REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 74 of 2011

CHRISTOPHER NDOLO MUTUKU.....1ST PLAINTIFF

CAROLINE NJOKI MUTUKU.....2ND PLAINTIFF

VERSUS

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. By way of a Chamber Summons dated 19th February, 2012, the Plaintiffs applied to this Court under Sections 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act and Order 8 Rules 1, 3 and 4 of the Civil Procedure Rules for Orders that a proper account with all necessary enquiries, specifically the legally applicable interest rate respecting the Plaintiffs' mortgage account with the Defendant, be taken. Further, they sought orders that any monies found to be due and owing to the Plaintiffs from the Defendant be repaid forthwith and in any event, within seven (7) days of the taking of the account. They also sought for the costs of the Application.

2. When the Application came up for hearing before this Court on 20th July, 2012, the parties recorded a consent order in the following terms:-

a) that the question of the rate of interest applicable to the Loan facility in issue be determined as a preliminary issue in respect of the application dated 12th February, 2012

b) that the Defendant files and serves its Replying Affidavit within 14 days of 20th July, 2012 and the Plaintiffs be at liberty to file a Further Affidavit within 7 days after service of the Replying Affidavit

c) that the parties file and exchange their written submissions in respect of the issue of the rate of interest within 14 days of the Service of the Replying Affidavit by the Defendant.

d) that the matter be mentioned in Court on 27th September, 2012 for purposes of taking a ruling date.

3. The matter subsequently came up for the hi-lighting of the written submissions by both parties. It is in respect of that preliminary issue of the applicable rate of interest to be levied upon the Loan facility that this Ruling is about.

4. A brief background to the matter will reveal that this is a dispute between the Plaintiffs and the Defendant arising from a Loan facility of Kshs. 10,530,000/- advanced to the Plaintiffs by the Defendant in or about July, 2007. It is contended that the Plaintiffs fell into arrears necessitating the Defendant to exercise its statutory power of sale to recover the amount outstanding. Interim orders were however granted restraining the Defendant, its servants or agents from advertising, selling, disposing of, alienating or in any manner dealing with the Plaintiff's property known as L.R. No. 209/9680/4 until such a time the Court would deem appropriate. There is no dispute that the Plaintiff did pledge L.R. No. 209/9680/4 as security for the said facility. It is also not in dispute that the Defendant has expressed its intention to realise the security to recover the amounts it alleges is still outstanding.

5. Mr. Mutuku, learned Counsel for the Plaintiff submitted that the Defendant habitually altered the rate of interest without duly informing the Plaintiffs which was in breach of express provisions in the Charge document dated 28th September, 2007, that the charge document had stipulated that any variation of interest was to be effected with due notice to the Plaintiffs and would become payable on the first day of the month next after notification of the amount thereof to the Plaintiffs. It is argued for the Plaintiffs that the rates of interest variously levied by the Defendant were too exorbitant and served to essentially clog the equity of redemption. It was further contended that the letters produced by the Defendant to support its averment that it had served notices to the Plaintiffs on the change of rates of interest have no merit. The Plaintiff's counsel argued that the Letters were not delivered to the Plaintiff in accordance to the provisions of Clause 11 of the Charge which provided for a series of delivery modes that appear not to have been invoked. Counsel specifically pointed out that two letters, namely the ones dated 15th December 2011 and 1st August 2011 do not show the Plaintiffs address and only read "TO BE ADVISED KENYA". It is the Plaintiffs' contention that with these anomalies, it was impossible for the Plaintiffs to have received this communication despite the Defendant having been seized with the Plaintiff's proper address evidenced in the Defendant's letters dated 11th July 2007 and 22nd December 2008 produced as **"HS1",** respectively. The Plaintiffs further contend that the notice of change of interest rates by way of publication through daily newspapers was not an agreed method of communication and the Defendant could not therefore rely on that alleged mode of communication.

6. On his part, learned Counsel for the Defendant was of the view that the Plaintiffs arguments on the application of the interest rates has no basis. In the Affidavit of Hamilton Suba sworn on 4th October 2012, the Defendant maintained that the facility had incorporated the Defendant's standard terms and conditions, which provided for the variation of the rate of interest pegged on the Defendant's base rate. That the Plaintiffs had not demonstrated that the Defendant had departed from the standard terms and conditions. The Defendant's also contended that the Charge dated 28th September 2007 was pursuant to and followed the General Terms and Conditions of the Application form of the Loan facility (GTC). It was further contended that the Defendant's base rate is a publicly quoted rate that is subject to change from time to time at the Defendant's discretion. That further, all customers of the Defendant are always notified of the changes of the base interest rate through various publications in the daily newspapers and in this regard, such changes to the rate of interest are duly advertised and become public knowledge. The Defendant therefore urged the court to find that the GTC are applicable in determining the interest rate applied to the loan facility and that the Defendant's variation of the rate of interest was legal and permissible under its agreement with the Plaintiffs.

