



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**HCCC NO. 1013 OF 1999**

**JOHN G. KAMUYU.....1<sup>ST</sup> PLAINTIFF**

**ELIZABETH WAITHERA KAMUYU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SAFARI 'M' PARK MOTORS..... DEFENDANT**

**JUDGMENT**

**The Plaintiffs' Case**

The Plaintiffs claim that on or about September, 1998 they sought and were granted by the Defendant a soft loan of Kshs.300,000/= for purposes of meeting appraisal fees required by Savings & Loan (K) Ltd in connection with a financial facility which the Plaintiffs had applied for. The Plaintiffs alleged that in consideration for being granted the bridging loan, they deposited with the Defendant their title No. L.R. No. 12243/8 to hold as security for the loan and not to transfer, sell or otherwise dispose of the same.

It is the Plaintiffs case that in breach of the agreement/understanding, the Defendant fraudulently and without their consent applied for, and caused the transfer of the title to itself. The particulars of fraud alleged to have been committed by the Defendant are as follows:-

- a) Making and causing the registration of an instrument of transfer dated 12<sup>th</sup> February, 1999 without consent, knowledge and authority of the Plaintiffs.
- b) Forging the signatures the Plaintiffs on the instrument of transfer dated 12<sup>th</sup> February, 1999.
- c) Applying for and obtaining rates clearance certificate dated 11<sup>th</sup> February, 1999 without authority and consent of the Plaintiffs.
- d) Applying for the obtaining rent clearance certificate dated 18<sup>th</sup> February, 1999 without authority and consent of the Plaintiffs.
- e) Applying for and obtaining letter of consent from Commissioner of Lands dated 18<sup>th</sup> February, 1999 without consent and authority of the Plaintiffs.

The Plaintiff consequently filed the suit herein by way of a Plaint dated 18<sup>th</sup> May, 1999 seeking the following substantive prayers:-

- 1) Annulment of instrument of transfer dated 12<sup>th</sup> February 1999 registered as entry no. 72892/2.
- 2) An injunction restraining the Defendant by itself, servant, agent, employee or otherwise howsoever from transferring alienating, disposing or otherwise dealing with LR no. 12243/8.

The 1<sup>st</sup> Plaintiff (PW1) testified during the hearing of the suit, and called one more witness. PW1's witness statement signed and dated on 14<sup>th</sup> May 2012 was admitted by the court as his evidence. PW1 stated that he is a retired civil servant and that in September 1998, he and his wife, the 2<sup>nd</sup> Plaintiff herein, had a building project and approached the Defendant who was situated at Bima House for a soft loan. It is the 1<sup>st</sup> Plaintiff's testimony that they met one Peter Njeru at Bima House and informed him that they wanted a soft loan of Kshs.300,000/= and offered their title for LR. No. 12243/8 - IR 72892 as security. The Plaintiffs referred the court to a copy of the title which was annexed to the Plaintiffs' bundle of documents dated 16<sup>th</sup> May, 2012 which were produced in evidence as the Plaintiffs' Exhibit 1.

PW1 informed the court that before delivering the title deed, the said Peter Njeru requested to view the property offered as security, and a representative from the Defendant was shown the beacons and the boundaries of the same. Further, PW1 stated that they entered into an agreement for a loan of Kshs.305,000/= and the court was referred to the agreement dated 12<sup>th</sup> September, 1998 in the Plaintiffs' Exhibit 1.

PW1 did not dispute receiving the loan of Kshs 305,000/=, but averred that he did not know what compound interest meant as he did not have independent legal advice at the time, and contended that he would not have taken the money had the Defendant explained the same to him. According to PW1, the representative of the Defendant who had gone to see the property who informed him that the loan amount had gone up to Kshs 560,000/= in 3 months because of the compound interest. PW1 stated that he wasn't able to pay the Kshs 560,000/=, and his offer to pay back the Kshs 305,000/= was declined by the Defendant who threatened to sell the plot.

