REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL APPEAL NO. 57 OF 2018

CORAM: D. S. MAJANJA J.

BETWEEN

ECOBANK KENYA LIMITED ....APPELLANT

AND

JOHN MWANZA .... RESPONDENT

(Appeal from the original Judgment and Decree of Hon.S. Makila, SRM dated 17th November 2016 at the Magistrates Court at Kisii in Civil Case No. 421 of 2014)

JUDGMENT

1. The appellant, ECOBANK KENYA LIMITED ("the Bank"), appeals against a judgment dismissing the case against it. It's case before the trial court was that on or about 20th August 2010, it advanced the respondent Kshs. 800,000.00 secured by a legal charge over land title number KAMAGAMBO/KANYAJUOK/1680 ("the suit property"). In due course, the respondent defaulted servicing the loan whereupon the appellant sold the suit property at a public auction. Following the sale, the Bank claimed outstanding balances as at 28th May 2014 on two accounts: Kshs. 1,160,736.00 on account number 009AB******* attracting a monthly compound interest at the rate of 16.75% p.a. and Kshs. 106,269.14 on account number 00900******** attracting a monthly compound interest at the rate of 28.5%p.a.

2. The respondent denied owing any money as alleged or at all. He also filed a counterclaim seeking a declaration that the sale of the suit property was null and void on the ground that it was premature, fraudulent and illegal.

3. The trial magistrate dismissed both the claim and the counterclaim thus precipitating this appeal on the grounds set out in the memorandum of appeal dated 14th August 2018. Both parties filed written submissions supplemented by oral submissions. At this stage it is important to recall the general principle governing first appeals. I must bear in mind that the primary role of the first appellate court is to re-evaluate the evidence before the trial court and then determine whether the conclusions reached by the learned trial magistrate stand or not while making allowance for the fact that I neither heard nor saw the witnesses testify (see ***Kenya Ports Authority v Kuston (Kenya) Limited*** **[2009]2 EA 212**).

4. A branch manager with the Bank, Eric Otieno Odhiambo (PW 1), testified that following a successful application by respondent for a loan, the Bank disbursed to him Kshs. 800,000. The loan was to be serviced by a monthly deduction from his salary and secured by a charge over the suit property. PW 1 recalled that the respondent defaulted in payment of the loan and the Bank wrote demand letters him and issued statutory notices Before the Bank put up the property for sale, it commissioned two valuations by *Legend Valuers* and *Keriasick and Company Limited*.

5. The sale was advertised in the newspaper on 30th April 2013 and the suit property sold on 17th May 2013 for Kshs. 230,000. After deducting the sale proceeds, the respondent owed Kshs. 1,160,736. PW 1 stated that the second account was a settlement account which included insurance and auctioneers charges and commission amounting to Kshs. 106, 269.14. He also explained that the interest as per the letter of offer was 16% but the same was varied according to market rates and that default interest was also payable. He stated that he was aware that variations in interest rate ought to be done with the authority of the Minister of Finance but stated that he did not have any evidence to show how interest rates variations were done.

6. The respondent (DW 1) admitted that he took out the loan and that it was secured it with the suit property in his wife's name. He stated that the land was valued at over Kshs. 1,000,000.00 but he was not given a copy of the valuation report. He testified that he stopped servicing the loan after 15 months following a road accident leaving a balance of Kshs. 600,000.00 at the time. He further stated that although he agreed with bank officials that he would be given a longer time to pay the instalments, he could no longer pay. He was surprised to receive a call in late 2012 informing him that the suit property would be sold yet he had not received any notice. He testified that the letters and notice were posted to a postal address that was no longer in his name. He also denied signing the notification of sale and told the court that he only

learnt of the sale when he was summoned to court. He complained that he was not involved in the second valuation before the sale and surmised that if he had notice he would have sold the suit property for Kshs. 1,800,000.00.

7. Based on the evidence I have outlined, the parties' oral and written submissions and I find that this appeal turns on two points. First, whether the trial magistrate erred in finding that the Bank had failed to exercise due diligence in realizing the security. Second, whether the trial court erred in dismissing the suit when there was sufficient proof of indebtedness.

