REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL NO. 84 OF 2015

BETWEEN

GERALD P. O. ONYANGO ………………………………. APPELLANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED.........RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.C. N. Sindani, SRM dated 10th December 2013 at Senior Resident Magistrates Court in Winam in Civil Case No. 300 of 2007)

JUDGMENT

1. The respondent was the plaintiff in the subordinate court. It filed suit against the appellant seeking to recover Kshs. 54,292.87 being the amount owing from a credit card advance for A/C number ***[particulars withheld]*** with interest thereon at 8% per annum from 23rd August 2007 until payment in full. It also prayed for interest on costs at 14% till payment in full.

2. The appellant denied liability for the sum claimed by the respondent. In his defence, he averred that he had discharged his obligations to the respondent as and when they fell due and despite oral requests to respondent to provide statements of account the respondent failed to do so. He also averred in the alternative that the respondent's included penalties and charges which were not permitted under their initial agreement and were illegal as they violated the ***Banking Act (Chapter 488 of the Laws of Kenya)***.

3. As this is a first appeal, 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 or saw the witnesses testify (see ***Kenya Ports Authority v Kuston (Kenya) Limited*** **[2009] 2 EA 212**). It is therefore necessary to set out the evidence presented by both parties during trial to proceed with this task.

4. Patrick Bet Tumweti (PW 1) was a personal branch officer with the respondent. He testified that respondent was claiming Kshs. 54,292.87 advanced to the appellant via a credit card facility. He told the court that when amount became due, the respondent wrote to the appellant demanding the same and on 30th March 2001 the appellant wrote back admitting that he owed the respondent the claimed amount. PW 1 also stated that the amount was inclusive of interest at 5% and late payment penalty at 3%.

5. A personal banker with the respondent, Rita Akoya (PW 2), told the court that the respondent was given a credit card facility with a limit of Kshs. 50,000/- vide account number ***[particulars withheld]*** and the respondent used it till June 2003 when he fell into arrears. PW 2 testified that the terms dictated that in case of default a penalty at 3% was to be levied on the outstanding balance. That consequently a 3%

penalty was imposed on the respondent and by November 2006 the outstanding amount stood at Kshs. 59,292.87. On cross examination PW 2 explained that when the appellant defaulted, his number was changed for ease of management and the respondent continued sending letters reminding him to make payments through his last known address.

6. The appellant (DW 1) admitted that he was granted a credit facility by the respondent with a credit limit of Kshs. 50,000/- and that he operated the card within the limit. DW 1 testified that at the time he was issued with the credit card his branch was in Nairobi. When he decided to change his branch and address to Kisumu, he informed the bank. Despite notifying the bank of the change, he did not receive any statements of account. He thus stopped using the credit card but kept on making random payments to cover the amounts he had already spent. DW 1 testified that despite several demands for the bank statements he was not supplied with any until he received the demand for payment from the respondent's advocate. The appellant averred that from his calculation of the random payments made, the respondent owed him a total of Kshs. 80,860/ -. DW 1 further testified that the interest and penalty charges levied were illegal as they were not included in the initial agreement.

7. Judgment was entered against the appellant and it is this judgment that has precipitated this appeal. In the memorandum of appeal dated 30th September 2015, the appellant took issue with the decree as extracted as it varied with the judgment which allowed interest on the costs and not on the principal sum. The appellant further contended that trial magistrate erred in law and in fact in allowing the respondent's claim as pleaded yet it was not strictly pleaded and proved. The appellant also condemned the trial magistrate for failing to consider the evidence presented by the appellant that he had made several payments towards clearing the debt and that the respondent charged irregular and illegal interest and penalties.

8. In addition to reiterating the issues raised in the memorandum of appeal, Mr Orengo, counsel for the appellant, relied on skeletal submissions and argued that that the respondent's claim was vague and could not be supported by the evidence as the statements presented by the respondent were not clear on the amount owing. Counsel urged the court to note the contradictions in the various statements presented in evidence. Counsel concluded by submitting that some of the charges were illegal and that the amount claimed should have been specifically claimed.