Further, PW1 stated that in February 1999, they went to the Ministry of Land to conduct a search where they found that the Defendant had forged their signatures in a transfer of their property. PW1 made reference to the instrument of transfer dated 12<sup>th</sup> February, 1999 in the Plaintiffs' Exhibit 1 and stated that the signatures therein were not those of the Plaintiffs. Further, he denied knowing or appearing before Peter Gitau Ngige who witnessed the signatures and stated that they never received Kshs.800,000/= stated in the transfer.

The witness informed the court that inquiries made by his advocates, Oraro & Company Advocates, about Peter Gitau Ngige from the Law Society of Kenya revealed that he had never taken out a practicing certificate, and was struck off the Roll of Advocates. The letter from Oraro & Company Advocates to the Law Society of Kenya dated 19<sup>th</sup> March, 2012 as well as the reply from the Law Society of Kenya dated 30<sup>th</sup> April, 2012 were filed in the Plaintiffs' Exhibit 1.

The 1<sup>st</sup> Plaintiff urged the court to find that the Defendant had forged their signatures and transferred their land, in addition to using it to obtain a loan of Kshs 1,400,000/= from Barclays Bank. PW1 stated that although the Defendant never made a formal demand for the monies lent, he was prepared to refund the Kshs 300,000/= lent.

During cross-examination, PW1 admitted to having been advanced Kshs 305,000/= in addition to having signed the agreement. Further, he admitted to having not repaid the loan and stated that according to paragraph 5 of the agreement, the consequences of non-repayment was that the property would be disposed of. Although PW1 stated that paragraph 6 of the agreement required him to execute the necessary documents in the event he defaulted, he averred that the Plaintiffs never signed a transfer. PW1 testified that he understood the agreement save for the clause on the compound interest.

PW1 reiterated that he did not know Mr. Gitau, Advocate who witnessed the forged signatures. According to PW1, the letter by Oraro & Company was written in March 2012 because the Plaintiffs had gone to America and learnt of the transfer late. It is the evidence of PW1 that he did not repay the money because the Defendant refused to take Kshs 305,000/=. Further, PW1 stated that he has been paying the rates to the Nairobi City Council with respect to the transferred property all through the years, and he contended that the Defendant was not entitled to release the security. PW1 stated that he had no proof that he reported the matter to the CID in February, 2000.

In re-examination, PW1 stated that the fraud alleged in his Complaint was in respect of the Defendant obtaining rent and rates clearance certificates. PW1 stated that he discovered the fraudulent transfer in February, 1999, and instructed his lawyer who obtained court orders which were registered as item No. 3 on the certificate of title. While explaining the cause of delay in taking action between 1999 to date, PW1 stated that it took time to get hearing dates and also attributed the same to occasional missing of the court file. The witness informed the court that he was agreeable to payment of interest at court rate.

The 2<sup>nd</sup> witness to testify for the Plaintiffs' case was Antipus Nyanjwa (PW2), who stated that he was a forensic document examiner with over 15 years experience with the Kenya Police and Criminal Investigations Department. His evidence was that on 3<sup>rd</sup> May 2012, he received a request from John Mbaluto of Oraro & Co. Advocates to examine and compare two disputed signatures of John Gakunga and Elizabeth Waithera on a transfer dated 12<sup>th</sup> February, 1999, against 5 other sets of specimen signatures and known signatures of the two.

PW2 stated that the five sets of documents used for comparison were specimen signatures of John Gakunga dated 3<sup>rd</sup> May, 2011, the known signature of John Gakunga in an affidavit of signature verification dated 27<sup>th</sup> September 2011, the known signatures of John Gakunga and Elizabeth Waithera in an agreement dated 12<sup>th</sup> September, 1998, the known signature of John Gakunga in a further agreement dated 12<sup>th</sup> September 1998 as well as the known signature of Elizabeth Waithera in an affidavit of signature verification dated 12<sup>th</sup> September 2011.

