REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 119 OF 2017

DAVID WAFULA NYONGESA..APPELLANT

VERSUS

NATIONAL BANK OF KENYA...RESPONDENT

(*An appeal arising from the judgment and decree of the Hon. B Ochieng,*

Chief Magistrate CM), in Kakamega CMCCC No. 6 of 2016 of 17th August 2017)

JUDGMENT

1. The suit at the trial court was initiated by the appellant herein against the respondent, for a declaration that the loan advanced to him by the respondent is duly settled and for a permanent injunction to restrain the respondent from demanding the loan monies from him. The respondent entered appearance and filed a defence, in which it conceded that it loaned to the appellant the monies the subject of the suit, and that the appellant had not repaid the loan fully. It was averred that the appellant was bound by the terms of the letter of offer, which included a clause reserving the respondent's right to vary the rate of interest applicable.

2. The case proceeded to full trial. Each side called one witness each. The principal bone of contention was the variation of interest. In the end, the trial court found that the appellant had not cleared the loan, and further that he was bound by the clause which allowed the respondent to vary the terms of interest. The suit was dismissed.

3. The appellant was aggrieved by the dismissal of his suit, and lodged the instant appeal. His principal case is that the trial court did not address its mind to the doctrine of estoppel which underpinned the appellant's suit. He also avers that the trial court failed to give due weight to the memorandum of understanding between the appellant and his employer, the Masinde Muliro University of Science and Technology.

4. Directions were taken on 29th October 2019, that the appeal would be disposed of by way of written submissions. Both sides have complied. The appellant's submissions anchor the appeal on the doctrine of estoppel, while the respondent's case is principally that the appellant was bound by the terms of the contract that he entered into with it.

5. The factual background to the matter, from my understanding of the pleadings, the oral testimonies and the documents lodged on record is that the respondent entered into a memorandum of understanding with the appellant's 'employer, the Masinde Muliro University of Science and Technology, to facilitate staff to access loans. The appellant, based on that memorandum, approached the respondent, and was advanced a loan of Kshs. 1, 300, 000.00, with interest at the rate of 15 per annum. His case is that he paid the amount loaned, together with interest, in full. The respondent's case is that the money had not been paid in full, for the percentage of interest was increased from 15% per cent to 27% per annum. The appellant countered that he was not aware of that variation of interest, and if there was a variation, then the same was effected contrary to the terms of the contract.

6. There is really only one issue for me to determine, and that is with respect to variation of interest, was it part of the money-lending contract between the parties?

7. The case by the appellant as presented before the trial court, at the oral hearing on 19th January 2017, was that the loan moneys were disbursed to him, and he paid all what was due by monthly instalments. After he completed paying the money in August 2015, the respondent sent to him a text message to inform him that he still owed a lot more money, meaning that he had not completed payment. He visited the respondent's branch at Kakamega, where he was advised that interest rate was varied from 15% to 27%. He stated that he had not been notified of the variation, and asserted that variation could not be effective without notice to his employer as agreed in the memorandum of understanding between the respondent and the Masinde Muliro University of Science and Technology. He stated that no notice was ever given to his employer as per that memorandum of understanding. At cross-examination, he conceded that he was not party to the memorandum of understanding but maintained that the same had been signed by his employer on behalf of staff. He conceded to signing the

loan application form and the letter of offer, and to the fact that two documents they provided that the respondent reserved the right to vary interest. He stated that he never visited the local branch of the respondent, nor received statements on the loan account and he got no clarification from the respondent.

8. An officer from the respondent testified on 12th April 2017. He stated that the initial interest was 15%, which was subject to change. He explained that the respondent had signed a memorandum of understanding with the Masinde Muliro University of Science and Technology, which facilitated arrangements by the university to secure loans for its staff. He conceded that no notice of the change of interest charges was given to the university. He said that the increment on interest was published in the media, adding that that notice was sufficient. He stated that the notice was in keeping with the terms of the loan agreement, and the appellant was expected to know about that. He stated that those terms were in the loan application form. He concluded by saying that the appellant ought to have raised those issues with the respondent.

9. There are three documents on record, which make provision on interest. The first document is the memorandum of understanding between the respondent and the appellant's employer, Masinde Muliro University of Science and Technology, dated 2nd March 2009; the terms and conditions signed by the appellant attached to the personal loan application signed by the appellant on 13th July 2009; and the letter in the letterhead of the respondent offering the loan to the applicant, duly signed by officers of the respondent and by the appellant.

10. In the memorandum of understanding, the terms on charges and interest are stated in clause 6, which I hereby reproduce verbatim:

> "6. TERMS AND CONDITIONS
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> The Bank will advance the Loans on the following terms and conditions:
>
> a. Interest:"
>
> i. The rate of interest will be based on the amount advanced and the repayment period agreed upon between the Bank and the Borrower and will be at 15% p. a. as more specifically shown in the Schedule hereto annexed.
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> ii. The amount of interest will be capitalized at the inception of the Loan and the payment made in equal monthly installments throughout the repayment period.
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> iii. Interest will be calculated and compounded in accordance with the usual practice of the Bank from time to time. The Bank's right to compound interest shall continue notwithstanding that the relationship between the Bank and Masinde Muliro University of Science & Technology and the Borrower may have ceased to exist by reason of termination of this agreement or otherwise until the date of full payment.
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> iv. Prior to any variation of the rate of interest or additional interest the Bank will give Masinde Muliro University of Science & Technology a Thirty (30) days' notice of its intention to vary the interest as such. The revised interest rates shall only apply to loan applications approved after the date of revision of the rate of interest."

