



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 55 OF 2001

JOHN GATU NDERITUU.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

JUDGMENT

JOHN GATU NDERITU, the Plaintiff herein, sued **KENYA COMMERCIAL BANK LTD.**, the Defendant herein, by the Further Amended Plaintiff dated 11th July 2009. In the aforesaid Plaintiff, the Plaintiff prayed for judgment against the Defendant in the following terms:

- (a) A permanent injunction restraining the defendant by itself, its servants, agents or otherwise howsoever from selling, alienating or in any other way whatsoever interfering with the plaintiff's property no. L.R. Nyeri Municipality block 1/639.**
- (b) A temporary injunction restraining the defendant by itself, its servants, agents or otherwise howsoever from selling, alienating or in any other way whatsoever interfering with the plaintiff's property no. L.R. Nyeri Municipality block 1/639 pending the hearing and determination of this suit.**
- (c) A declaration that the lending contract between the plaintiff and the defendant is tainted with illegality and the illegal interest, levies and charges there under are irrecoverable.**
- (d) A declaration that the plaintiff has fully repaid to the defendant the amount borrowed from the defendant.**
- (e) General damages plus interest.**
- (f) An order that the charges held by the defendant as security over L.R. Nyeri Municipality/Block 1/639 be discharged forthwith and the title document be released to the plaintiff.**
- (g) Costs of the suit and interest.**
- (h) Any further or better relief that the Honourable Court may deem fit to grant.**

The Defendant filed a defence to deny the Plaintiff's claim. In its defence dated 10th June 2008 the defendant sought for the dismissal of the suit and for entry of judgment for the defendants for:

- (a) A declaration that the Plaintiff owes the bank Kshs.18,615,167.85 comprising the principal,**

interest and other relevant charges that have accrued in favour of the Defendant as set out above.

(b) A declaration that the Defendant be allowed to proceed with the sale of L.R. Nyeri Municipality Block 1/639.

(c) The costs of this suit on a full indemnity basis.

(d) Interest on a, b and c above.

When the suit came up for hearing, the Plaintiff and the Defendant each presented the evidence of one witness in support of their positions. **John Gatu Nderitu** (P.W.1) told this court that he borrowed a sum of Ksh.1,800,000/- in 1988 from K.C.F.C. a subsidiary of Kenya Commercial Bank Ltd. The aforesaid subsidiary has wound up and its business taken over by the Defendant. P.W.1 further said that he also borrowed another sum of Ksh.800,000/= in 1989. In total the Plaintiff borrowed a sum of Ksh.2,600,000/=. P.W.1 said he pledged **L.R. NO. NYERI/BLOCK 1/639** as security for the aforesaid loans. The 2nd borrowing was secured by a charge dated 15th May 1989. The rate of interest was fixed at 18% p.a. P.W.1 complained that the Defendant kept on increasing the rate of interest i.e. 21% then 28% p.a. and further 29% p.a. P.W.1 produced some letters to show that the Defendant notified him of the increase of the rate of interest. At first, P.W.1 said, he used to liquidate the debt by monthly installments of Ksh.66,500/= but following the increase in the rate of interest the installments increased to 103,445/= per month. P.W. 1 said he was unable to meet the monthly installments due to high interest rates. On top of that, the Plaintiff claimed that the Defendant imposed penalties at the rate of 1% on 27th July 1990, 2% on 13th November 1990 and 3% on 19th July 1994. P.W.1 produced notices showing that he was notified of the imposition of penalties. The Plaintiff claimed that he was never shown by the Defendant any letter showing that the Minister for finance had approved the increase of the rate of interest as required under *Section 44* of the Banking Act. P.W.1 further averred that he was never consulted before the rate of interest was varied. The Plaintiff said despite that, he continued to service the loan. He produced bank statements indicating that he has so far paid a total of Ksh.4,434,161/= since 1988. P.W.1 produced bank statements covering the period between 4th June 1988 and 9th May 1996. It is said the Defendant stopped giving the Plaintiff statements from 1996. P.W.1 stated that as of now he does not know the exact amount outstanding from him to the Defendant. He indicated that the outstanding amount demanded by the Defendant kept on changing as follows:

In 1998..... Ksh.17,565,915/40.
In 2001..... Ksh. 7,467,066/10.
In 2003.....	Ksh.19,467,066/10.
In 2006.....	Ksh. 2,500,000/=.
In 2008.....	Ksh.18,615,167/80/

The Plaintiff alleged that the above inconsistencies forced him to file this suit. On cross-examination the Plaintiff said that he wrote several letters to the Defendant seeking for indulgence. He further admitted that his auditors were of the view that the outstanding loan to the Defendant as of 5th August 2004 stood at Ksh.3,800,536/=. The Plaintiff also admitted that the Defendant was willing to accept payment of Ksh.2,500,000/= as full and final settlement of the loan in the year 2006 but he declined the offer.

The Defendant on its part tendered the evidence of Jesse Gikandi (D.W.1). He told this court that the Defendant charged interest which was legal. D.W.1 said that the same was in accordance with the Central Bank Act. He said the interest charged was not exorbitant. D.W.1 said he was aware that the Plaintiff had questioned the interest charged. D.W.1 produced a loan statement excluding penalties from 31st May 1988 to date showing the outstanding debt to be Ksh.47,465,572/15. He claimed the loan has not been serviced for 21 years. D.W.1 said the Plaintiff paid 7 installments at a rate of 66,500/= and thereafter payments became erratic. On cross-examination, D.W.1 said that the sum of Ksh.47,465,572/15 was the bank's own computation whose calculation has never been given to the Plaintiff. D.W.1 stated that he was not aware that the bank required permission from the Minister for Finance to vary the rate of interest. He also admitted that the Defendant varied the rate of interest without seeking the approval of the

Central Bank. D. W. 1 confirmed that the Defendant had offered the Plaintiff to pay Ksh.2,500,000/= to settle the outstanding debt. D.W.1 also confirmed that the bank is still willing to accept Ksh.2,500,000/= in full and final settlement of the debt.

At the close of the evidence, learned counsels appearing in this case were permitted to file written submissions. I have considered the evidence plus the written submissions. Upon perusing the pleadings, and upon considering the evidence plus the submissions I think the following issues arose for the determination of this Court:

- (i) Whether or not the Defendant complied with the law and or the terms of the contract in altering the rate of interest and in levying penalty charges?
- (ii) Depending on the answer to (i) above, whether or not the Plaintiff is entitled to the orders sought in the Plaintiff!
- (iii) Whether or not the Defendant is entitled to the remedies sought!

Let me begin with the first issue. It is not in dispute that the Plaintiff pledged **L.R. NO. MUNICIPALITY/BLOCK 1/639** to secure financial accommodation from the Defendant. The Defendant advanced to the Plaintiff a sum of Ksh.1,800,000/= in 1988. The Defendant further advanced to the Plaintiff another sum of Ksh.800,000/= in 1989. In both occasions the Defendant made a charge against the title. There is also no dispute that the Plaintiff paid part of the loan and at some stage he defaulted. The Defendant was prompted to take steps to enforce the terms of the charges in recovering the debt. In other words the Defendant attempted to realize its securities which action prompted the Plaintiff to file this suit. It is the submission of the Plaintiff that the Defendant acted contrary to the law and the terms of the letter of offer when it altered the rate of interest and in levying penalties on the outstanding debt. The Defendant is of the view that it acted within the law and in accordance with the terms of the letter of offer in trying to recover the debt from the Plaintiff. The letters of offer and the charges were produced by the Plaintiff as exhibits in evidence. The letters of offer dated 30th March 1988 was quite plain in paragraph 2 as follows:

“Within the validity and limit of the facility, this rate will not be allowed to exceed the maximum rate which finance companies may charge on advance as laid by the Central Bank of Kenya.”