It was the evidence of PW2 that after his examination and comparison, his opinion was that John Gakunga and Elizabeth Waithera did not sign the transfer dated 12<sup>th</sup> September, 2011 and therefore, that the signatures on the transfer were forgeries. PW2 stated that the report on his findings was prepared and signed on 12<sup>th</sup> May, 2012 and the same was annexed to the bundle of documents produced as Plaintiff Exhibit 1.

During cross-examination, PW2 stated that he did not meet John Gakunga and Elizabeth Waithera face to face, and clarified that the known signatures are usually specimen signatures given for comparison, as well as known signatures made in the normal course of events. While admitting that he never saw the original transfer that was in question, PW2 stated that he could tell the pen pressure from a photocopy depending on how the ink was distributed.

Upon re-examination, PW2 stated that it was not a requirement to meet the person whose signature was being examined. The evidence of PW2 marked the close of the Plaintiffs' case and the matter proceeded for defence hearing where the Defendant called one witness.

### **The Defendant's Case**

The Defendant in its defence dated 12<sup>th</sup> November, 2012 denied the Plaintiffs averments and more particularly, denied having granted the Plaintiffs a soft loan of Kshs.300,000/= in September, 1998. In addition, the Defendant denied that the Plaintiffs deposited title No. L.R. No. 12243/8 with it for the purposes of securing payment of the loan and the particulars of fraud set out in the foregoing were also denied.

Francis Kihonge Ng'ang'a (DW1) testified on behalf of the Defendant and stated that he was one of the

directors of the Defendant. He produced the Defendant's bundle of documents dated 15<sup>th</sup> October 2012 as the Defendant's Exhibit 1. DW1 referred the court to the agreement dated 12<sup>th</sup> September 1998 in the Defendant's bundle of documents where the Plaintiffs borrowed Kshs.305,000/=, and stated that the Defendant had also borrowed the money it lent to the Plaintiffs from financiers who were charging a high interest rate. According to the DW1, the Plaintiffs gave him their title deed, signed transfer form and a power of attorney.

It was the testimony of DW1 that the Plaintiffs did not pay the debt on 12<sup>th</sup> October 1998 as agreed, and has not done so to date. DW1 stated that in February 1999, the Defendant did a transfer of the Plaintiffs' property to its name. In further testimony, he stated that the court issued orders stopping the transfer of the property in May 1999. DW1 averred that the property was charged to Barclays Bank after the orders became spent.

Further, DW1 alleged that in December 1999, the 1<sup>st</sup> Plaintiff borrowed an additional Kshs 100,000/= and deposited another security. According to DW1, the Plaintiff did not repay the loan and the security was transferred to the Defendant who charged it. DW1 denied the allegation of fraud set out in the Plaintiff, and stated that the agreement stipulated how they got the transfer and title from the Plaintiffs who ceased to have any authority or mandate over the titles. According to DW1, they were not required to get any consent from the Plaintiffs. DW1 admitted to having previously lent small amounts of money to the Plaintiffs, and stated that this was done on a friendly basis as the Defendant was not in the business of lending money.

It was the evidence of DW1 that the compound interest of 30% in the loan agreement was high because they too were borrowing the money, and the Plaintiffs were to repay it in a month's time. According to him, the items in the agreement on interest as well as the repercussions of default were discussed before the agreement was executed. Further, DW1 stated that they appeared at Karen Police Station where the Plaintiffs admitted to having given their title and transfer voluntarily and therefore, that there was no fraud involved in their procurement.

DW1 reiterated that the Plaintiff has never paid sum of Kshs 305,000/= with the compound interest since 1998. He informed the court that he could transfer the property to the Plaintiffs were they to pay the borrowed amount with accrued interest. DW1 maintained that he did nothing illegal and acted as per the agreement.