7. I have considered the rival submissions of counsel and also the materials placed before me. At the commencement of the hearing of the applications, the parties agreed that the court should first determine the rate of interest as a preliminary issue. It is the contention of the Plaintiffs that the interest rates were varied by the Defendant without notification to the Plaintiffs on countless times in contravention of what is mandated by clause 2 (b) and (c) of the Charge document dated 28th September, 2007. Clause 2 of the Charge provides as follows:-

"2. COVENANT TO PAY INTEREST.

The Chargor hereby agrees with the Chargee that the rate of interest payable on all moneys hereby secured shall be determined as follows:-

a) Until service of such a notice as is hereinafter referred to (or as otherwise provided under Sub-Clause 2(e) below) interest shall be at the rate of Thirteen per centum (13%) per annum;

b) The Chargee reserves the right to vary the rate of interest and may from time to time serve on the Chargor notice forthwith requiring payment of interest at such increased or reduced rate as shall in the decision of the Chargee fairly represent the rate of interest commonly chargeable in Kenya having regard to such circumstances as the Chargee considers to be relevant and the decision of the Chargee in this behalf shall not be questioned on any account whatsoever;

c) In any event of the Chargee requiring a variation in the rate of interest under the provisions of sub-clause 2(b) above the Chargee will notify the Chargor of the amount of the resulting increased or decreased monthly instalments payable under the provisions of sub-clause 1(b) above and the first of such increased or decreased monthly instalments shall become due and payable on the first day of the month next after notification of the amount thereof to the Chargor;……" (Emphasis supplied)

8. From the foregoing, it is clear that the rate of interest payable on the facility was agreed at 13% per annum. The Defendant had the exclusive and unlimited right to vary the said rate of interest and notify the Plaintiffs of such variation. The clause further required that once there had been such variation of the rate of interest, the Defendant would communicate and or notify the Plaintiff the resulting increased monthly instalments. The said increased monthly payments were payable on the first day of the month next after notification. The Plaintiffs contend that the Defendant wrongfully and arbitrarily varied the rate of interest on various dates to 13.75%, 15.75%, 20%, 18.5%, 25.5% and 23.5%, contrary to what had been agreed in the charge document.

9. The Defendants response to this was that GTC applied and that the Plaintiff had been duly notified both through advertisements in the daily newspapers and by letters dated 22/09/2008, 01/08/2011 and 15/12/2011, respectively. The Defendant also produced a schedule detailing the application of the various interest rates.

10. There is no dispute that there was change of the rate of interest. The issue is whether such change was lawful and in accordance with the terms of the contract between the parties. In order to discern whether the changes were in terms of the contract, is imperative to revert to the said contract for its terms and conditions. The contract between the parties is contained in two documents, the GTC dated 4th July, 2007 and the Charge dated 28th September, 2007, respectively.

11. I have examined the said documents and it is clear that the GTC did not fix the rate of interest payable on the facility. Such rate was disclosed in two documents the Letter of Offer dated 11th July, 2007 and the charge dated 28th September, 2007. The Letter of Offer disclosed that the Bank's base rate was 13/75% and with a margin of -0.75%. On the other hand, the Charge provided at Clause 2(a) that until service of notice of change of rate of interest, the interest payable was 13% per annum. The charge was executed by both parties whilst the Letter of Offer was signed by the Defendant only. Accordingly, my view is and I so hold that as at the commencement of the facility on 28th September, 2007, the rate of interest agreed upon by the parties was 13% p.a. I reject the assertion by Hamilton Suba in paragraph 7 of his Affidavit that the interest rate under the facility was teh bak's base rate plus a margin of 0.75%. the G.T.C does not disclose that fact. The letter of offer indicated the bank's base rate to be 13.75% with a margin of negative (-ve) 0.75%. thus the rate of 13% p.a. appearing On the Charge document

12. From the evidence on record, the Defendant seems to have applied the rate of interest of 13.75% from the commencement of the facility. There is no evidence to show that the Plaintiffs were notified of the charge from 13% to 13.75% in terms of the contract between the parties. Accordingly, the charge of 13.75% for the period 2007 and September, 2007 was irregular and without any basis, I will shortly revert to the other rates of interest charged.

13. The Defendant contended that it has always notified its customers of the changes in its base rate through publications in the daily newspapers and that all changes to the rate of interest have been

advertised. Firstly, the Defendant did not produce any evidence of any such publication or advertisement of the changes complained of by the Plaintiffs. It is a requirement of the law that he who alleges must prove. The Defendant has not proved the allegation of publication. Secondly, even if there was such publication, which is not the case, that is not one of the modes agreed upon by the parties. Clause 11 of the Charge document provided that notices to the Plaintiffs would be by either personal service or leaving the same at the last known place of residence or business in Kenya of the Plaintiffs or by registered post to the last known address of the Plaintiffs. I have looked at the GTC, the same does not provide the mode of giving notice and for that reason, I hold that the only way notice of change of interest could be effected upon the Plaintiffs is as provided for in Clause 11 of the Charge.

