REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 27 OF 2006

JOHN MBURU…….....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA…….....DEFENDANT

JUDGMENT

1. The plaintiff, **JOHN MBURU,** was a customer of a financial institution named **HOME SAVINGS & MORTGAGES LIMITED.**
2. The plaintiff sought and was granted a loan amounting to Kshs. 440,000/-. The plaintiff avers that the loan was to be repaid together with interest, which was to be calculated at the rate of 16% per annum, compounced on yearly rests.
3. However, the plaintiff also acknowledged that the defendant, **CONSOLIDATED BANK OF KENYA LIMITED**, had a right to vary the rate of interest, provided that the defendant had served a Notice upon the plaintiff. The said Notice was supposed to have been served not less that 14 days before the variation could take effect.
4. According to the plaintiff, if there was an increase in the rate of interest, the defendant was under a contractual duty, to inform the plaintiff of the exact quantum of the monthly instalments which the plaintiff would then be required to pay.
5. It was the plaintiff's case that he never received any Notice from the defendant that the rate of interest would be varied from the initial rate of 16% per annum. In the light of the absence of Notices of variation of the rate of interest, the plaintiff asserted that the rate of interest remained at 16% per annum throughout the period when the loan was outstanding.
6. Nothwithstanding that position, the defendant is said to have demanded from the plaintiff, more than Kshs. 13,000,000/- in September 2003; and more than Kshs. 14,000,000/- in April 2004.
7. As far as the plaintiff was concerned, the demands from the defendant were not accurate. Therefore, the plaintiff said, in his Plaint, that he approached the defendant, with a view to reconciling or verifying the accounts.
8. According to the plaintiff, the defendant responded to his requests by insisting that the accounts provided by the defendant were accurate.
9. Nonetheless, although the defendant had demanded in excess of Kshs. 14,000,000/-, the defendant ultimtely accepted Kshs. 6,000,000/- in full and final settlement of the loan.
10. It was the plaintiff's case that although he agreed to pay that sum, he did so reluctantly and under duress. He feared that the charged property would otherwise have been sold by the defendant, at a throw-away price. In those circusmtances, the plaintiff alleged that he was compelled to make hasty arrangements to sell-off his propety to a third party.
11. After the sale, the plaintiff sought and was given statements of his bank account. A perusal of the said statements of account revealed to the plaintiff that the bank had varied the rate of interest

from 16% upto a peak of 37%. Secondly, the defendant is said to have varied the mode of calculation of the interest, from yearly rests to monthly rests.

12. Those variations were described by the plaintiff as being illegal, null and void, irregular and unlawful because the variations breached the Banking Act, as well as the Mortage instrument.
13. Another complaint which the plaintiff made against the defendant was that the defendant made fraudulent misrepresentation by grossly overstating the amount of money which was due from the plaintiff.
14. The fraudulent misrepresentation was said to have been intended to unjustifiably enrich the defendant, at the expense and to the detriment of the plaintiff.
15. According to the plaintiff, he served demand notices upon the defendant, but the latter failed, refused or neglected to settle the sums due. It was for that reason that the plaintiff decided to institute these proceedings against the defendant.
16. In the case, the plaintiff sought the following reliefs;

a. *Kshs. 4,147,826/-;*
b. *General Damages;*
c. *Interest on (a) and (b) at Court rates;*
d. *Any other or further relief which this court was able to grant.*

17. On its part, the defendant indicated that the letter of offer which the defendant gave to the plaintiff was for Kshs. 440,000/-, which was thereafter payable over a period of five (5) years.
18. The said loan was allegedly offered on condition that the plaintiff would execute a mortgage over the suit property, L.R. No. **6725/22, RIDGEWAYS, NAIROBI.**
19. In accordance with the said letter of offer, the plaintiff executed a mortgage instrument dated 5th December 1983.
20. It was the defendant's case that any such variations as were effected on the rate of interest, were done in accordance with the terms of the mortgage instrument.
21. The defendant also set out particular instances when the plaintiff defaulted in the payment of instalments which were due, culminating in the defendant advertising the suit property for public auction.
22. The first such attempt to sell the property was said to have been made in October 1984. That auction was put-off, at the request of the plaintiff.
23. Although the plaintiff is said to have promised to regularise his account, the defendant asserts that the plaintiff defaulted.
24. Nonetheless, the defendant accepted the plaintiff's request by extending the period for the payment of the loan, from five (5) to ten (10) years.
25. The defendant denied the contention that the plaintiff sought to either verify or to reconcile the statements of account. As far as the defendant was concerned, the plaintiff always had the statements of account in his possession, but he never raised issues regarding the accuracy or otherwise of the said statements.
26. Meanwhile, in relation to the duress which the plaintiff complained about, the defendant contended that the parties held negotiations and that the plaintiff benefitted from independent legal advice from his lawyers.
27. After the negotiations, the parties are said to have reached an agreement which constituted an account stated. In the light of the account stated, the defendant reasoned that the plaintiff was estopped from challenging the agreement between the two parties.
28. The allegations of fraud and negligent misrepresentation were denied by the defendant.
29. The defendant also denied the assertions of loss and damage which the plaintiff attributed to the actions of the defendant.
30. Finally, the defendant asked they court to dismiss the plaintiff's claim.
31. When the case came up for trial, the plaintiff called two witnesses, whilst the defendant called one witness.
32. **PW1, WILHAN LAWRENCE WACHIRA,** was a Certified Public Accountant. He testified that the plaintiff instructed him to examine his mortgage account to ascertain whether or not the interest debited to the account was in accordance with the terms of the mortgage instrument.
33. The plaintiff provided PW1 with the mortgage Deed, together with the bank statements dating