During cross-examination, DW1 stated that he was lending the money to the Plaintiffs on friendly terms and admitted to not having a licence to undertake money lending business. DW1 had no evidence to prove that the Defendant was borrowing the money they lent the Plaintiff. DW1 reiterated that the Plaintiff deposited the title and duly executed transfer forms at the time of signing of the agreement on 12<sup>th</sup> September 1998. This witness informed the court that the Plaintiffs paid for the rates, obtained the rates clearance certificate and availed them to Defendant. DW1 averred that the Plaintiff signed the transfer dated 12<sup>th</sup> September 1998 in the Defendant's Exhibit 1 as well as the transfer dated 12<sup>th</sup> February 1999 in the Plaintiffs' Exhibit 1.

DW1 further stated that there was no loan agreement entered by the parties with respect to the further loan of Kshs.100,000/=, and he maintained that the charge in favour of Barclays Bank was executed when the court orders were already spent. DW1 stated that the Plaintiffs' signatures in the forensic examiners report were not forgeries. He informed the court that he could not recall if E. N. Nga'nga' Advocate witnessed the agreement, and stated that although the agreement was silent on the issue, the Plaintiffs were briefed on the 30% compound interest by the Advocate.

Further, DW1 testified that he could not recall Peter Gitau Ngige who witnessed the signatures in the transfer. He contended that he had maintained the *status quo* ordered by the court, and save for temporary offices which were built before they came to court, no permanent house had been built on the land. DW1 averred that by the time the court was issuing *status quo* orders, the property had been leased to a Mr. Kamau who operates a garage in the premises. DW1 denied that the compound interest rate of 30% was

exorbitant, and stated that he was amenable to negotiations to reduce the interest rate since he was financing a friend.

In re-examination, DW1 stated that he was not in the business of lending money. He averred that an agent presented the transfer for negotiation and reiterated that the 1<sup>st</sup> Plaintiff cleared the rents and rates. DW1 maintained that they had complied with the court orders as the property had been leased before they came to court.

### **The Submissions**

The court directed parties to file written submissions, and the Plaintiffs' counsel in submissions dated 4<sup>th</sup> July, 2013 stated that they had shown to the requisite standard that the signatures on the disputed transfer form were forgeries. Counsel submitted that the expert opinion of Antipas Nyanjwa that the transfer is a forgery was not challenged by any rebuttal evidence put forth by the Defendant.

It was argued for the Plaintiff's that the particulars of fraud listed in the Plaint were fully proved to the necessary standard as set out in the case of **Urmila w/o Mahendra Shah -vs- Barclays Bank International Limited & Another, (1979) KLR 76** where the court stated that the standard of proving allegations of fraud was more than balance of probabilities. The Plaintiffs' submitted that the Defendant's failure to call Peter Gitao Ngige, the Advocate who allegedly witnessed the disputed signatures infers that the signatures were forgeries. For this submission, the Plaintiffs relied on the case of **Kimotho -vs- Kenya Commercial Bank (2003) I EA 108** where the court held that failure by a party to call a reasonably expected witness may prompt to Court to infer that that person's evidence would not have helped that party's case.

It is also the Plaintiffs submission that once fraud is proved, the court will nullify any instrument used to perpetrate the fraud. Further, the Plaintiffs argued that the transfer was not properly drawn or attested by a duly qualified Advocate as required by sections 34(1) of the Advocates Act (Cap. 16) Laws of Kenya. The Plaintiffs argued that it had been shown that the transfer document was witnessed by an advocate who did not hold a practicing certificate, and relied on the case of **National Bank of Kenya Limited -vs- Wilson Ndolo Ayah (2009) eKLR** where a Charge and Guarantee instrument that had been prepared by an Advocate without a valid practicing Certificate were declared invalid.

