



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 54 OF 2013(O.S)

IN THE MATTER OF: MORTGAGOR/CHARGOR AND MORTGAGEE/CHARGE

AND

IN THE MATTER OF: PROPERTY KNOWN AS L.R NO. 15153/93, KIAMBU

AND

IN THE MATTER OF: DISCHARGE OF CHARGE

BETWEEN

ANTHONY THUO KANAI :::::::::::::::::::: PLAINTIFF/APPLICANT

AND

CANNON ASSURANCE LIMITED ::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. The ruling before the Court relates to the Originating summons dated **13th February 2013** and filed in Court on **14th February 2013**. It is expressed to be brought under Order 37 rule 14 of the Civil Procedure Rules, Section 84 (1) (a) (b) of the Land Act as well as Sections 1A, 1B and 3A of the Civil Procedure Act.

2. The application is supported by the Plaintiff's affidavit sworn on **13th February 2013** and is based on the grounds stated therein. The Plaintiff seeks for several orders as follows:-

1) ...

2) ...

3) ...

4) *That the Defendant/Respondent in preparing the said statement of account adheres to the loan offer letter dated **14th September 2011** and Charge dated **22nd March 2012** whereby the maximum principal sum is **Kshs. 10 million** and applicable interest being **6%**.*

- 5) *That this Honourable Court be pleased to disallow any interest on the additional amount of Kshs. 542,140/= illegally appearing in the Defendant's Statement of account as part of the principal as being contrary to the terms of the loan.*
- 6) *That this Honourable Court be pleased to declare that the applicable interest on the loan is 6% and that the purported variation of the interest to 15% as unlawful, illegal and contrary to the provisions of Section 84 (1) (a) (b) of the Land Act.*
- 7) *That this Honourable Court be pleased to declare that the Defendant is not entitled to any interest from 18th January 2013 for illegally fettering the Plaintiff's equity of redemption by including erroneous interest on the statement of account despite protest by the Plaintiff to remove the same.*
- 8) *That this Honourable Court be pleased to order that the Defendant executes and delivers to the Plaintiff in triplicate within 7 days, a Discharge of Charge of the Property forwarded by the Plaintiff to the Defendant on the 1st February 2013 together with his title documents and all documents relating to L.R No. 15153/93 belonging to the Plaintiff which are in the Defendant's possession.*
- 9) *That the costs of this suit be awarded to the Plaintiff/Applicant.*
- 10) *That this Honourable Court grants such other or further orders as it may deem fit and expedient in the circumstances.*

3. Briefly, the uncontested facts of this case are as follows. The cause of action arose from a Charge dated **22nd March 2012** and registered on **16th April 2012**. The Plaintiff applied for and was granted a mortgage loan of **Kshs. 10,000,000/=** which was secured by his property known as L.R No. 15153/93. The total repayment period was agreed to be twenty (20) years and in 240 equal monthly instalments of Kshs. 71,643/= each calculated at annual rates at interest of 6%. This is specifically stated in the Letter of Offer dated 14th September 2011 and later incorporated in the Charge. The terms and conditions of the loan advanced to the Plaintiff by the Defendant are set out in the Charge which is in the Court record.

4. It seems that the dispute between the parties arose when the Defendant terminated the Plaintiff's employment on 13th November 2012. In the termination letter dated 13th November 2012, the Defendant informed the Plaintiff that they would vary the interest rate of the loan he had taken. The letter stated in part "*note that any indebtedness that remains unpaid will attract interest at market rates*". According to the Plaintiff, the notice was vague and did not comply with the explicit provisions of section 84 (1) (a) (b) of the Land Act. The said section provides that the variation of the rate of interest may be done by giving the Chargor at least a 30 days written notice. The said notice should be clear on the new rate of interest to be paid in respect of the Charge.

5. The Plaintiff accuses the Defendant of breaching the Charge and the letter of Offer dated **14th September 2011**. It is the Plaintiff's case that the Defendant without notice and his consent included to the loan an additional amount of Kshs. 542,140/= and illegally charged interest thereon. The amount includes the debits of Kshs. 420,260/=, Kshs. 42,120/= and Kshs. 79,760/= being stamp duty, valuation fees and legal fees respectively. The Plaintiff avers that the Charge provided that the maximum amount of the loan advanced was Kshs. 10,000,000/=.

6. It is therefore the Plaintiff's case that the Defendant has refused to correct the erroneous statement of account forwarded to the Plaintiff whereby the principal sum indicated therein is in excess of the amount provided for in the letter of offer and Charge.

7. The application is opposed by the Defendant through the Replying affidavit of **Maina**

Mukoma, described as the Managing Director of the Defendant herein, and sworn on **22nd February 2013**.

8. It is the Defendant's case that the sums of Kshs. 542,140/= have been lawfully added to the loan account as they were incurred towards the completion and perfection of the security. The Managing director averred that the said charges were secured under the Charge and referred to as "Secured obligations." He referred to Clause 14.9 of the Charge which stated that until all the secured obligations were paid and fully satisfied, the Defendant was entitled to lien of all property of the Plaintiff and also to exercise its right to foreclose.