8. It is not in dispute that the Bank advanced the respondent a loan facility and that he defaulted in servicing it. The respondent challenged the Bank's exercise of the power of sale on the ground that it did not issue statutory notices and that the suit property had been sold at an undervalue thus occasioning him and his surety substantial loss. On this issue the trial magistrate found that the Bank had issued statutory notices but was not convinced that the appellant had sold the land at the best possible price. The trial court found as follows;

> *In my view it was very prejudicial to the defendant for the bank to sell the charged property at Kshs. 230,000/= whereas the defendant allegedly owed the bank over Kshs. 790,591.75 (P exhibit 8) as at 30/9/2011.*
>
> *For the plaintiff to exercise its statutory power of sale over the charged property at such undervalued price and to still pursue the defendant for alleged balance amounts to subjecting the defendant to double jeopardy.*

9. The duties of the chargee, the Bank when exercising the power of sale, are set out in **section 97 (1)** of the ***Land Act, 2012*** which provides;

> *97 (1) A chargee who exercises a power to sell the charged land, including the exercise of the power to sell in pursuance of an order of a court, owes a duty of care to the chargor, any guarantor of the whole or any part of the sums advanced to the chargor, any chargee under a subsequent charge or under a lien to obtain the best price reasonably obtainable at the time of sale.*
>
> *(2) A chargee shall, before exercising the right of sale, ensure that a forced*
>
> *sale valuation is undertaken by a valuer.*
>
> *(3) If the price at which the charged land is sold is twenty-five per centum or below the market value at which comparable interests in land of the same character and quality are being sold in the open market—*
>
> > *(a) there shall be a rebuttable presumption that the chargee is in breach of the duty imposed by subsection (1); and*
> >
> > *(b) the chargor whose charged land is being sold for that price may apply to a court for an order that the sale be declared void, but the fact that a plot of charged land is sold by the chargee at an undervalue being less than twenty-five per centum below the market value shall not be taken to mean that the chargee has complied with the duty imposed by subsection (1).*

10. The Bank's position is that it had discharged its statutory duty. It submitted that it commissioned two valuation reports in a bid to satisfy its statutory obligations. It drew the court's attention to correspondence with its instructed auctioneers which showed that it was keen on having the land sold at the highest possible price. The respondent argued that the court was entitled to draw a negative inference from the failure by the respondent to produce a copy of the initial valuation report or call the valuer to testify. He submitted that the trial court could not be faulted in taking judicial notice of the fact that ordinarily, banks advance a loan based on a collateral whose value is in excess of the loan amount.

11. I have analysed the two valuation reports placed before the trial court. As the reports were produced without objection, there was no need to call the valuers to testify. The report by *Keriasek & Co. Ltd* dated 29th April 2013 recommended the current open market value of the land as Kshs. 100,000/=, the value for mortgage purposes was placed at Kshs. 80,000/= and the forced sale value was put at Kshs. 75,000/=. The report prepared by *Legend Valuers Ltd* prepared in June 2013 put the open market value at Kshs. 300,000/=, the mortgage value at Kshs. 280,000/= and the forced value at Kshs. 200,000/=.

12. I have noted that both pre-sale valuation reports assessed the size of the suit property at a lower acreage than what was indicated in the title document. The title indicates that the approximate area as 0.34 Hectares while the valuation reports which were based on mutation forms and ground inspections put the area at 0.18 Hectares. This could indicate a failure on both parties to conduct due diligence before effecting the charge instrument hence the appearance that the suit property was sold at a loss. The respondent's contention that the land was initially valued at Kshs. 1 million was not supported by any other evidence. The Bank was required to conduct the valuation prior to exercising its power of sale and the valuation reports prepared by the two firms confirmed that it complied with the statutory duty.

13. I therefore find and hold that the trial court fell into error when it relied on the Bank's failure to produce the initial valuation and consequently reached the conclusion that the respondent had proved that the charged property was grossly undervalued. I also note that the respondent did not provide an alternative or different valuation to support his contention. On the other hand, the evidence shows that the Bank obtained the highest possible market price when it sold the land at Kshs. 230,000/= when compared to the forced sale value assessed by the pre-sale valuations. The market value assessed by *Legend Valuers Ltd* was Kshs. 300,000/= hence the land was sold according to the statutory requirement that the selling price should not be less than 25% of the property's market value.