While submitting that the loan agreement dated 12<sup>th</sup> September 1998 was illegal, null and void, Counsel stated that the Defendant's witness had testified that the Defendant did not have a licence to engage in money lending at interest to members of the public. The Plaintiffs argued that only a duly licensed institution licensed under the Banking Act or any other relevant statute, can undertake the business of money lending at interest to members of the public. It was argued that the Defendant's lack of licence to carry out money lending business renders the loan agreement dated 12<sup>th</sup> September 1998 illegal, null and void, and un-enforceable and therefore, that the Court cannot be called upon to perpetuate an illegality. Counsel argued that the Defendant's recourse lies in restitution of the monies advanced which was not counterclaimed in this case.

Further, it was argued that the unconscionable bargain due to the applicable 30% interest rate compounded monthly vitiates the loan agreement and the Plaintiffs referred the court to the case of **Gimalu Estate Ltd & 4 others -vs- International Finance Corporation & Another (2006) eKLR** as well as the case of **Alec Lobb Ltd -vs- Total Oil GB Ltd (1983) 1 WLR 87**. Counsel submitted that were the Plaintiffs to repay the sum of Kshs.30% interest compounded monthly from 12<sup>th</sup> September, 1998 to date, the sum payable would be Kshs.20,103,170,624,900,000,000/= which is outrageous and unconscionable to warrant the agreement being set aside by the court.

Counsel submitted that the Plaintiffs had established a case of fraud to allow intervention by the court and the equity maxim that "equity will not suffer a wrong to be without a remedy" was relied on. Lastly, the Plaintiffs submitted that costs should follow the event and be awarded to the successful party. Counsel referred the court to Section 27 of the Civil Procedure Act as well as **Halsbury's Laws of England 4<sup>th</sup>**

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The Defendant's counsel filed submissions dated 21<sup>st</sup> July, 2013 wherein he argued that no fraud was committed by the Defendant. It was submitted that the agreement dated 12<sup>th</sup> September, 1998 was not illegal or unenforceable as alleged by the Plaintiffs, and that the construction and interpretation of the terms of the loan agreement was admitted. It is the Defendant's submission that it is undisputed that it lent the Plaintiff Kshs.305.000/= which was to be repaid between 12<sup>th</sup> September 1998 and 12<sup>th</sup> and October, 1998, and further, that the Plaintiff has never repaid the lent money to date.

While stating that the Plaintiff was fully aware that there was a default clause which entitled the Defendant to rightful and legally exercise his recourse to recover the loan, Counsel argued that the issues raised in the Plaintiff's submissions are unmeritorious, misconceived and a gross abuse of the legal process aimed at circumventing contractual obligations arising from the Plaintiffs' breach of the agreement.

It was the Defendant's submission that the suit was filed on 20<sup>th</sup> May, 1999 which was over 7 months after the Plaintiffs had breached the agreement. Counsel stated that the Plaintiffs had acted wrongfully by rushing to court late and reliance was placed on the equitable maxim that equity regards as done that which ought to be done. Further, it was submitted that the Plaintiffs participated in the agreement and were estopped by their conduct from raising the issue of illegality which was not pleaded in the Plaint. The Defendant argued that in their pleadings, evidence and submissions, the Plaintiffs had failed to prove that there was any illegality in the agreement, or that the same was contrary to public policy and that the court cannot assist the Plaintiffs from the effects of his faults.

Further, it was argued that there was no evidence that the Plaintiffs were induced by duress, misrepresentation or mistake to enter into the agreement and reliance was placed on the case of **Osman - vs- Malangwa (1995-1998)**, 2 EALR 266, **Jiwaji -vs- Jiwaji, (1968) EA 547** as well as **Tsehange -vs- School Outfitters (U) Ltd, EALR (2000) I EA 20** for the proposition that in the absence of fraud, duress, undue influence, mistake and misrepresentation, courts will enforce a promise so long as some value for it has been given.

While submitting that Antipus Nyanjwa was not an expert witness whose evidential value fell beyond the expectations under the Evidence Act, Counsel for the Defendant stated that his report did not specify which cases be handled and further, that his admission of not seeing the Plaintiff append his signature as a specimen for analysis infers that the assessment was based on general assumptions.

