



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 62 OF 2017

EQUITY BANK (KENYA) LIMITED.....APPELLANT

-VERSUS-

NTEMI LIMITED.....RESPONDENT

(Being an Appeal against the Judgement made on 26th January, 2017 by the Honourable Mr. D.O. Mbeja,

Senior Resident Magistrate, in Nairobi Milimani Chief Magistrate Court Case No. 2348 of 2015)

JUDGEMENT

BACKGROUND

1. The Respondent, a limited liability company, brought the suit against the Appellant on 28/4/2015 by a plaint dated 12th January, 2015. The Respondent was seeking among other things, the sum of Kshs.530, 388 together with interest at commercial rates, on reducing balance from December, 2011 until payment in full.
2. The suit arose out of breach of an agreement entered into between the parties on 27th September, 2011 when the Appellant agreed to advance and/or lend the Respondent a sum of Kshs.3,928,800 to aid Respondent in the finance for the purchase of motor vehicle registration number KBQ 884T, Jeep Wrangler.
3. It was averred that it was a term of contract between the parties that the principal sum would attract interest at a rate of 8.5% per annum which sum would be repaid by agreed 36 instalments of Kshs.136,963/= until payment in full.
4. After the loan amount was disbursed to the seller of the motor vehicle, the Appellant varied the agreed monthly instalments to Kshs.151,696/= per month from Kshs.136,963 which was in excess by Kshs.14,733 per month in variation. This variation was made without notice to the Respondent.
5. This in essence, completely varied the terms of the contract. As a result thereof the Respondent paid the enhanced amount and as such made over payments in a total sum of Kshs.530,388/= which the Respondent now claims. The payments were made between the year 2011 and 2014.
6. The matter was fully heard and the Respondent was successful, thus granted reliefs as prayed.
7. Thus the Appellant lodged instant Appeal and set out 8 grounds of Appeal.

(i) The learned trial magistrate erred in law and fact in finding that the Respondent/Respondent had proved its case on a balance of probability when there was no such proof leading to a miscarriage of justice.

(ii) The learned trial magistrate erred in law and fact in failing to recognize that the lending contract dated 27th September, 2011 between the Appellant and the Respondent provided for provision for variation of interest, that the Appellant had by contract and law the right or authority to vary the interest rate, the Appellant was not even under obligation to notify the Respondent of such variation and therefore arrived at a wrong decision.

(iii) The learned trial magistrate erred in law and fact in holding that the Respondent was not an existing customer of the Appellant and therefore the notice of variation of interest issued by the Appellant did not touch or affect the Respondent and

thereby arrived at a wrong decision.

(iv) **The learned trial magistrate erred in law and fact in holding that the variation of interest was not formally communicated to the Respondent by the Appellant and the Respondent ought to have been specifically addressed by the Notice advertised by the Appellant in the print media and therefore arrived at a wrong decision.**

(v) **The learned trial judge erred in law and fact in failing to understand that the variation of interest was carried out by the Appellant under the terms of lending contract, was not tainted with illegality and the notice was not unreasonable.**

(vi) **The learned trial magistrate erred in law and fact in finding in conclusion that the Respondent had overpaid his loan account by Kshs.530,388/= which the Respondent failed to prove.**

(vii) **The learned trial magistrate erred in law in applying the provisions of the Banking (Amendment) Act No. 25 of 2016 retrospectively.**

(viii) **The learned trial magistrate erred in law and fact to take cognizance of the case law put to him in the submissions of the Appellant.**

8. The parties were given directions to canvass appeal via submissions but only Respondent filed the same.

RESPONDENT'S SUBMISSION

9. The respondent submitted that, after the appellant varied interest rate the Respondent paid the enhanced amount under protest and notified the Appellant that it would sue for a refund of the overpaid amount.

10. Respondent's contended that, it had negotiated the interest rate chargeable on the account and although the Appellant reserved the right to vary the interest rate under the lending agreement there was no such variation after the disbursement of the loan.

11. It was argued that, the parties negotiated a contract which it asked the Court to enforce and not to re-write as alleged by the Appellant and the Respondent agreed with the Appellant's contention that **"...the function of the court is to enforce what is agreed between parties...(as per Shah JJA in Fina Bank Ltd vs Spares & Industries Ltd [20001 1 EA 52].**

12. The respondent further contend that, for avoidance of doubt and to put the court in the full picture;

(a) The Appellant's notice to its customers about the proposed variation and increase in the interest rates was issued and published by the Appellant on 9th September 2011. This was also confirmed by the Appellant's witness in the Lower Court, one Nicholas Gachui Mwichigi. By this time the Respondent was not a customer of the Appellant and it was submitted that under no stretch of imagination can it be said that the notice of increase in the Appellant's lending rates would have applied to the Respondent.

(b) The letter of offer of finance was issued by the Appellant on 27th September, 2011 and was accepted by the Respondent on 13th October, 2011.

13. The Respondent's submitted that it became a customer of the Appellant from the date it accepted the offer of finance i.e. from 13/10/2011 and not before and the Appellant was seeking to hide under a notice it had given its existing borrowing customers in September 2011, even before the Respondent became its customer, to purport to vary the interest rate.

14. It was the Respondent's submission that the purported notice was of no consequence or application to it as it was not a customer of the Appellant at that time and cannot be said to have been notified of any variation.

15. The increment in the interest rate was in place at the time the Respondent negotiated its rate and if the Appellant negotiated a rate below what it was allowed to charge it is its problem and has nothing to do with the Respondent.

16. However immediately the Appellant disbursed the loan, around 11th November 2011, the Appellant levied interest not at 8.5% as negotiated but at 13.5% which it was charging its old customers and completely ignored what had been negotiated between the parties.

