



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL APPEAL NO.19 OF 2018

ESTHER GETAMBU.....1ST APPELLANT

ANTHONY NJAGI GETAMBU.....2ND APPELLANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA LTD.....RESPONDENT

(Being an Appeal from the judgment at Nairobi Milimani Commercial Courts CMCC No. 7424 of 2012 delivered on 14/2/2017 by Hon. Kassan SPM)

JUDGMENT

1. The outcome of this Appeal hinges on whether Housing Finance Company Limited (**HFCK or the Bank**) was entitled to levy default interest charges on the account of Getambu Anthony Njagi and Getambu Esther Muthoni (**the Appellants**).
2. By way of a Complaint dated 10th December 2012, the Appellants complained that the Bank had illegally charged them interest on arrears and insurance charges culminating in the sum of Kshs.617,413.48. The two, who are husband and wife, had sought refund of this sum and discharge of property known as Land Reference sub-division **Number 3170 Section 1 MN Nyali Mombasa used to secure the facility**.
3. In the trial before the Chief Magistrate's Court, Esther testifying on her own behalf and on behalf of her husband, told Court that in July 2009 she received a 45 day demand letter from auctioneers demanding Kshs.434,351.00 as outstanding charges. That on agreement with one of the Bank's manager she paid Kshs.200,000.00 and was to pay the balance by 31st August 2009. That prior to that day the property had been advertised for sale on 11th September 2009.
4. So as to forestall the sale, she paid cash of Kshs.306,508.00 on 29th August 2009. She complained of various unlawful charges in form of penalty interest. She also complained of insurance charges levied after she had completed repayment of the debt.
5. The Bank's defence was that the Appellants defaulted in repayment of the loan and it was entitled to charge the interest it did and all other charges including those associated with insurance.
6. At trial Lawrence Githinji testified on behalf of the Bank. He pointed to clauses 5 and 7 of the Charge document as being the default clauses. That upon issuing a statutory notice, the customers paid the demanded sums in two tranches being Kshs.200,000.00 and Kshs.306,445.00. But that left Kshs.133,000.00 being auctioneers charges as owing. This amount and interest is said to still be outstanding.
7. In a judgment delivered on 4th February 2017, the Trial Magistrate held that:

“the clause above clearly allows the Defendant to charge some money not specified”. The Plaintiff signed this document (charge document).

It is assumed that she carried the diligence before securing this document. It is also common knowledge that a delay in paying instalment in most banks attract interest and other charges. This is most probably pegged on the fact that banks are in business and depend on interest part revenue. Secondly it is a fact that if borrowers are not charged for delay in payment of instalment then most will not pay and transfer payment period without penalty”

8. The Learned Magistrate further held that upon the last payment made by the customers, auctioneers charges needed to be paid and that all

other charges being charges on site insurance and life insurance were lawfully due.

9. Dissatisfied with that decision the Appellants preferred this appeal and raises a whopping 21 grounds yet the only substantial question is whether the Bank was entitled to charge penalty interest, default charges or interest on arrears. The Appellants contend that the contract between them and the Bank did not provide for the imposition of those charges and that the trial Magistrate erred in not following the High Court decision in **Francis Kamau Ichatha –vs- Housng Finance Company Kenya (2014) eKLR** which was cited to him.

10. It was also argued, on behalf of the customers, that clauses 2, 5 and 9 of the Charge document were not free from obscurity and it was upon the Court to invoke the *Contra Proferentem* Rule. That since the law is that clauses imposing bank charges must be clear about the obligation of the customers to pay, any ambiguity should be construed in favour of the customers and against the Bank.

11. On the issue of illegality of charges, the Bank submits that the interest charged by it was lawful and unpaid auctioneers charges and insurance charges were due. In this regard the Bank pointed out to the clauses 1, 4i,5i,6iii,7 and 9 of the Charge document.

12. It was contended that as the Appellants acknowledged default in repaying the loan as contracted and other contractual obligations, they could not claim illegality. The Bank sought to rely on the decision of **Murad Ebrahim Murad and Another –vs- Kenya Commercial Bank Limited & Another (2018) eKLR**.