The Defendant submitted that the Plaintiffs' claim on forgery cannot be sustained and argued that the rates clearance, consent and instrument of transfer were obtained with the full consent, authority and knowledge of the Plaintiffs who performed their contractual obligations voluntarily and executed all documents to facilitate their transfer. It is the Defendant's submission that the Plaintiff's reference to Peter Gitau Ngige has no credence since the importance and value of this witness was never shown and the Plaintiffs never applied to have summons issued against this person to appear before the court.

Counsel for the Defendant argued that the Plaintiff's ignorance was not a defence and further, that it was not the court's duty to rescue and salvage the Plaintiffs from the consequences of their default. The Defendant argued that since the Plaintiffs are seeking an equitable relief, they must come to equity with clean hands, and the Plaintiffs were accused of having never made any effort to settle the amount claimed. Counsel for the Defendant stated that there was no evidence that the Defendant was operating a lending and borrowing business.

In respect of the interest rate at 30% being too high and unconscionable, the Defendant submitted that the rate was not mandatory but discretionary based. Counsel argued that the interest rate was not fixed under duress, misrepresentation or mistake, but was done voluntarily by all parties and the Plaintiffs never raised the issue at the execution of the agreement. Further, it was argued that the transfer was legally effected and that the Plaintiffs failed to summon the Land Commissioner to prove that the registered transfer was void. Finally, Counsel submitted that the issue of costs is discretionary and relied on the case

### **The Determination**

It is not disputed herein that the Plaintiffs and Defendant entered into a loan agreement in which the Defendant lent the Plaintiff's Kshs, 305,000/=. It is also not disputed that the Plaintiffs were given the said loan by the Defendant and have not repaid it to date. Lastly it is not disputed that the Plaintiffs gave title to their property being as security for repayment of the loan, and that the said agreement provided that the disposal of the said property upon default in repayment of the loan.

The dispute herein is centered around two issues, the first being whether the said loan agreement between the Plaintiffs and Defendant was illegal, null and void, and secondly whether the registration by the Defendant of the instrument of transfer dated 12<sup>th</sup> February 1999 was fraudulent. Two other consequential issues are whether the Plaintiffs are entitled to the remedies sought, and which party shall bear the costs of this suit.

#### **On whether the loan agreement between the Plaintiffs and Defendant was illegal, null and void.**

The Plaintiff presented two limbs of arguments on this issue. The first was that the Defendant did not have a licence to engage in moneylending at interest to members of the public. The Plaintiffs relied on section 3(1)(a) of the Banking Act which restricts any person from transacting any banking business, financial business or the business of a mortgage finance company unless it is an institution which holds a valid licence. However the definition of banking business, financial business and business of a mortgage finance company as defined under the Banking Act primarily involves the taking of deposits of money from members of the public, and the utilizing of such deposits. The Act therefore does not regulate nor apply to the sole business of lending of money.

The legal regime that comes closest to regulating moneylenders is the Microfinance Act (Cap 493D of the Laws of Kenya) which defines microfinance business as the business of—

- a) Receiving money, by way of deposits or interest on deposits which is lent to others or used to finance the business; or
- b) providing loans or other facilities to micro or small enterprises and low income households;

The Microfinance Act distinguishes between deposit-taking microfinance business and non-deposit-taking microfinance business in which latter group money lenders would fall. The Act regulates deposit-taking microfinance business in great detail, but not non-deposit-taking microfinance business, and the regulations required by section 3(2) of the Act in this regard are yet to be gazetted. It is thus my finding that there is thus no legal requirement at the moment requiring moneylenders to be licenced, and the Defendant was thus not engaging in any illegal business.

The second limb of the Plaintiff's argument is that the loan agreement entered into by the parties herein is clearly unconscionable due to the usurious interest rate that was applicable, namely 30% interest compounded monthly. It is my view that in the absence of regulations regulating the business of moneylending, loan agreements entered into under such an arrangement are subject to the general principles of contract law, The Law of Contract Act (Cap 23 of the Laws of Kenya) at section 2 provides in this regard that the general principles of common law will apply. The only requirement placed by the Law of Contract Act under section 3 is that contracts for the disposition of land must be in writing.