9. With regard to the variation of the interest rate, it is the Defendant's case that they had the sole and absolute discretion to vary the interest from time to time. *See clause 3.1.1 and clause 3.1.2 of the Charge*. It is further the Defendant's case that in the event that a notice of variation was not given, the same would not prejudice or in any way affect the rights of the Defendant to recover any such interest.

10. The Plaintiff testified on 29th October 2014. He relied on his Witness Statement and the List of documents filed on 28th March 2014. He testified that the additional amount of Kshs. 542,140/= increased the interest exposure and the same ought to have been recovered separately. It was also his testimony that the said charges were unsecured because they were advanced before the Charge was registered on 16th April 2012.

11. On cross examination, it was the Plaintiff's testimony that the Defendant was not entitled to charge interest on the sum of Kshs. 1,000,000/=. This was the deposit for purchase of the property paid on or around 14th September 2011. He further testified that the Defendant had wrongfully deducted a total of Kshs. 779,842/= from his salary.

12. The parties filed written submissions which were highlighted before me. The Plaintiff appeared on his behalf while Ms Ngonde appeared for the Defendant.

ANALYSIS

13. I have considered the application, the affidavits on record as well as the oral submissions by Counsel. I therefore take the following view of the matter.

14. The main issues for determination are as follows:-

- ***Whether the Defendant is entitled to include the sum of Kshs. 542,140/- to the Loan amount of Kshs. 10,000,000/=***
- ***Whether the Defendant is entitled to vary the interest rates as provided for in the Charge***

15. With regard to the first issue, the Plaintiff accuses the Defendant of breaching both the Charge and the letter of Offer dated 14th September 2011. According to the Plaintiff, the Defendant without notice and his consent included to the loan the additional amount of Kshs. 542,140/= and illegally charged interest thereon. He submits that the said amount was an illegal addition which together with illegal interest charged between October 2011 and May 2012 meant that the Defendant was making illegal deductions from his salary even before there was a registered Charge. The effect of this was that the Defendant increased the monthly instalment from Kshs. 71,643/= as provided for in the Letter of offer to Kshs. 75, 527/=.

16. It is the Plaintiff's case that the sums should be demanded separately. In essence, the Plaintiff does not deny the fact that the sums of Kshs. 542,140/= was paid on his behalf by the Defendant.

17. The Plaintiff further submits that he is entitled to a further credit in the amount of Kshs. 59,560/= being the illegal deduction made from his salary by the Defendant prior to the registration of the charge. The Plaintiff did not lead any evidence to this effect and no documentary evidence was given to substantiate the same. I will therefore not delve into the said issue.

18. On the other hand, it is the Defendant's case that the primary documents forming the basis of the relationship between the Plaintiff and the Company recognised the existence of disbursements as part of the Plaintiff's liabilities under the Charge. The Letter of Offer provided that the property to be held as security was to be valued at the chargor's own cost and that the legal fees in respect of the charge was to be borne by the Chargor. *See paragraphs 1 and 3 respectively.* In the Charge document, at clause 1.1 and 14.9, the disbursements paid by the Defendant on behalf of the Plaintiff in preparation of the Charge and perfection of the Defendant's security were considered as secured obligations. In that case, the Plaintiff had to reimburse the Defendant the said disbursements with interest.

19. The Plaintiff did not raise an issue with the aforementioned charges before this suit, yet it is clear he was aware of the same. The Defendant is therefore entitled to demand the same from the Plaintiff. The charges paid for by the Defendant were lawfully incurred towards completion and/or perfection of the security. The said charges are secured under the Charge and referred to as "Secured Obligations". See clause 14.9 of the Charge. Besides, the Plaintiff has not shown any evidence that he paid any legal fees or stamp duty towards the perfection of the security, which is ordinarily the responsibility of the Chargor unless agreed otherwise.

20. The primary documents in the resolution of this matter is the Letter of Offer and the Charge document. The Defendant is entitled under Clause 2 and 2.1 to all the secured obligations. This includes the maximum loan amount and the charges incurred in perfecting the security document which is the Charge. The disbursements remained unpaid and thus formed part of the monies advanced to the Plaintiff which attracted interest.

21. In light of the foregoing, it is my considered view that the additional amount of Kshs. 542,140/= included in the loan was lawful as the same was contemplated in the Charge document.

22. The second issue is with regard to the variation of the interest rate. The Defendant by the letter dated 13th November, 2012 notified the Plaintiff that any indebtedness that remained unpaid would attract interest at market rate. Further, vide a letter dated 17th January, 2013 the Plaintiff was informed that his Mortgage was attracting an interest rate of 15% per annum.

23. It is the Plaintiff's case that the Defendant unlawfully varied the interest rate on the loan from 6% to 15% without complying with the provisions of Section 84 (1) (a) & (b) of the Land Act. According to the Plaintiff, the letter dated 13th November 2012 indicating that the loan would attract interest at market rates, was vague as it did not specify a percentage of interest. Secondly, the letter did not specify that it was a notice to vary interest. Lastly, there was no 30 days Notice prior to the variation of the interest.