from December 1983 to April 2004.

34. After conducting an audit, PW1 concluded that the defendant had charged interest which was not consistent with the terms of the mortgage instrument. In particular, the defendant had charged interest on monthly rests, instead of on yearly rests; and the defendant had also varied the rate of interest from 16% upto 37%.
35. Whereas PW1 acknowledged that the defendant had the right to vary the rate of interest, he emphasised that the variation could only be effected after the defendant had given Notice of not less than 14 days, to the plaintiff.
36. The plaintiff informed PW1 that he had not been given any notice by the defendant. Therefore, PW1 concluded that there should never have been any variation of the rate of interest, from 16% per annum.
37. By his calculations, based on the 16% rate of interest, PW1 concluded that the balance which was outstanding as at April 2004 should have been Kshs. 1,852,826/-. Therefore, as the plaintiff paid Kshs. 6,000,000/- to the defendant, PW1 concluded that there was an overpayment of Kshs. 4,147,826/-.
38. During cross-examination, PW1 said that if the bank had complied with the variation clause, then the conclusions derived from PW1's audit would be wrong.
39. PW1 also confirmed that the plaintiff did not show him either the Letter of Offer dated 19th October 1983, or the Acceptance which the plaintiff signed.
40. When PW1 was shown the Letter of Offer, he noted that the rate of 16% was subject to other obligations, including the obligation to pay instalments timeously.
41. But when being re-examined, PW1 said that the mortgage instrument did not refer to the Letter of Offer. The implication, in my understanding, was that the mortgage instrument superceded the Letter of Offer.
42. **PW2, JOHN MBURU,** is the plaintiff. He testified that he borrowed Kshs. 440,000/- from **SAVINGS & MORTGAGES LIMITED**, a financial institution which was thereafter taken over by the defendant, **CONSOLIDATED BANK OF KENYA LIMITED.**
43. John said that it is he who applied for the loan. In both the application and the Letter of Offer, John noted that the rate of interest was 16%.
44. After getting the offer from the bank, John signed an Acceptance note. In the said Acceptance note, John indicated that he would secure the borrowing by a mortgage over the suit property.
45. He pointed out that the interest was to be charged at the rate of 16%, calculated on yearly rests. However, he also noted that the rate of interest could be varied, provided that the bank had given him a 14 days Notice.
46. However, John emphasised that he had never been given any Notice for variation of the rate of interest. In particular, John denied ever being served with the Notices which the defendant had incorporated into its Bundle of documents.
47. It was John's evidence that when he offered to settle the loan by paying Kshs. 2,000,000/-,he did so on the basis of *"simple calculations"*. But after his offer was rejected, the bank put John under pressure by instructing auctioneers to auction the charged property.
48. It was in those circumstances, when, according to the plaintiff, he paid the sum of Kshs. 6,000,000/-.
49. But John did not consider that payment to be the end of the matter. His evidence was that he still intended to determine how the bank had gone about setting the rates of interest which it charged to his account.
50. It was then that John instructed Wachira (PW1) to audit his statements of account. And, on the basis of the report by the auditor, John asked the court to order the bank to pay him;

a. *Kshs. 4,147,826/-; and*
b. *General Damages for breach of contract.*

51. According to John, he would not have agreed to pay Kshs. 6,000,000/- to the bank, if he had had the audit report.
52. During cross-examination, John insisted that he made the payment only because he was under duress. At the same time, John confirmed that there was an exchange of correspondence which reflected the offers and counter-offers between the parties. The negotiations commenced with

John's offer of Kshs. 2,000,000/-, and ended with the negotiated sum of Kshs. 6,000,000/-.