Under common law the parties in such agreements are left exposed to the vagaries of the doctrine of freedom of contract. Contracts for loan of money are legal under common law, and such loans can be secured by way of personal security consisting of guarantees or indemnities, or by real security consisting in rights in or over property belonging to the borrower. Interest, including compound interest, is at common law as a general rule not payable unless there is express agreement to that effect. (See **Chitty on Contracts Thirtieth Edition, Volume II -Specific Contracts** at chapter 38 paragraphs 238 – 277.)

While the loan agreement between the Plaintiff and Defendant had provisions on security and interest to be charged, I find that certain statutory provisions are relevant to the said agreement. Firstly, the Plaintiffs title to LR Number 12243/8 which was deposited with the Defendant is registered under the repealed Registration of Titles Act, and which was the operative law at the time of the loan agreement they entered into by the parties herein. The continued application of the Act is saved by sections 107 of the Land Registration Act (Act No. 3 of 2012), and section 162 of the Land Act( Act No. 6 of 2012)

A power of sale under the repealed Registration of Titles Act could only arise if property was subject to a charge. Section 66 of the repealed Registration of Titles Act required that a charge created by the deposit of documents of title to land under the Act was to be evidenced by an instrument in writing in form U in the First Schedule, which was required to be registered, and no charge by deposit of documents of title may be created in any way other than as specified in the Act. No such instrument in the form required by the Registration of Titles Act was produced in evidence by the Defendant, and therefore he could not legally exercise a power of sale over the Plaintiffs' property.

Secondly I also note that the Banking Act in Section 44A places limit on interest recovered on defaulted loans as follows:

**“(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 nonperforming;**

**(b) interest, 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 amounts owed by the debtor.**

**(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.**

**(4) This section shall not apply to limit any interest under a court order accruing after the order is made.”**

This section provides a statutory application of the in *duplum* rule to the banking sector, which rule basically provides that interest stops running when the unpaid interest equals the outstanding capital amount. I find that this rule is also applicable in the present case as it seeks to prevent lending contracts which provide usurious rates of interest. The rate of interest in the present case was therefore unconscionable to the extent that it provided for payment of interest that considerably exceeded the amount outstanding as the principal sum.

To this extent I therefore find that the contract entered into by the Plaintiffs and Defendant is unenforceable for the foregoing reasons. However, as the Plaintiffs have admitted to having received the loan amount of Kshs 305,000/= and indicated their willingness to repay the same, I will enter judgment on admission in favour of the Defendant for the loan advanced to the Plaintiffs together with interest at court rates.

I am obliged to comment in this regard that the legal regime regulating moneylending is still in an unsatisfactory state, and consumers are in this regard not availed the protection that is available in other legal regimes that regulate financial dealings. There is thus urgent need for the relevant authorities to enact the necessary regulations that are required under the Microfinance Act to regulate non-deposit-taking microfinance businesses, including on the issues whether such microfinance businesses can take

title documents to land as security, and that of the interest rates that can be chargeable.

### **On whether the registration by the Defendant of the instrument of transfer dated 12<sup>th</sup> February 1999 was fraudulent.**

DW1's evidence on how the transfer was effected was contradictory. During evidence in chief, he stated that during execution of the loan agreement on 12<sup>th</sup> September 1998, the Plaintiffs executed the transfer form as well as a power of attorney, which the Defendant did not produce in evidence. Secondly, while the Defendant's witness stated that the transfer was for recovery of the monies advanced of Kshs 305,000/=, the transfer instrument dated 12<sup>th</sup> February 1999 indicates that the consideration for the transaction was Ksh 800,000/=