9. Ms Ongira, counsel for the respondent, opposed the appeal and argued that the appellant admitted the demand and even offered to pay. She contended that the contract between the parties was clear on the nature of interest and charges the appellant was obliged to pay and that the statements produced by the respondent supported the claim. Counsel submitted that the appellant had failed to prove that he had paid Kshs. 10,000/- or any other sum as claimed by him.

10. It is not in dispute that the appellant applied for and was issued with the respondent's credit card on terms and conditions issued by the bank. The application form signed by the appellant confirmed that the he would be bound by the terms and condition of the card issued by the bank which terms were produced in evidence in a document titled, *"Conditions of Use"*. If these terms were not applicable, then the appellant did not show the what other terms were applicable and that were being referred to in the agreement.

11. From the memorandum of appeal and submissions, three issues fall for determination. The first issue concerns the decree issued by the trial court. The trial court allowed prayers (a), (b) and (d) of the plaint in the following terms:

> *In finality I find the plaintiff's case meritorious and allow the same as prayed in prayer (a) of the plaint. The plaintiff is also awarded costs of the suit together with interest as sought in prayer (d). I make no other orders in regard to the suit*.

12. Order 21 rule 7(1) of the ***Civil Procedure Rules*** states that the decree shall agree with the judgment. Under **Order 21 rule 8(5)**, the parties have a duty to prepare the decree by submitting their respective drafts to each other for approval and or amendment. If there is an error, then either party has the right to

apply to the court to amend or correct the decree particularly if it did not agree with the judgment. The fact that the decree does not accord with the judgment should not be a ground for appeal but a matter to be settled by the trial court under **rule 8(4)**. I now turn to the substance of the appeal.

13. As I understand the appellant's complaint is that the respondent produced two contradictory statements that show different figures at different dates hence the claim was not proved. The duty of the trial court, in such circumstances, is to resolve the contradiction and make a finding. The respondent's claim was for Kshs, 54,292.00 as at 23rd August 2007. This is supported by the statement produced by produced by PW 1 which showed that the amount outstanding was Kshs. 54,292.87 as at 17th August 2007 while the statement produced by PW 2 showed the amount outstanding as 17th November 2006 was 59,295.00. The appellant did not deny that he took out the card and had in fact admitted that he owed some money. The statement by PW 1 is clear that the amount claimed in the plaint is Kshs. 54, 292.00 as at 23rd August 2007 which is the amount claimed. I therefore find that the amount due was duly proved.

14. Under the Conditions of Use of the card, the appellant was to pay a 5% monthly charge under Clause 3(i) and a 3% late payment charge under Clause 5(i)(a). While the appellant claimed that he did not use the card after he stopped receiving statements of account, the Conditions of Use provide that the charges and interest continue to accrue until the agreement is terminated in accordance with Clause 7. The appellant did not terminate the agreement hence the charges continued to accrue.

15. The burden of proof was on the appellant to prove that he paid money to the respondent by showing payment receipts or other proof of payment. The schedule of payments he produced was self- serving, did not contain or reference supporting documents and could not assist his argument. In any case, the appellant had the right to plead a set-off in respect of the amount he claimed to have paid or in the event of overpayment, file a counterclaim for the sum due to him under **Order 7 rule 3** of the ***Civil Procedure Rules***.

16. The appellant claimed that he failed to fully settle the matter due to lack of statements and that he duly informed the respondent of his new address. He stated that had he received the bank statements, he would have cleared the outstanding amounts. This per se is not a defence to indebtedness particularly in view of his own admission of indebtedness and the provisions of the agreement that required him to make payments.