11. The clause on interest in the terms and conditions, attached to the loan application form signed by the appellant, states as follows:

> "Interest
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> Interest on all credit facilities will calculated on the daily overdrawn balances at the prevailing interest rate, and shall be payable to the Bank as monthly arrears. Where the interest rate on the credit facility is linked to the Bank's 'Base Lending Rate' the Bank reserves the right to change the Base Lending Rate from time to time. Interest will be charged on all amounts owed by the Applicant."

12. In addition to that clause on interest, there is another relevant clause, headed 'Variations,' which states as follows:

> "Variations
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> The Bank will advise the Applicant of any change in the Base Lending Rate, charges, or fees by publication of notice in local or national newspapers or by a notice at its branches in Kenya, or by notes in customers' statements. The Applicant will be deemed to have received notification of change 4 (four) days after publication of notice at the Bank's branches."

13. The interest clause in the letter of offer written by the respondent, dated 22nd July 2009, and signed by the appellant and officers of the respondent, reads:

> "Interest: (and other costs)
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> To be at the rate of 15% per annum on monthly rests for the time being, calculated on daily balances. However reserves the right to change the rate of interest without notice depending on the cost of funds in the money market. In addition to interest, the Bank is entitled to be paid and may debit your account with all expenses and other charges including but not limited to legal fees and any other expenses incurred and related to the maintenance and management of your facility. The Bank reserves the right to vary the existing charges without notice to you."

14. From his written submissions, the appellant hinges his case on the doctrine of estoppel, arguing that the respondent had given him a promise or assurance with regard to interest, and it could not afterwards change or revert to its previous legal relationship as if no such promise or assurance had been made. He cited the decisions in *Serah Njeri Mwobi vs. John Kimani Njoroge*, *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* [2014] eKLR, Daniel *vs. Tearney* [1980] 102 US 415 and *Sita Steel Rolling Mills vs. Jubilee Insurance Company Limited* [2007] eKLR.

15. On this part, the respondent submits that the basis of the contract was not the memorandum of understanding between the respondent and the appellant's employer, Masinde Muliro University of Science and Technology, to which the appellant was not signatory, but the documents that appellant personally signed, that is the loan application form and the letter of offer from the respondent. The two documents contained a clause on interest rates which was clear that the respondent reserved a right to vary interest, and for the manner of the communication of that variation to the appellant. It is submitted that parties are bound by the terms of the contract that they had committed themselves to. The respondent has cited the decisions in *Housing Finance Company of Kenya Limited vs. Gilbert Kibe Njuguna* Nairobi HCCC No. 1601 of 1999 and *National Bank of Kenya Ltd vs. Pipe Plastics Samkolit (K) Ltd and another* [2001] eKLR.

16. Let me start by considering which of the three documents that the parties are bandying about formed the basis of the contract. The appellant places reliance on the memorandum of understanding between his employer, Masinde Muliro University of Science and Technology and the respondent, while the respondent relies on the other two documents. I agree with the respondent. The appellant was not party to the memorandum of understanding between his employer and the respondent. He was not a signatory to it. The nature of that document was an arrangement through which the respondent could extend loan facilities to employees of the appellant's employer. That document could not possibly be the basis of the contract between the respondent and the appellant. The documents that the appellant executed were the loan application form and the letter of offer. It is these documents that bound him, and it is the terms expressed in them that shall be the basis for determination of the appeal.

17. The second issue is whether the doctrine of estoppel applies. In simple terms, estoppel is the judicial device where a court may prevent or estop a person from making assertions or going back on his or her word. In this case, did the respondent make any assertions or assurances to the appellant with respect to the interest rate to be charged, that the respondent turned its back on?

18. The appellant argues that interest rate had been fixed at 15% per annum. The respondent promised or assured him that that was the position, and the variation to 27% per annum was a going back on that word, in respect of which the respondent ought to be estopped. The respondent argues that the interest rate indicated of 15% was variable at its instance, the respondent exercised that power and, therefore, the question of estoppel did not arise.

19. I would again agree with the respondent. The appellant relies on the terms of the memorandum of understanding, which fixed interest at 15%, to be varied with notice to the appellant's employer. That made interest rate still variable, so long as there was notice. Unfortunately for the appellant, he was not party to the memorandum of understanding. Secondly, the contract that he entered into with the respondent did not incorporate that memorandum of understanding into the money lending contract. Its terms are, therefore, not binding on the respondent. The other documents expressly provide that the rate of interest could be varied, and the respondent exercised that option. Consequently, the doctrine of estoppel cannot possibly apply since the rate of interest fixed at 15% was variable, and was varied. It cannot, therefore, be said that the respondent was bound to stick to charging interest at 15%, the contract allowed it vary the same, and so it did. The terms of the contract are clear, they did not make the rate of 15% immutable. They did not make a promise or assurance of immutability to the appellant, and, therefore, there cannot be basis for arguing that estoppel ever arose.