The Defendant attempted to discredit PW2 as an expert witness in its submissions and not during cross-examination, and did not controvert the evidence of PW2 to the effect that the signatures on the transfer instruments were forgeries. I am in this regard persuaded by the decision in the case of **Ali Mohamed Sunkar -vs- Diamond Trust Bank Ltd (2011)eKLR** that an expert report can only be challenged through a counter expert report which was not available in the present case. In addition, the Defendant did not call the Advocate who witnessed the said transfer document as a witness to confirm that indeed the Plaintiffs did sign the said transfer. The court is therefore justified to make an inference that the Plaintiffs did not sign the said transfer. It is thus my finding that the Plaintiffs have established beyond a balance of probabilities that the Defendant fraudulently procured a transfer of the suit property to its name.

### **Whether the Plaintiffs are entitled to the reliefs sought.**

The Plaintiffs have sought for an order to annul the instrument of transfer dated 12<sup>th</sup> February 1999 registered as entry no. 72892/2 in IR 72982 of LR Number 12243/8. Section 80 of the Land Registration Act of 2012 gives power to the court to order rectification of the register through cancellation or amendment of any registration which was obtained, made or omitted by fraud or mistake. In this case it has been established that the transfer registered as entry no. 72892/2 in IR 72982 was fraudulent. It has also been found that the loan agreement giving the Defendant the right to sell and transfer the property was unconscionable and unenforceable. The Plaintiffs are therefore entitled to the said prayer and cancellation of any consequent transfers and entries arising therefrom.

On the prayer for an injunction restraining the Defendant from transferring alienating, disposing or otherwise dealing with LR no. 12243/8, the principles that apply to the grant of a permanent injunction are well known. Once the Plaintiffs have established a right, infringement of that right will be restrained unless an award of damages would be sufficient or adequate remedy. It is my finding in this regard that notwithstanding that the Plaintiff has established that the transfer of their property to the Defendant was fraudulent, they are not entitled to the injunction sought as against the Defendant. This is for the reasons of their conduct and admission of not repaying the loan leading to the said transfer, and that they still need to refund the amount paid to the Defendant together with interest,

### **On which Party shall meet the costs of the suit**

This court has reached conclusions that are in favour of both the Plaintiffs and Defendant in its findings on the issues discussed in the foregoing. Costs of a suit largely follow the event, and this court has discretion to determine which party will meet the costs and to what extent. The applicable law is section 27 (1) of the Civil Procedure Act (Cap. 21) which states as follows:

**“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”**

The material event referred to in the provisions of the said section is the result of the proceedings, and it is the successful party in this result who is normally awarded costs. I find that the Plaintiffs have only partially succeeded in their claim and I have also taken into account their conduct herein of not paying the amount lent to them. Each party shall therefore meet their costs of the suit for the reasons given in the foregoing.

### **The Orders**

Arising from the above-stated findings and reasons, this Court enters judgment for the Plaintiffs only to the following extent:

1. The Chief Land Registrar shall forthwith cancel the instrument of transfer dated 12<sup>th</sup> February 1999 registered as entry no. 72892/2 in IR 72982 of LR Number 12243/8, and shall cancel the registration of Safari ‘M’ Park Motors Limited and/or Safari Marks Park Motors Limited as proprietors of LR no. 12243/8 and rectify the register to enter the names of John Gakunga Kamuyu and Elizabeth Waithera Kamuyu as registered proprietors of LR no. 12243/8
2. Judgment on admission is entered for the Defendant herein, and the Plaintiffs shall refund to the Defendant the amount of Kenya Shillings 305,000/= with interest at court rates with effect from 13<sup>th</sup> October 1998 until payment in full, within three months of the date of this judgment.
3. A prohibitory order shall issue against the rectified title to LR no. 12243/8 in favour of the Defendant until payment in full of the sum ordered to be paid by the Plaintiffs in Order 2 hereinabove.
4. Each Party shall meet their own costs of this suit.
5. The Parties herein shall be at liberty to apply.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4<sup>th</sup> day of December, 2013.

**P. NYAMWEYA**

**JUDGE**