17. In his defence before the subordinate court, the appellant pleaded violation of the ***Banking Act*** generally. He did not plead specifically which provisions of the ***Act*** were violated and how they were violated. The relevant part of his statement of defence stated as follows;

> *[6] [T]he defendant states that in claiming the sum of Kshs. 54,292.87 the plaintiff imposed interest, penalties and charges which are neither permitted under the agreement but which are directly in violation of the provision of the Banking Act and therefore, illegal.*
>
> *[7] The defendant further states that the interest charged, which amounts to 96% per annum is oppressive, unconscionable and therefore irrecoverable.*

18. The appellant submitted before the trial court that the charges were not provided for in the contract between the parties, that they were unconscionable and oppressive. As I have stated elsewhere in the judgment, the Conditions of Use provide for a 5% monthly charge under clause 3(i) and a 3% late payment charge under clause 5(i)(a). These were the terms that were agreed upon and this court had no jurisdiction to vary them. This position is supported by the Court of Appeal in ***National Bank of Kenya v Pipeplastic Samkolit (K) Ltd and Another*** **NRB CA Civil Appeal No. 95 of 1995 [2001]eKLR** where it observed that;

> *A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah JA in the case of* ***Fina Bank Limited vs Spares & Industries Limited (Civil***

Appeal No 51 of 2000) (unreported)*: "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".*

19. For completion of the record, the issue of banking and other charges is dealt with in **section 44** of the ***Banking Act*** which stipulates that;

No institution shall <u>*increase*</u> *its rate of banking or other charges without approval of the Minister.* [Emphasis mine]

This provision only applies to and regulates the increase of banking and other charges. It does not apply to levying of charges in the first instance as the parties are free to negotiate the terms. There is no evidence that charges provided in the Conditions of Use were increased hence I find and hold that **section 44A** of the ***Banking Act*** is inapplicable to this case.

20. In the memorandum of appeal, the appellant averred that; *"The learned trial magistrate failed to find and hold that the respondents had violated the* ***in duplum rule*** *as embodied in* ***section 44A*** *of the* ***Banking Act*** *which limits the amount recoverable from a debtor to a maximum of twice the principle amount owing at the time the loan became non-performing plus recovery of costs."*

21. The appellant added in the oral and written submissions before this court that the rate of interest is unconscionable, unlawful and as result the debt irrecoverable as it contravenes **section 44A** of the ***Banking Act*** which states, in part, as follows

47(1)An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under Subsection 2.

(2)The maximum amount referred to in subsection (1) is the sum of the following:-

a. the principal owing when the loan becomes non-performing.

b. interests in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

c. expenses incurred in the recovery of any amount owed by the debtor.

----

(6)This Section shall apply with respect to loans made before this Section comes into operation, including loans that have become non-performing before this Section comes into operation:-

Provided that where loans become non-performing before this Section comes into operation, the maximum amount referred to in subsection (1) shall be the following:-

a. the principal and interest owing on the day the Section comes into operation; and

b. interest in accordance with the contract between the debtor and the institution, accruing after the day this Section comes into operation, not exceeding the principal and interests owing on the day, this Section comes into operation.

c. expenses incurred in the recovery of any amount owed by the debtor.

22. I have read and re-read the appellant's defence and submissions before the trial court and, unfortunately, I find that this issue was not raised at all. *In* ***Attorney General v Revolving Tower Restaurant [1988] KLR 462,*** *the Court of Appeal upheld the principle that an appellate court has discretion to allow an appellant to take a new point before it if full justice can be done to the parties but*

found that in that case the facts bearing upon the new point had not been fully explored to show the relevance of the new point of law and the court would therefore not allow that new point.

23. Section 44A of the ***Banking Act*** raises issues that would have required resolution by the trial court. For example, was the debt due from the appellant "non-performing"? What is a non-performing debt? How much of the amount of the debt claimed was the principal and how much of it was interest excluding other charges? All these and other issues would have been ventilated before the trial court so the respondent would have an opportunity not only to rebut any legal arguments but to put forth factual matters in support of its case. I therefore decline the appellant's entreaty to deal with this issue.

24. This appeal lacks merit. It is dismissed with costs to the respondent.

25. The appellant is at liberty to move the subordinate court for settlement of the terms of the decree.

DATED and **DELIVERED** at **KISUMU this 20th day of December 2016.**

D.S. MAJANJA

JUDGE

Mr Orengo instructed by Aboge and Company Advocates for the appellant.

Ms Ongira instructed by Odhiambo Owiti and Company Advocates for the respondent.