14. In reaching this conclusion, I also find support of the court in ***Ecobank Kenya Limited v First Choice Mega Stores Limited*** **NRB HC Misc. Appl. No. 20 of 2017 [2018]eKLR** where the court reached a similar conclusion as follows:

> *[14] The subsequent valuation reports made on the property in November 2015 and March 2017 placed the market value of the charged property at Kshs. 54,000,000/= and Kshs. 55,000,000/= respectively. These valuations were by two different reputable*

valuation firms. Their findings are consistent and most probably represent the correct and true value of the charged property. The initial valuation report by Highlands Valuers Ltd made in November 2014 before the facilities were granted to the chargor may have been overcast and the possibility of influence by the chargor cannot be ruled out given that it would have been in the interest of the respondent to have a high valuation returned. In the premises, I find there is no real basis to discredit the subsequent valuation reports without ascribing any specific reasons. The report by Tysons Limited carried out in March 2017 was after the ruling in Nairobi HCCC No. 16 of 2016 made on 9th February 2017 and I do not suppose the claimant would have had any reason to obtain anything but the true market valuation of the charged property. I therefore accept that the Tyson Ltd Valuation report made in March 2017 represented a correct valuation of the property at the time it was made. The respondent cannot merely allege this was an undervaluation without offering any evidence and/or material on which the assertion is based.

16. Before I turn to the second issue, I wish to point out that the fact a security is sold at an undervalue does not, of itself, discharge the debt. It merely entitles the debtor to claim damages equivalent to the amount between the actual value and undervalue. Since that amount is in the nature of special damages, it must be pleaded and proved. Such an amount if found due, would be set off against the debtor's total indebtedness.

17. On the second issue, counsel for the Bank submitted that the trial court unjustifiably dismissed its claim for the debt yet the respondent had expressly admitted to owing Kshs. 600,000/=. Counsel for the Bank submitted that if there was uncertainty as to how much was owed, the court should have ordered for a rendering of accounts before judgment in accordance with the overriding principles.

18. The respondent countered that the Bank had not been forthright and had failed to prove how the two loan accounts had been arrived at or the interest rates applicable. The respondent argued that the Bank was not entitled to burden him further as the balance at the time the loan fell into arrears was Kshs. 600,000/= and the Bank had failed to exercise due diligence in securing the best price for the security.

15. PW 1 produced a loan statement dated 11th February 2014 which showed that the balance due was Kshs. 1,118,699.15/=. He admitted that the interest rates had been varied due to market rates as per the letter of offer and that he had no proof of the interest rate charged. He also explained that the second account comprised of the costs of the sale which under the loan agreement and the charge the respondent was to pay.

16. As regards the rate of interest, it is also not clear what interest rates were applicable at any given time. The plaint indicated that the interest rate applicable for 009AB****** was a monthly compounding interest of 16.75% and a monthly compounding interest of 28.5% for 00900******8. The charge instrument at Clause 2.1.1 and Clause 2.1.3 allowed for variation of the interest rate at the appellant's sole discretion. The instrument further discharged the appellant from informing the respondent about the change in the rates at Clause 2.1.4. The respondent contested the legality of these interest rates and contended that the minister's approval had not been sought for such variations. The onus fell upon the Bank to prove that it had sought the minister's approval to increase the interest rates in accordance with **section 44** of the ***Banking Act*** which it failed to do (see ***Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited CA No. 282 of 2004 [2014]eKLR***).

17. What is clear though, is that the respondent expressly admitted his indebtedness on oath when he stated that he owed Kshs. 600,000.00. The amount would continue to attract interest at the contractual rates. I have found that the sale of the security was regular. It realised Kshs. 230,000/= less costs of Kshs. 106,269.14 leaving a balance of Kshs. 123,730.86 which should be set off from the Kshs. 600,000.00. I would therefore enter judgment for the appellant against the respondent for the sum of Kshs. 476,269.14. For the reasons I have stated above, I would impose the contractual interest is 16.75% per annum on that amount.

18. In conclusion and for the reasons I have set out above, I allow the appeal and set aside the judgment and decree of the subordinate court and substitute it with the following orders:

(a) Judgment be and is hereby entered for the appellant against the respondent for Kshs. 476,269.14 together with interest at 16.75% *per annum* from the date of filing suit until payment in full.

(b) The respondent shall pay the costs of this appeal assessed at Kshs. 50,000.00.

DATED and **DELIVERED** at **KISII** this 21st day of **FEBRUARY** 2019.

D.S. MAJANJA

JUDGE

Mr Kebira instructed by Ocharo Kebira and Company Advocates for the appellant.

Mr Otieno instructed by O. M. Otieno and Company Advocates for respondent.