53. Although the final payment was said to have been made in full and final settlement of the loan, the plaintiff also insisted that he had actually paid that sum on a *"Without Prejudice basis"*. For that reason, John insisted that the whole matter could still be re-opened.
54. When the plaintiff closed his case, the defendant called its witness, **JULIUS MWANIKI GIKONYO (DW1).** Julius worked as a Credit Officer at Consolidated Bank of Kenya Limited.
55. He confirmed that the plaintiff applied for a loan of Kshs. 400,000/-. Thereafter, the plaintiff's account was debited by the sum of Kshs. 440,000/-, which was inclusive of the amount of Kshs. 40,000/-, in respect to Administrative charges.
56. **JULIUS** conceded that although the defendant was entitled to vary the rate of interest from the original rate of 16%, that could only be done after the bank had given Notice to the plaintiff.
57. The witness drew attention to a Notice dated 19th March 1984, which indicated that interest was being increased from 18% to 19%. However, during cross-examination, Julius conceded that the said letter did not indicate the particulars of the person to whom it was addressed.
58. In the circumstances, I find that that letter cannot have constituted a Notice of variation of the rate of interest.
59. Furthermore, the defendant did not tender any evidence to show how the original rate of 16% had been increased to 18%. In effect, there was a gap in the defendant's records, which remained un-explained.
60. As there was no explanation about when and how the rate increased from 16% to 18%, there was a lack of a foundation upon which the increment from 18% to 19% was based.
61. Julius also drew attention to a Notice dated 22nd August 1984, which indicated that the rate of interest was being reduced to 19%. Pursuant to that letter, the said variation took effect from 15th June 1984. In effect, the variation was being back-dated to a date preceding the Notice.
62. To my mind, even if the said reduction could have been beneficial to the plaintiff, it did not comply with the terms of the mortgage instrument. The defendant should have given at least 14 days Notice before the variation could take effect.
63. But even if it is taken that the Notice was not retro-active, as the new instalments were to become payable from 1st September 1984, the position remains unchanged, concerning the insufficiency of the Notice.
64. Another curious feature of the Notice dated 22nd August 1984 was that whereas the rate of interest was reduced to 19%, the instalment amount increased from Kshs. 11,474/- to Kshs. 12,266/-.
65. In the event, the alleged reduction of the rate of interest was inexplicable, as it resulted in an increase in the amount of money which the plaintiff was required to pay every month. The reduction did not benefit the plaintiff.
66. Julius conceded that the bank debited interest on monthly rests, whilst interest ought to have been charged on yearly rests. That implies that the defendant's computation of the money payable by the plaintiff was erroneous.
67. In the circumstances, the Notices which the bank issued did not contain the accurate figures as regards the plaintiff's indebtedness.
68. I have made reference to the issuance of Notices because Julius readily admitted that the bank did not have proof of service of the Notices on the plaintiff.
69. Does that mean that the bank was not entitled to vary the rate of interest from the original 16%?
70. If that question was to be answered only on the basis of the Notices for variaton, the answer would have been in the affirmative.
71. However, it is to be noted from the plaintiff's letter dated 12th July 2004 that the plaintiff had made the following point;

"IV. The last officially notified rate of interest

was 19% p.a.

.....

VII. I advance the position that the bank

forfeited its chance to increase the interest rate on my account above 19% by virtue of its failure to serve me with appropriate notice under clause 4 (ii) and as such it can have no valid claim on any incremental interest.

VIII. I attach a document marked 'Appendix A' which best represents the final tally of my account after all things are considered. Main features are:

- ***Interest is calculated on yearly rests.***
- ***Interest rate applied is 16% for the first year and 19% for subsequent years, this being the last official rate notified to me under clause 4 (ii)".***