14. It may be argued that publication of change of rate of interest in the daily newspapers is an effective convenient and cheaper way of communicating the change of the rate of interest to the borrowers. Lenders may argue that it is cumbersome to write to each of their individual customers to advise on the change of interest rates. To my mind, that cannot be acceptable for reasons that, the lenders do enter into individual contracts with each of their customers therefore having individual obligations *inter se*. Further, it is not every day that every borrower flips through the daily newspapers to see if his lender has effected changes of the rate of interest applicable to his borrowing. In any event, if a lender wishes to use the media as a form of communication, be it electronic or print as one of the mode of notification, it should expressly state so in the security instrument. My thinking is informed by the fact that, the purpose of the notice to a borrower is to put him on notice of the intended increased/decreased liability. With the usual penal consequence (by way of penalty interest, default charges and other charges) that follow default in making an adequate repayment on the stipulated time, media publication does not give a borrower adequate, convenient and effective notice to be able to carry out his obligations under the Charge document to adjust the repayment on time. In any event, if a Bank can render a Statement of Account on monthly basis to all its customers, it will likewise make commercial sense if the Bank should notify its borrowers individually of changes in the interest rates that increase the borrower's liability/burden as and when they arise. Accordingly, I hold that, any publication in the newspapers of the change in the rate of interest, which I have found there was none, was not in accordance with the contract between the Plaintiffs and the Defendant and did not affect the rate of interest on the facility.

15. The other issue that arise is, which as between the GTC and the Charge would apply to the Plaintiffs facility. I raise this issue because whilst the Defendant contend that the GTC allowed it to change its publicly quoted base rate from time to time, the Plaintiffs insist that the Charge document required that the Plaintiffs be notified of such change. My view is that, whilst a Letter of Offer may incorporate the General Terms and Conditions of a lender, once a subsequent document of contract such as a Charge is executed, it is expected that all terms and conditions contained in the Letter of Offer or such GTC are expressly incorporated or they automatically merge with the Charge. Threfore when there arises a conflict between the terms and conditions in the G.T.C/Letter of Offer and the Charge, the provisions of the latter prevails. This is so because the Charge document is the later in time and it is assumed that when the parties execute the same, they are aware of the provisions of the earlier documents. I am not alone in his. In the case of John **Muriithi Gacugo Ng'ang'a –vs- HFCJ & Anor NRB HCCC No.15 of 2005 UR** – Hon. Kimondo J delivered himself thus:-

"The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intentions of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supercede any other agreement between the parties."

16. In view of the foregoing, my view is that whilst the Defendant had the right to vary its rate of interest, notice of such variation should have been given to the Plaintiffs in terms of Clause 2 (a) (b) and (c) of the Charge.

17. Being of the aforesaid conclusion, I consider it necessary at this point to examine whether change of rate of interest variously effected by the Defendant was in accordance with the Charge documents. From the record, the following are the various changes in the rates of interest charged by the Defendant and the notifications thereof:-

a) 13.75% p.a. – 2007 to 31/08/2008.

As I have already held above, this change had no basis as the Charge expressly indicated the interest as 13%.

b)15.25% from 1st September, 2008 to June, 2010. The change of the rate of interest to 15.75% was communicated to the Plaintiffs by a letter dated 4th September, 2008. I note that the letter exhibited as "CNM2" was properly addressed to the Plaintiffs to their known address. However, the letter purported to apply the rate retrospectively to 1st September, 2008. This was contrary to Clause 2(a) and (c) of the Charge which requires that such change shall be effective from the first day of the month next after notification. Accordingly, I hold that the rate of interest was properly varied from 13% p.a. then prevailing to 15.25% from 1st October, 2008 to end of June, 2010.

c) 14.25% - from July, 2010 to July, 2011 – there was no evidence of service of any notice. Accordingly, the change did not become effective in terms of Clause 2(a) of the Charge.

d)15.25% - From 1st August, 2011 to September, 2011. The letter of notification is dated 1st August, 2011. It has no address. There is no evidence to show that it was personally served upon the Plaintiffs. I therefore hold that the changes were never effective.

e) 16.25% - From 1st October, 2011 to November, 2011. There was no evidence of any notification. The same therefore did not become effective.

f) 24% - From 1st January, 2012. Notification for this change is contained in a letter dated 15th December, 2011. However, the letter does not contain the Plaintiffs' address. There is no evidence to show that the same was delivered to the Plaintiffs and if so how the notice thereof was effected. The Plaintiffs have denied ever receiving the same. Evidence of service of the same in terms of Clause 11 lacking, I am inclined to hold that the same never become effective.

18. I have endevoured to analyse the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the Charge document that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the Defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected. Clauses 2 and 11 of the charge must be given effect. I cannot re-write the agreement or the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it. This is what the Court of Appeal seems to have said in the case of **Shah –vs- Guilders International Bank Ltd (2003) KLR 8**

19. Accordingly, I make a determination of the rate of interest applicable to the facility as follows:-

a) From the date of drawdown to 30th September, 2008 – 13% per annum.

b) From 1st October, 2008 to date – 15.25% per annum.

Having determined the preliminary issue of the rate(s) of interest applicable, the parties are at liberty now to prosecute the rest of the motion if they deem necessary. The costs of the application shall be in the cause.

It is so ordered.

DATED and DELIVERED at Nairobi this **15th** day of **February**, 2013.

A. MABEYA

JUDGE