



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL SUIT NO. 1708 OF 1997**

BENJAMIN WAMUGI WAWERU ..... PLAINTIFF

VERSUS

HOUSING FINANCE COM. (K) LIMIT ED .....DEFENDANT

**JUDGEMENT**

1. The plaintiff's claim as pleaded in the plaint is that sometimes in November 1985 he applied for a loan from the defendant. His loan application was accepted, and he was offered a sum of Ksh.225,000/- . The plaintiff was supposed to pay that loan in ten years and the interest rate was 13% per annum and the monthly installment payable was Ksh.3,650/-. The loan was secured by a charge over the plaintiff's property known Chinga/Kikingi/668 and 669. The plaintiff's property was dully charged.
2. The plaintiff claims to have paid over Ksh.600,000/- as at the time this was suit was filed which is July 1997. The plaintiff complains that he has been charged interest rates irregularly and other penalty interests which clogged his ability to clear the loan. The plaintiff claims that he has fully repaid the loan including legitimate interest and claims other charges unconscionable and unjustified. The plaintiff seeks for a permanent order of injunction restraining the defendant from alienating, selling or interfering with the suit property and an order compelling the defendant to release the discharge of the plaintiff's title. The plaintiff is also seeking for declaration that he is under no obligation to pay the penalty interest and sought for an order of accounts.
2. The defendants filed a defence. It is admitted that the they charged the plaintiff's property and the interests charged and in accordance with the terms and conditions set out in the charge document. It is further contended that the plaintiff failed to service the loan and to adhere to the installments thus the defendant instituted recovery proceedings and issued the plaintiff with the statutory notice as stated in the charge. As at 21<sup>st</sup> September 1987 when the statutory notice was issued the outstanding loan and interest amounted to Ksh.247,010.75/- . However, the plaintiff did not pay the account which was contractual being un payable to the defendant.
3. The plaintiff gave evidence in support of his claim and gave a chronology of how he borrowed a sum of Ksh.225,000/- in 1987 and made the following repayments.

In 1987 he paid Ksh.48,400

In 1988 he paid Ksh.62,633/-

In 1989 he paid Ksh.34,790/-

In 1990 he paid Ksh.70,507

In 1991 he paid Ksh.14,431.80/-.

Within that year he claimed that he was short of money. He was relying on income from tea and dairy cattle that is why he used to make payments by quarterly installments or in ramp sum as opposed to monthly installments. The plaintiff testified that in 1992 he did not make any payment because he had experienced many problems due to post election violence that is when he received a notice from the defendants advocate threatening to auction the charge property. At the time the auctioneers were claiming a sum of Ksh.235,000/- with interest. The plaintiff continued to hold discussions with the defendant and the auctioneer was called off on 7<sup>th</sup> August 1992 after he had paid a total of Ksh.40,000/-. He claims to have paid a total of Ksh.94,400/- in 1993 and in 1994 he sold his cows and paid a sum of Ksh.120,000/- after which he thought he had cleared the loan. However the plaintiff was threatened with another notice to sell the property in 1996. That is how he agreed to pay a sum of Ksh.900,000/- in full and final settlement on 6<sup>th</sup> June 2005. He however changed his mind because he felt cheated after he carried out an audit and established that he had actually overpaid the defendants by a sum of Ksh.97,000/-.

4. On the part of the defendant Miss June Njoroge an Assistant Manager legal services gave evidence and reiterated in fact that the plaintiff borrowed and was granted a loan of ksh.225,000/-. She produced the letter of application by the plaintiff. The letter of offer by the defendant and the charge that was created to secure the borrowing dated 28<sup>th</sup> February 1986. According DW1 the defendant was allowed under clause V of the charge to vary the interest chargeable after issuing a notice. She went on to testify that after six months after the loan was advanced to the plaintiff he fell in arrears. He was issued notices of default. She produced exhibit No.4 which was a letter informing the plaintiff of the increment of interest to 29%. The defendant also issued instructions to their advocates to institute recover proceedings by way of sale of the charged property but the defendant obtained an injunction to stop the sale. The plaintiff also approached the defendant and negotiated to pay the loan and he wrote correspondence which was produced as exhibit No.7. The plaintiff wrote a letter making a proposal of settlement which the defendant allowed but the plaintiff failed to honour the proposal. Another notice was issued on 15<sup>th</sup> November 1990. The auction as also stopped at the request of the plaintiff who had suffered a bereavement. However the account remained un sufficed and another statutory notice was issued on 28<sup>th</sup> August 2002. The plaintiff accepted to settle the account by paying a sum of Ksh.900,000/- in full and final settlement of the account. The defendant accepted this offer but the plaintiff only paid Ksh.10,000/- . According to DW1 the plaintiff's account was perpetually in arrears. He made intermitted payments and did not adhere to the schedule of payment. She produced the account that show the plaintiff's account is still in arrears of Ksh. 3,096,215.55 as at 31<sup>st</sup> March 2010. The account continues to accrue interest which should be paid. The defendant urged the court to dismiss the case.