17. The Respondent submitted that, a stated in the opening statement of the Appellant's submissions, that the Court should enforce the contract as agreed between the parties and not outside the contract.

18. At no time during the currency of the loan did the Appellant notify the Respondent of any interest charge changes duly approved by the Minister of Finance under Section 44 of the Banking Act in respect of the facility and it is the Respondent's submissions and position that the variation of the contract, as negotiated, was unilateral, unlawful and of no effect and void ab initio and any such additional charges as levied on it by the Appellant are unrecoverable and illegal under the Banking Act.

EVIDENCE ADDUCED

19. The Respondent called one Gideon Meenye, Advocate and a director of the Respondent Company, and confirmed that the Respondent

applied for a banking facility from the Appellant for Kshs.3.9 Million for the purchase of a motor vehicle which facility was granted by the bank. He produced a letter of offer and acceptance as an exhibit.

20. The money was to be repaid by 36 monthly instalments, at an agreed interest of 8.5%. When repayments were being made on a monthly basis, the bank began to make more deductions than the agreed amount. Instead of Kshs.136,000 the bank deducted Kshs.151,696, which conformed for 36 months, the Respondent paid the loan in full.

21. The Respondent protested the excess payments by a letter dated 28/1/2014. Later the Respondent was advised that the interest rates were varied but the Respondent was never notified.

22. During cross examination the Respondents witness stated that he did not raise the issue in 2011 and 2012. There was no formal protest about the repayments. The same applied to the year 2013. He also stated that all payments were made under duress. The Respondent was dealing with a lady called Mercy who advised the Respondent to pay.

23. The defence called Nicholas Gachui Mwachigi; a credit manager at Equity Bank. He stated among other things that money was disbursed to the Respondent on 9/11/2011. The bank did not overcharge, and that the bank had a right to vary interest from time to time.

24. He made reference to a notice issued by the Appellant which appeared in the Daily Nation newspaper on Wednesday November 2011 adjusting the Bank's lending interest rates to 25% with effect from 15th November, 2011.

ISSUES, ANALYSIS AND DETERMINATION:

25. After going through the evidence on record, pleadings and submissions filed, I find the issues are; ***whether the respondent proved its case on balance of probabilities? what is the orders as to costs?***

26. The contract entered between parties herein was that the principal sum would attract interest at a rate of 8.5% per annum which sum would be repaid by agreed 36 instalments of Kshs.136,963/= until payment in full.

27. After the loan amount was disbursed to the seller of the motor vehicle, the Appellant varied the agreed monthly instalments to Kshs.151,696/= per month from Kshs.136,963 which was in excess by Kshs.14,733/= per month in variation. This variation was made without notice to the Respondent.

28. This in essence, completely varied the terms of the contract. As a result thereof the Respondent paid the enhanced amount and as such made over payments in a total sum of Kshs.530,388/= which the Respondent now claims. The payments were made between the year 2011 and 2014.

29. It is not in doubt that the Respondent paid the enhanced amount against their will in the instant suit. The variation of the interest was not formally communicated to the Respondent herein to let it know that its dealings with the bank will be affected.

30. The notice issued by the Appellant which appeared in the Daily Nation newspaper on Wednesday November 2011 adjusting the Bank's lending interest rates to 25% with effect from 15th November, 2011 was intended for its existing customers and this was made in November 2011. The said notice was not specifically addressed to the Respondent whose engagement with the bank was in writing.

31. The Appellant's notice to its customers about the proposed variation and increase in the interest rates was issued and published by the Appellant on 9th September 2011. This was also confirmed by the Appellant's witness in the Lower Court, one Nicholas Gachui Mwachigi.

32. By this time the Respondent was not a customer of the Appellant and it was submitted that under no stretch of imagination can it be said that the notice of increase in the Appellant's lending rates would have applied to the Respondent.

33. A Notice would be an advance warning or information that the Bank intends to vary its interest. Varied interest results in varied monthly instalments which becomes due and payable on the first day of the month next after the Notification of the varied monthly installments.

34. In so far as the Bank failed to prove that it issued a Notice to the respondent to vary interest from 8.5% per annum to 13.5% per annum, this Court has to find that it was in breach of its own covenant.

35. There is another angle on the matter which respondent raises. This would be in breach of section 44 of the Banking Act which provides as follows:-

“No institution shall increase its rate or other charges except with the prior approval of the Minister.”

36. The effect of the holding by the Court of Appeal in ***Civil Appeal No. 282 of 2004 (Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR***, is that Section 44 of the Banking Act is applicable to rates of interest as it is to other Banking charges. And on the manner and burden of proving the compliance with the provisions of section 44, the Court of Appeal held:-

“On the first issue, it was the respondent's evidence and submission that it was unclear whether the interest increase was done in compliance with Section 44 of the Banking Act. This section requires banks to notify the Minister for Finance before any change in the rate of banking is effected. It provides as follows:

“Restrictions on increase in bank charges

44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”

37. The Respondents claim is for a liquidated amount of Kshs.530,388/= which is yet to be settled to date.

38. The trial court made a finding that the Respondent established a prima facie case against the Appellant on a balance of probabilities, this I do find in the affirmative, all the circumstances of this case considered, as there’s a clear intention to create legal relations between the parties.

39. The variation of the terms of the contract entered into on 27th September, 2011 was not proper as the same was made without any written notice to the Respondent. From the evidence so far on record the Respondent never in any way acquiesced and agreed to be bound by the change in lending rates without notice. The Respondent made the payments under protest. The Respondent has a valid and legitimate claim against the Appellant.

40. The court thus finds no merit in appeal and makes the following orders;

i) Appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2019.

C. KARIUKI

JUDGE