together with simple interest at the rate of 22.5% per centum per annum or at such rate as the Bank shall in its sole discretion from time to time decide Provided Always that the Bank shall not be required to advise me/us of the Borrower prior to any change in the rate of interest so payable And Provided Further that the Bank shall be at liberty without prior consultation with the Borrower and without affecting, compromising all or any of its rights herein to instead charge a penalty at the rate of 22.5% per centum per annum on any repayment instalments...”

12. A plain reading of the provision above is that the interest chargeable would be simple interest at the rate of 22.5% per annum. There is no provision for compound interest and therefore the attempt by the Appellant to apply compound interest to the guaranteed amount was mischievous to say the least and not supported by the documents executed by the parties.

Issue 2: Whether the Respondent paid the amount that was owing under the Charge Instrument and the Deed of Guarantee and Indemnity and therefore ought to be discharged.



13. The Appellant submitted that it had produced a detailed statement of accounts demonstrating the Respondent's current outstanding amount at the time of filing the suit in the lower court which stood at Kshs 906,293.60/-. That to the contrary, the Respondent had failed to discharge the burden of proving that she had fulfilled her obligations as guarantor.
14. On her part, the Respondent emphasised that she settled the entire guaranteed sum and redeemed the charge. That a total of Kshs 1,138,050.00/- was paid by the Respondent and acknowledged by the Appellant.
15. The lower court found that the Respondent had relied on bank statements issued by the Appellant in claiming that she had so far paid a sum of Kshs 1,138,050/- and that no evidence was adduced to dispute or controvert the argument that the Respondent had substantially repaid the loan amount and accrued interest.
16. I have analysed the Record of Appeal particularly the examination on witnesses in court. I note that PW1 testified that she cumulatively paid the bank a sum of Kshs 1,138,050/- and that her accountant calculated this using the bank statements and deposit receipts. DW1, a Credit Analyst at Appellant Bank testified on cross examination that she needed to confirm whether the Respondent paid Kshs 1,138,050/- to the bank and that the Appellant had applied a compound interest in their counterclaim. She did not tender any evidence to contradict or controvert the evidence of the Respondent.
17. The witness testimonies indicate that the Respondent relied on the bank statements provided by the Appellant to prove that she had paid the amount owing plus a surplus. The Appellant had the opportunity to rebut this assertion by breaking down the amounts already paid and what may be due and owing but did not do so during the trial at the lower court. Neither was any explanation offered to support the same on appeal.
18. I note also that DW1 testified that the Appellant bank applied compound interest in its computation while the proper interest to apply was simple interest. I therefore agree with the lower court's decision that in the absence of reconciled accounts the Respondent had discharged her obligations on a balance of probabilities.
19. In the end I uphold the lower court's Judgment dated October 15, 2019. The appeal before me lacks merit and is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF AUGUST 2023.

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Odhiambo holding brief for Mr. Karuti for the Appellant.
2. Ms. Kulohoma for the Defendant.
3. Lucy - Court Assistant