5. The above is the summary of the evidence before this court. The claim by the plaintiff is a straight forward claim arising out of a contractual arrangements between a borrower and a lender. The terms of the conditions of the lending is contained in the charge that was executed between the plaintiff and the defendant and it is dated 28<sup>th</sup> February 1986. The issue for determination is whether the plaintiff is entitled to the prayers sought on the grounds that his account was charged with illegal interest and penalties that are outside the charge document.

6. Both counsel for the plaintiff and the defendant filed written submission. According to the plaintiff he completed paying the loan by paying a sum of over Ksh.600,000/- towards the loan account. Counsel submitted that the charges levied by the defendant are outside the provisions of section 39 of the Central Bank Act and also Section 44 of the Banking Act. Counsel posted that there was a gazette notice published by the Minister of Finance which gave the maximum interest rate that were chargeable in 1998, 1990 and 1991. It was also contended that the notice requiring the increase of interest rate was not served

upon the plaintiff, therefore the interest rates were valid illegally. It was the plaintiff's counsel submission that the defendant changed the terms of contract as regards letter of admission to pay the sum of Ksh.900,000/- in full and final settlement, the plaintiff contend that he was hoodwinked but later realized that he had over paid . Counsel relied on the case of **Professor David Mucimi Ndeti vs Daima Bank Limited HCCC NO. 2198 OF 2000 at Milimani Commercial Division** where the court granted the plaintiff and injunction because it was obvious his account had been over charged with interest.

7. I have considered all the evidence and the submissions. It is not disputed that both the plaintiff and the defendant are governed by the terms and conditions set out in the charge. The charge clearly indicated that the loan of Ksh.,225,000/- was to be repaid in monthly installments of Ksh.,3,526/- per month at the interest rate of 13 ½ % per annum and the interest rate was variable. Further under Clause V of the charge it is provided as follows:

“It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows:-

(i) Until the service of such notice as is hereinafter referred to interest shall be at the rate shown in the said Schedule.

(ii) The chargee may from time to time serve on the Chargor on demand notice requiring payment of interest at such increased or reduced rate as the Chargee shall determine having regard to such circumstances as they consider to be relevant and the decision of the chargee in this behalf shall not be questioned on any account whatsoever.

(iii) In the event of the Chargee requiring a variation of the rate of interest under the provisions of sub-clause (ii) of this Clause the monthly installment payable under the provisions of Clause 3 hereof and the first of such varied monthly installments shall become due and payable on the first day of the month next after notification of the amount thereof to the Chargor.

(iv) All the covenants and provisions contained herein relating to the payment of interest shall be construed and have effect as referring to interest as fixed or altered by the provisions of this Clause.

8. I see several letters dated 27<sup>th</sup> March 1997, 1<sup>st</sup> May 1987 and 28<sup>th</sup> April 1989 all addressed to the plaintiff indicating that the interest rates have been varied. These letters were addressed to the plaintiff's P.O. Box 47677 Nairobi which is the same address appearing on the charge document. The plaintiff has not been able to adduce evidence to prove that these letters were never received. The plaintiff claims to have been over charged interest but he failed to adduce any evidence to establish how he was overcharged with interest. For example the plaintiff did not show after he failed to honour the payment by installment as indicated in the charge but paid intermittently how much interest was supposed to be charged for every installment paid late. The matter was adjourned to enable the plaintiff adduce evidence from accountant but no such evidence was forthcoming.

9. Another valid issue that was raised by the defence was regarding the admission by the plaintiff that he would pay the loan by Ksh.900,000/- in full and final settlement. The defendant accepted that offer and stopped the auctioneer that was scheduled for the sale of the plaintiff's property. The plaintiff on his part claims that he was hoodwinked to write a letter agreeing to settle Ksh.900,000/-/. There is no evidence on record to prove that the plaintiff was hoodwinked. The defendants were consistency seeking to recover the loan. I find the letter dated 6<sup>th</sup> June 2005 written by the plaintiff to the defendant was plain and unambiguous the plaintiff has merely found it convenient to disown the same. In view of the above findings I find the plaintiff has not proved his case on a balance of probability . I find the case lack merits and it is hereby dismissed with costs to the defendant.

JUDGMENT READ AND SINGED ON 28TH DAY OF JANUARY 2011 AT NAIROBI.

M.K. KOOME  
JUDGE