13. The duty of this Court sitting as a first appellate Court has been restated in numerous decisions but the most cited is **Selle v Associated Motor Boat co. {1968} E.A 123**. A first appeal is by way of a re-trial and the appellate court is not bound to follow the trial court's findings of fact if it appears that the lower court failed to take account of particular circumstances or if the impression of the demeanour of a witness is inconsistent with the evidence generally. A caveat always being that, unlike the trial court, the appellate court does not have the advantage of seeing and hearing the witnesses first hand and due allowance must be given in this respect.

14. The facts of the case are really not contested and looking at the bank statements produced, it is clear that on several occasions the Bank charged penalty interest on arrears. Indeed in the statutory notice dated 26th April 2006 (Page 133 of the record), the Bank calls for payment of Kshs.1,107,010.65 plus interest at 16.25% on the capital in addition to 18.75% per annum being the interest on the arrears. The issue has to be whether interest on the arrears was contracted for or can otherwise be read into the contract as part of custom or trade usage.

15. The charge document dated 29th December 1994 (Pages 75-86 of the record) is the contract between the parties herein. In respect to interest would be clauses 2 and 4 which are set out below:-

2. If the Borrower shall until the actual or extended date as provided in Clause 3 hereof or the date on which the final instalment of principal money is advanced to the Borrower by the Company whichever of the two dates is the earlier (hereinafter called the "final advance date") pay to the company the said sum with interest on so much of the agreed advance as shall have been from time to time calculated as aforesaid on the first day of every month commencing on the First day of the month next following the date of this charge AND if the Borrower shall after the final advance date pay to the company the total sum advanced by the company to the Borrower with interest thereon calculated as aforesaid monthly instalments of Kenya Shillings Thirty –Seven Thousand Two Hundred and Eleven (Kshs.37,211.00) each (or by such adjusted monthly instalments as shall be agreed at the final advance date (or by such increased monthly instalments as the company may require under the provisions of sub-clause (iii) of Clause 5 hereof) until the whole of the total sum advanced by the company to the Borrower with interest thereon shall be fully paid the First of such instalments to be paid on the first day of the month next following the final advance date and each subsequent instalment to be paid on the first day in every succeeding month and if and so long as the borrower performs all the obligations on the borrower's part herein contained other than in regard to the payment of principal and interest the company will accept the payment of such interest and instalments in repayment of the total sum advanced by the company to the borrower with interest thereon and will not enforce the security hereby constituted PROVIDED that notwithstanding that any instalments may have been paid pursuant to this clause the remainder of the principal money hereby secured shall continue to be due for all the purposes of the exercise of statutory and other powers to redeem on the day of next or such other date as is stipulated in clause 1 hereof...

4. It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows:-

i Until the service of such a notice as is hereinafter referred to interest shall be at the rate of twenty six per centum (26%) per annum.

ii The Company may from time to time serve on the borrower a demand notice requiring payment of interest at such increased or reduced rate as shall in the decision of the Directors of the Company fairly represent the rate of interest commonly chargeable in Kenya having regard to such circumstances as they consider to be relevant and the decision of the Directors of the Company in this behalf shall not be questioned on any account whatsoever.

iii In the event of the Company requiring an increase in the rate of interest under the provision of sub-clause (ii) of this Clause the Company will notify the Borrower of the amount of the resulting increased monthly instalments payable under the provisions of Clause 2 hereof and the first of such increased monthly instalments shall become due and payable on the first day of the month next after notification of the amount thereof to the Borrower.

iv All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effect as referred to interest as fixed or altered by the provisions of this Clause.

16. As would be self-evident from the terms of the two provisions, default interest or interest on arrears is not provided.

17. What about clause 5 also relied on by the Bank? It reads:-

5:

i. For the better securing payment to the company of all principal money interest and other moneys due or to become due under the charge the borrower HEREBY CHARGES the property described in the schedule hereto with payment to the company of such principal money interest and other moneys.

ii. PROVIDED always that on payment in one sum or by any instalments paid in accordance with the provisions hereof of all money secured by this charge and all costs and expenses properly incurred by the company in relation to the premises at the time of such payment the company will release and discharge the said property to the borrower or as the borrower shall direct.

18. This too, in my view, does not give the Bank the right to charge default interest. This court takes a view that all costs and expenses properly incurred by the Bank in relation to the premises referred to in this provision would charges such as insurance premium on the premises which are set out in the latter part of the contract.

19. The rule that it is not the business of a court to rewrite a contract between parties in the absence of special circumstances such as fraud continues to endure. To be asked in this matter is whether, in the absence of clear provisions obligating the customer to pay default interest, there a basis on the strength of trade custom and usage, for the Court to read such obligation into the contract.