72. Therefore, although the bank did not provide proof that it had served Notices on the plaintiff, to alert him about the impending variations in the rate of interest, the plaintiff did confirm in writing that he received an official notification of the increament to 19%.
73. By the letter dated 12th July 2004 the plaintiff also confirmed that the rate of 19% was for the years subsequent to the first year. In effect, the 19% interest would have been chargeable from 4th December 1984. I have arrived at the date considering that the mortgage instrument is dated 5th December 1983.
74. In the event, I find that the computation of the outstanding balance as at April 2004, by Wilham Lawrence Wachira (PW1) was erroneous.
75. By the letter dated 12th July 2004, the plaintiff told the defendant that the total amount due to him, as a refund, was Kshs. 2,569,587/-. That figure was said to have been based on calculations which took into account interest at 16% for the first year, and interest at 19% for the remaining period.
76. Thereafter, on 20th December 2005, messrs **GACHANJA & COMPANY ADVOCATES,** who were then representing the plaintiff, issued a Demand Notice to the defendant, for a refund of Kshs. 1,852,174/-. That sum was described as the overpayment, considering that as at 30th April 2004 the plaintiff owed Kshs. 4,147,836/-.
77. Three (3) days later, the plaintiff's lawyer pointed out that the refund should be in the sum of Kshs. 4,176,836/-, as the plaintiff's debt had been Kshs. 1,852,174/-.
78. The point to be noted is that the parties had to calculate the balance which was due and owing from the plaintiff immediately prior to the payment which he made, amounting to Kshs. 6,000,000/-. The outstanding balance was not a static figure, which could simply be derived by simple tasks such as deducting the money paid from the original loan amount.
79. The process of ascertaining the balance involved the process of verifying the rate of interest which was applicable during different periods within the lifespan of the loan. On that issue, the parties were not in agreement.
80. But there was an agreement on one issue; the plaintiff did not service the loan in accordance with the terms of the mortgage. Therefore, he did fall into arreas. In those circumstances, the bank had a ligitimate right to demand payment. The bank was also entitled to take steps to realise the secuirty, if the plaintiff did not remedy his defaults in payment. Accordingly, I find that when the bank demanded payment, and later when the bank took steps to realise the security, it was not harassing the plaintiff.
81. The demands made by the bank resulted in the plaintiff holding negotiations with the bank. Often times, the two parties were able to find common ground.
82. I find that the actions of the bank cannot be described as having been calculated for purposes of *"instilling inexcusable terror in the plaintiffs to thereby wring out the monies paid, from the plaintiffs";* as had happened in the case **of MADHUPAPER INTERNATIONAL LTD & ANOTHER VS KENYA COMMERCIAL BANK LTD & 2 OTHERS HCCC No. 1263 of 1992.**
83. From as early as 14th October 1991, the plaintiff thanked the bank for so much understanding and a most caring attitude towards him.
84. On 29th September 2000, the plaintiff wrote to the defendant stating, *inter alia;*

"I have been notified of the intended sale of the above property by public auction scheduled for the 17th November 2000.

For all its implications I find I would be insincere not to acknowledge your great patience over this long outstanding debt and your undoubted good intentions in accomodating me all the way".

85. Thereafter, on 14th May 2003 the plaintiff wrote, again, to the defendant expressing his appreciation to the bank for discounting the loan and also for being generous.
86. There followed offers and counter-offers between the parties until they agreed to settle the matter through the payment by the plaintiff, of Kshs. 6,000,000/-.
87. The point I am making was that the defendant did not jsut suddenly, and without any warning, put up for sale the plaintiff's land. The defendant listened to the proposals put forward by the plaintiff and thereafter gave several chances to the plaintiff to try and pay-off the loan.
88. During the long period of time when the parties discussed the proposals and counter-proposals, the plaintiff had every opportunity to audit the statements of his account. The plaintiff also had the benefit of independent legal advise from several lawyers.
89. If he wished to make payment on a *"Without Prejudice"* basis, there could have been nothing to prevent him from doing so.
90. But he made a choice to tell the defendant that the sum of Kshs. 6,000,000/- would constitute a full and final settlement of the money which was owed to the defendant.
91. In exchange for that payment, the plaintiff sought from the defendant a duly executed conveyance in favour of the purchaser, together a duly executed discharge of the charge.
92. The defendant executed both the discharge of charge and the conveyance, which it then handed over to the plaintiff's advocates.
93. In effect, the bank provided due consideration to the plaintiff. Indeed, the defendant did exactly what the plaintiff demanded in exchange for the payment.
94. Having parted with the security, the defendant's legal position was altered, to its detriment. Therefore, it would be unjustifiable to now turn around and tell the defendant that although it had already altered its position on the basis of the understanding reached between the two parties, that whole understanding now counted for nought.
95. In the case of **MOORGATE MERCANTILE CO. LIMITED VS TWITCHINGS [1976] 1 QB. 225** at page 241, Lord Denning MR *expressed himself thus, when discussing "Estoppel by Conduct;"*

"Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and equity. It comes to this: when a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so. Dixon J. put it in these words:

'The principle upon which estoppel in pais is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he caused another party to adopt or accept for the purpose of their legal relations'

96. Applying that principle to this case, I find that the plaintiff led the defendant to believe that when the plaintiff paid Kshs. 6,000,000/- and the defendant discharged the security, that would result in the full and final settlement of the debt which the plaintiff owed the defendant.
97. Accordinlgy, the plaintiff is estopped from re-opening the matter. And on that basis, the plaintiff's claim cannot be sustained. It is therefore dismissed with costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **February** 2015.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Mrs. Ochieng for the Plaintiff.

Mrs. Oketch for the Defendant.

Collins Odhiambo – Court clerk.