20. The respondent argues that the appellant was bound by the terms of the contract that he signed, to the effect that the interest rate of 15% written into the contract at the date it was entered into could be varied. That is the correct position. The appellant entered into the contract in those terms, and was no doubt bound by them.

21. However, the issue of the conscionability of the contract arises, especially with respect to the question of the respondent having the sole discretion to vary or change a critical term of the contract without any recourse to the appellant, in terms negotiating with him or even notifying him of the change. That issue was raised and dealt with in the decision that the appellant cites in *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* (supra), where the Court of Appeal said:

> "*26. …While we agree that the clause does appear to give the respondent discretion to vary the rate of interest, we do not accept that this discretion was absolute. Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest.*
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> *27. Consider the English decision of Paragon Finance plc vs. Staunton; Paragon Finance plc vs. Nash [2002] EWCA Civ 146All ER 248. In this case a mortgage company (Paragon Finance) had claimed possession from the two defendants on the grounds that the defendants were in arears with the mortgage interest repayments. It was not in dispute that the repayments were owing. The defendants however took issue with the rate of interest charged and argued that the mortgage company had failed to adjust the interest rate chargeable in line with the prevailing market rates. The legal charges held by the mortgage company gave it the power to vary a portion of the interest rate from time to time. On appeal, among the issues that the court was to determine was whether the discretion given to the mortgage company to vary interest rate was subject to an implied term that it was bound to 'exercise that discretion fairly, as between both parties to the contract, and not arbitrarily, capriciously or unreasonably.' The court then held that 'the power given to the claimant by the mortgage agreements to set interest rates from time to time was not completely unfettered. A construction to the contrary would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level.'*
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> *28. we are in agreement with the sentiments of the English Court that the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as what the rate of interest would be. As*

stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower.

29. We find it particularly unfortunate that in the present appeal, the respondent varied the interest and seemed not to provide this knowledge to the appellant or to the borrower. We think this was wrong. If that information was readily availed to the borrower, the borrower would make an informed decision based on his or her circumstances and the consequences that are likely to arise due to the variation undertaken. The borrower may choose to opt out of the contract through full liquidation or look at other institution that would *accommodate his or her interest. Information supplied to a borrower before any adverse variation of interest rate is made affords him an opportunity to assess this relationship with his lender, and the right to terminate the contract may even be exercised."*

22. I have cited from the decision in *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* (supra) extensively because the issues in that matter were, to a large extent, similar to those that are the subject of the appeal before me. The contract terms herein fixed the interest rate at 15%, but reserved a right to the respondent to vary the same without so much as consultation or notice to the appellant. Interest was varied, almost by double, from 15% to 27%. No notice was given to the appellant, and according to the respondent, he was expected to have gotten notice through the media. The money lending contract was negotiated and in writing, it should follow that when interest rate has to be varied by the lender, the borrower ought to be notified of the intent to vary the interest rate, so that he gets an opportunity to negotiate. At the very least, once the variation is done, the borrower ought to be notified personally or directly. A publication of a notice of the variation in the media cannot suffice, for it presupposes that the borrower has access to the media in question, and it would be unreasonable to expect him to pay special attention to everything, should he have access to the media, that appears in that media. After all, he would not be expected to know when the media would carry notices that are of interest to him. The variation in question was huge, from 15% to 27%, it had serious implications on the instalments that the appellant was to pay every month, and, no doubt, generally on his financial affairs. It was only fair that he should have been notified directly, either through snail mail, email or text. It would, therefore, mean that the manner the term on interest was varied was unconscionable, unfair and burdensome on the appellant.

23. So, having found that the terms on variation of the interest rates were unconscionable, what should I do? There is lots of case law in Kenya on the point. In *Kenya Commercial Bank Finance Company Ltd vs. Ngeny & Another* [2002] 1 KLR 106 , the court said:

"*The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional term upon the other party. Equity can intervene to relieve that party of such condition."*

24. The same court said, in *Shah vs. Guilders International Bank Ltd* [2002] 1 EA 264:

"… *where the rate of interest (has been agreed upon by parties) the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent."*

25. I find that the interest rate charged after variation was manifestly excessive and was effected without proper notice to the appellant. For those reasons, I hereby allow the appeal, set aside the judgement of the Chief Magistrate's court, and substitute the same with a declaration that the loan advanced to the appellant by the respondent had been fully settled, and issue an injunction to restrain the respondent from demanding the amounts based on the varied interest rates from the appellant. The appeal is allowed in those terms. The appellant shall have the costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2020

W. MUSYOKA

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020, this ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

W. MUSYOKA

JUDGE