20. This question has vexed the courts before and somewhat different positions have been taken in answering it. On one end of the spectrum is the High Court decision in Orion East Africa Ltd. –vs- Housing Finance Co. of Kenya Ltd. HCC No. 914 of 2001 in which the Court held that penalty or default interest is normally chargeable on an amount in default.

21. However, Odunga J rejected the notion that default interest not expressly provided for could amount to a trade usage. The Judge in Francis Joseph Kamau Ichatha –vs- Housing Finance Company of Kenya Ltd. [2014] Eklr reasoned thus;

Paragraph 66: Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1)(b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court.

22. On this debate, I associate myself with the position of Odunga J. If a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters with the customer. There must be clarity on what the charges and interest are and how they are to be imposed. In the matter before Court, the Bank which is admittedly the author of the contract made it clear that it would charge an interest rate at 26% per annum or at such reduced or increased rate as the Bank would deem as fairly representing the rate of interest commonly chargeable in Kenya (See clause 4). The Bank choose not to include a charge of default interest and to impose such interest through judicial fiat or craft would be to re-write the contract to the detriment of the borrower. It is for this reason that the Court is unable to agree with the conclusion of Trial Court. It may well be laudable that a penalty interest be charged so as to discourage borrowers from defaulting in repayment of their obligations yet unless such charges are expressly provided for and defined, then the lender would have to make do with imposing the contracted interest rates even on the arrears. The alternative would be for the Bank to call up payment of the debt immediately there is default.

23. In respect to insurance fees the contract contemplates this in Clauses 6(iv) reads:-

6 (iv) That the borrower will repay every sum from time to time paid by the company for effecting or keeping on foot any such insurance within fourteen days next after the date on which the same was paid by the company or by such instalments as the company shall agree and that every such sum until it is repaid in full shall bear interest at the rate for the time being payable hereunder and with the interest thereon shall be charged on the said property.

24. As to the charges for enforcing the security which would include auctioneers charges, clause 9 is relevant and reads

9. The company may from time to time make such payments as it may consider expedient to any person whether the Borrower or anyone acting at the Borrower’s requests or a receiver or a subsequent chargee or to any person acting on the instructions of the Company in connection with maintaining repairing amending altering or improving the said property or for outgoings in relation thereto or for any costs or expenses incurred by the Company for the enforcement protection or improvement of the security hereby created and all moneys so paid shall be deemed to be principal money hereby secured and shall carry interest at the rate for the time being payable hereunder from the date of the same being paid by the Company and shall be repayable with such interest by the Borrower on demand made by notice in writing and until repayment with such interest shall be charged on the said property.

The Expression “expenses” in this Clause shall be deemed to include all payments made by the Company for the benefit of this security in respect of:-

i Any work in or in connection with the construction repair maintenance or improvement of any private road or street.

ii Ground rent or any tax rate or assessment whatsoever affecting the said property.

iii All costs and disbursements (Legal or otherwise) properly incurred or paid by the Company incidental to this Charge or the collection of any moneys due or to become due hereunder which if not agreed shall be taxed as between advocate and client.

25. The Bank would certainly be entitled to recover auctioneers fees and money paid for insuring the premises if such recovery was deserved and if the continuation of the charge was justified. This, however, is not a matter which this Court can determine without a decision on whether, upon exclusion of the default or penalty interest on arrears, there was still default.

26. The appeal is for allowing as I hereby do. The orders that commend themselves to this Court are as follows:-

i. The judgment of the Trial Court of 14th February 2017 is hereby set aside.

ii. This matter shall be referred back to the lower Court to a magistrate other than Hon. Kassan for purposes of making an order for taking of accounts that excludes the penalty or default interest on arrears.

iii. Upon such taking of accounts, the lower court shall decide on whether there was truly default and whether the auctioneer's charges and charges for insurance on the premises are due.

iv. Upon the taking of accounts, the Trial Court shall proceed to determine the prayers in the suit including making an appropriate order on costs.

27. For now, costs of the Appeal shall be to the Appellants.

Dated, Signed and Delivered in Court at Nairobi this 27th Day of September 2019

F. TUIYOTT

JUDGE

PRESENT:

Munene for Appellant

Khamali for Kioko for Respondent

Court assistant: Nixon