There is a statutory control in the manner banks should vary upwards the rate of interest on loans advanced to their customers. The relevant provision is *Section 44* of the Banking Act which provides as follows:

“No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”

In other words banks should not increase the rate of interest without seeking the approval of the Minister for Finance. In essence, the Defendant admitted that it increased its rate of interest with the approval of the Minister. The bank did not tender any documentary evidence to show that it was authorised to do so. The bank was enjoined to tender such evidence to show that it complied with the Statutory requirement and within the terms of the letter of offer and the charge document. I am convinced that the Plaintiff has shown that the Defendant breached the provisions of *Section 44* of the Banking Act when it purported to increase the rate of interest and to levy penalties without prior approval from the Minister of Finance. The Defendant miserably failed to counter the Plaintiff’s evidence on this issue.

Having concluded the first issue, let me now turn my attention to the second issue as whether or not the Plaintiff is entitled to the orders sought in the Plaintiff. I have already set out the nature of judgment the Plaintiff has prayed in the Further Amended Plaintiff dated 11th July 2009. There is no doubt that the rate of interest agreed upon by the parties before the purported variations by the Defendant was 18% p.a. That rate was subject to variation by the Defendant with the approval of the Minister or the Central

Bank. I have already stated that the rate of interest was increased without the approval of the Minister nor the Central Bank of Kenya. The Defendant's unlawful act of varying the rate of interest placed a clog on the Plaintiff's equity of redemption. In the circumstances of this case the Plaintiff is only bound to pay the principal debt plus interest at the agreed rate of 18% p.a. It means that the parties to this suit must go back and balance accounts on the basis of the letter of offer and the charge document. Pending the taking of accounts the Plaintiff is entitled to an order of injunction to restrain the Defendant from exercising its statutory power of sale. The Plaintiff has produced documents showing that so far he had repaid to the Defendant a sum of Ksh.4,434,161/=. On the other hand the Defendant has also produced a computation showing that the Plaintiff's outstanding debt due to the Defendant stood at Ksh.47,465, 572/13. The above figures are two worlds apart and that is why there is need for the parties to take accounts. As far as I am concerned, those are the only orders which I think the Plaintiff is entitled to plus costs of the suit based on the figure arrived at after the taking of accounts.

The third and final issue is whether or not the Defendant is entitled to the remedies sought in the Defence? I have hereinabove enumerated what sort of orders the Defendant has sought. I am afraid to state that the Defendant having failed to file a counter-claim, it is not entitled to the orders sought in the defence. A defence is not a statement of claim hence there is no basis to give the Defendant the judgment sought. Even if the Defendant had filed a counter-claim, I doubt whether the orders could have been given in view of the fact that the Defendant had opted to exercise its statutory power of sale.

In the final analysis, I enter judgment in favour of the Plaintiff and against the Defendant in the following terms:

- (i) A declaration that the Defendant acted unlawfully when it increased the rate of interest over and above the agreed rate of 18% p.a. without prior approval by the Minister of finance under *Section 44* of the Banking Act.
 - (ii) A declaration that the Defendant was therefore not entitled to recover any interest over and above the agreed rate and the penalties levied thereafter.
 - (iii) The Plaintiff and the Defendant are ordered to appoint an agreed accountant and or auditor to take accounts on the outstanding loan or otherwise on the basis of the letter(s) of offer or the charge(s) document(s) with interest at the rate of 18% p.a. If the parties do not agree on the accountant or auditor, then any party may seek for an order from court to appoint one. The report to be presented to court on 24th June 2011. The parties to share the costs of the auditor and or accountant.
 - (iv) Pending the outcome of the taking of accounts the Defendant is restrained from exercising its statutory power of sale.
 - (v) Costs is awarded to the Plaintiff based on the figure presented by the person taking accounts.
 - (vi) This suit is fixed for mention on 24th June 2011 for further orders and directions.
- Dated and delivered at Nyeri this 25th day of March 2011.***

J. K. SERGON
JUDGE

In open court in the presence of Mr. Waweru for the Plaintiff and no appearance for Sichangi & Co. for the Defendant.