



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 638 OF 2006

SAMUEL NDIBA KIHARA.....1ST PLAINTIFF

VIRGINIA NDUTA NDIBA.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

ROBERT NGUNYI NJURA.....2ND DEFENDANT

NANCY WANJIKU MBUGUA.....3RD DEFENDANT

RULING

1. For determination by this Court is an application for review dated 7th November 2019 seeking the following orders:-

1. That the order on taking accounts issued on 19th July 2019 be reviewed and or varied.

2. That this Honourable Court be pleased to order that the Plaintiffs and all the Defendants do each appoint an Independent Accountant.

3. That the two accountants to appoint an umpire and the three to prepare a report on the accounts as between the Plaintiffs and the 1st Defendant, the 2nd Defendant and 3rd Defendants for mortgage A/c No. ML 600-0003164 and A/c No. ML 600 - 0005926 respectively.

4. That costs of this application be costs in the cause.

2. The orders sought to be reviewed are paragraphs 48 and 49 of the Judgment of this Court of 19th July 2018 which reads:-

[48] In the upshot, I direct that parties herein agree on and appoint an Independent Accountant to take accounts between the Plaintiffs and the Bank and to file his Report within 45 days of the date of his appointment. In default of such agreement each party to appoint an Accountant and the two Accountants to appoint an umpire and the three to prepare a Report of the accounts within 45 days of the appointment of the umpire. Where parties agree on one accountant, his costs will be shared equally by the parties. However, where three Accountants are appointed each party will bear the costs of its Accountant while the costs of the umpire will be shared equally by the parties.

[49] In taking the accounts regard will be given to this Court's finding on the unlawful and uncontractual interest rate imposed and make a Report as to the extent, if any, of the Plaintiffs' indebtedness as at the date the Bank exercised its Statutory Power of Sale.

3. Reading the application, the request for review is premised on one broad reason. That parties are unable to agree on the mode of taking of the accounts. Looking more carefully, the applicant is saying that parties are unable to agree on the scope of the account taking exercise.

4. The Application is opposed and the Court has considered the arguments for and against the motion.

5. The Court made the order for taking of accounts on the basis of the pleadings and evidence before it. On the question of unlawful increase of interest, the Plaintiffs had pleaded:-

“Without any consent of the Plaintiffs, the first Defendant in 1995 unilaterally and unlawfully increased the applicable rate of interest from 22% p.a to 26% p.a and imposed a penalty interest unilaterally of 1.5% per month on the interest outstanding amount”.

6. This pleading informed the first issue framed by the Court for determination which was:-

“Whether the 1st Defendant as from 1995 unlawfully increased the applicable rate of interest from 22% p.a to 26% p.a and imposed penalty interest unlawfully of 1.5% per month.”

7. Upon an analysis of the evidence and the law, the Court answered that question in the affirmative, in favour of the Plaintiffs. In making the order for taking of accounts, the Court observed:-

“This Court has found that the Bank imposed unlawful and uncontracted interest rates and its impact on the Plaintiffs’ indebtedness can only be revealed by the taking of accounts.”

8. This Court takes it that the scope of the account taking process is apparent on the reading of the Judgment and the reasons for the exercise made clear.

9. What the Applicants seek is an expansion of the accounts taking to include those of the 2nd and 3rd Defendants. They are the persons who bought the charged property. In their further submissions, the Applicants argue that the expanded scope will reveal how much was paid by the purchasers and whether the sale was tainted with impropriety amounting to fraud. I am afraid this Court does not see the necessity of including the accounts of these two defendants as it already held them to be purchasers for value without notice. See paragraphs 39 to 43 of the decision of 19th July 2018. If, however, my finding was wrong then the manner of challenging it is by way of Appeal and not by revisiting it through a review.

10. As to the manner of appointing the accountants, the order of Court is clear. There is a default process in the event of disagreement of a joint accountant.

11. In a sum, the Notice of motion of 7th November 2019 is without merit and is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 21st day of September 2020

F. TUIYOTT

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 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kihara for Applicants.