24. Section 84 (1) of the Land Act states as follows;

"Where it is contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee-

a) Giving the Chargor at least thirty days notice of the reduction or increase in the rate of interest; and

b) Stating clearly and in a manner that can be readily understood the new rate of interest to be paid in respect of the charge." Underlining supplied

25. A reading of this section and particularly the use of the word 'may' reveals that the requirement herein is not mandatory. Therefore the fact that the Defendant did not notify the Plaintiff of the variation of interest within at least 30 days does not affect the right of the Defendant to claim such interest. Furthermore, there was a valid binding contract between the parties, which is the Charge, indicating that the Defendant had the sole discretion to vary interest from time to time. The Charge document also indicated that if a notice of variation was not given, the same would not prejudice or in any way affect the rights of the Defendant to recover any such interest.

26. It is trite law that a Court of law cannot rewrite a contract between the Parties. In that spirit, this Court cannot rewrite the contract that was voluntarily entered into by the Plaintiff. The duty of the Court is to enforce contracts in the absence of any vitiating factors.

27. The Plaintiff is therefore stopped from alleging that he was never notified before the rates were varied, having signed the Letter of Offer and the Charge, which expressly provided that the Defendant was at liberty to vary the interest rates from time to time without notice to the Plaintiff. Though some of these conditions may look arbitrary and unfair, the Court cannot do much to change the same given that the parties agreed to the terms voluntarily. See; ***Elijah Kipng'eno Arap Bii Vs. Kenya Commercial Bank Ltd, Milimani Civil Case No. 324 of 2000.***

28. In addition, it was indicated in the Plaintiff's letter of appointment at paragraph 9 that home and car loans would be available at preferential terms. It is only logical then, that when the Plaintiff was terminated from employment the unpaid debt would attract market rate interests and not the preferential interest of 6%. In simple terms the Plaintiff was not entitled to continue enjoying preferential terms of this loan.

29. The above notwithstanding, it is not in dispute that the Plaintiff was terminated from employment on 13th November 2012. In that case, the new interest rates were to take effect in December 2012. In that month, the Plaintiff and the Defendant were still in the process of clearance. It seems the parties had some disagreements in the process of clearance. Come January 2013, the Plaintiff remitted an amount of Kshs. 9,000,000/= to the Defendant's account on 17th January 2013 and a further Kshs. 1,000,000 on 19th January 2013 to make a total of Kshs. 10,000,000/=. At this point the Plaintiff was convinced that he had cleared the loan. However, the Defendant issued the Plaintiff with a statement of Account demanding the sum of Kshs. 329,418/= as the outstanding amount prompting the Plaintiff to file the current suit.

30. On 26th February 2013, upon the Plaintiff's application, this Court stayed further interest in the loan account and ordered the Plaintiff to deposit the sum of Kshs. 329,418/= in a joint interest earning account in the names of the Advocates for the parties herein.

31. The Defendant further filed a detailed Statement of the Loan Account on 31st March 2014 indicating that the outstanding amount was Kshs. 205,144/=. In this Statement the applicable interest is indicated at 6% all through and it seems the Defendant abandoned the interest rate of 15%. See the Statement of Account at Page 86 of the Defendant's bundle of documents. This Court will consider the sum of Kshs. 205,144/= as the outstanding amount. This is the sum indicated in the corrected and detailed statement of the loan account prepared by the Defendant as ordered by this Court.

32. In view of the findings already made in this ruling above, it is clear that the Plaintiff has failed to prove that he has cleared repaying the loan. It has been established that the sum of Kshs. 542,140/= was lawfully included as part of the loan and the same was to attract interest as long as it remained unpaid. In the circumstances, it is inevitable that in order for the Charge to be discharged, the Plaintiff should pay what is due to the Defendant with respect to the loan disbursed.

33. In the upshot, this Court makes the following orders:

- a) *The Plaintiff to pay the Defendant the balance of Kshs. 205,144/= together with interest at Court rates from 26th February 2013 until payment in full.*
- b) *Upon such payment, the amount of Kshs. 329,418/= deposited in the joint earning account of the parties' Advocates be released to the Plaintiff together with the interest to date.*
- c) *Upon payment of the outstanding amount, as per prayer (a) herein, the Defendant to execute and deliver to the Plaintiff in triplicate within seven days, a Discharge of Charge of the property together with the Plaintiff's title documents and all documents relating to L.R No. 15153/93 which are in the Defendant's possession.*
- d) *The costs of this application is assessed at 50% and given to the Plaintiff/Applicant.*

It is so ordered.

READ, DELIVERED DATED AND AT NAIROBI THIS 30TH DAY OF JANUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Thuo for the Plaintiff/Applicant

M/s Ngonde for the Defendants/Respondents

Teresia – Court Clerk