

REPUBLIC OF KENYA

HIGH COURT AT NYERI

CIVIL CASE 8 OF 2006

PATRICK MWANGI RUNYORA.....PLAINTIFF

Versus

CONSOLIDATED BANK OF KENYA LTD.....1ST DEFENDANT

**GARAM INVESTMENT AUCTIONEERS.....2ND
DEFENDANT**

J U D G M E N T

On 10th November, 2008, the plaintiff suit was dismissed pursuant to *order 1XB rule 4* of the Civil Procedure Rules. However the first defendant had a counter claim which it proceeded to prove.

Only one witness testified in support of the counter claim. That witness was none other than **Justus Wainaina Gikonyo**, credit officer with the 1st defendant. It was his testimony that on or around November, 1986, the plaintiff applied for a loan from the 1st defendant totaling Ksh.96,000/=. The said loan was secured with a charge dated 4th November, 1980 over land parcel number **Ruguru/Sagana/222**. The loan advanced as aforesaid was to attract interest at the rate of 19% though the 1st defendant had the discretion to adjust the same in terms of clause 6 of the charge document. The plaintiff however fell into arrears, the last repayment on account of the loan having been made on 14th February, 1994. He produced statement of account to show how the repayments by the plaintiff were made and that as at 30th November, 1999 when it stopped loading interest on the amount the balance outstanding was Ksh.1,712,922/90.

Following the plaintiff's default aforesaid, the 1st defendant instructed the 2nd defendant to realize the security. However, before the 2nd defendant could carry out into fruition the said instructions, the plaintiff successfully filed this suit on 17th February, 2006 seeking injunctive orders to stop the sale by public auction scheduled for 8th March, 2006, of the suit premises.

From the foregoing narration of events in this suit, it is quite apparent and common ground that the plaintiff was advanced a loan facility of Kshs.96,000/= which he secured by the suit premises. The plaintiff thereafter failed to repay the loan and as at 30th November, 1999 the balance outstanding on the loan account was Ksh.1,712,922/90 hence the counterclaim.

However, it should be noted that the loan was advanced to the plaintiff by Home Savings & Mortgages Limited. On 25th July, 2007, the Minister for finance through a legal Notice No.136 of 2002 in the exercise of powers conferred by *Section 3 (1)* of the Consolidated Bank of Kenya Act made a vesting order vesting all the undertakings of amongst others Home Savings and Mortgages Limited to the 1st defendant. Under *Section 5* of the said Act, the 1st defendant assumed powers to enforce all contracts, agreements, conveyance, undertakings, securities and other instruments entered into by Home Savings and Mortgage Limited as if it was a party thereto.

At the hearing of the counterclaim, the plaintiff did not bother to attend court though he had been duly served with the hearing notice. Accordingly the 1st defendant's evidence was unchallenged and uncontroverted. Under *Section 74* of the Registered Land Act, the chargee's remedies against a

defaulting charger are appointment of a receiver, sale of the charged property and a suit for the amount secured by the chargee. The chargee can sue for the money secured by the charge where the charger was bound to repay, has been served with three (3) months Notice, and the notice has expired. From the documents tendered in evidence, it is apparent that the plaintiff was served with a demand under *Section 65 (2) of the Registered Land Act* on 3rd November, 2003 and a statutory Notice under *Section 74 of the same Act*. Consequently, the charger was bound to repay the secured amount, three months after the service of the first notice. In the case of **Aberdare Investments Ltd V Housing Finance Co. Ltd (1999) 2 E.A.1** it was held that:

“.....the choice of a remedy for recovery of an unpaid loan under a mortgage is that of a mortgagee, and the mortgagor cannot tell the mortgagee to take such action as may suit the mortgagor.”

The 1st defendant is quite entitled to mount this suit much as the security has not been realized.

The 1st defendant prayed in the counterclaim that judgment be entered in its favour in the sum of Ksh.1,712,922/90 plus interest at the rate of 20% from 30th November, 1999 until payment in full. There is evidence that the 1st defendant stopped applying interest on the loan amount on or about 30th November, 1999. The rate of interest was set out in the charge document. As correctly submitted by **Thuku**, learned counsel for the 1st defendant, a charge is a contract between the chargor and the chargee. Consequently, the interest rate was a contractual term that cannot be varied. Accordingly the aforesaid sum should continue to attract interest at the rate of 20% from 30th November, 1999 until payment in full. In support of this submission, learned counsel relied on the case of **Joseph Kimani Waweru V Peter Leo Onalo (2006) eKLR** in which **Justice Waweru** opined that:

“....interest at commercial rates ought to be allowed only where a contract between the parties provides for it....” I entirely agree with these observations.

All said and done, I am satisfied that the 1st defendant has on a balance of probabilities proved its counterclaim against the plaintiff. Accordingly I now enter judgment against the plaintiff in the sum of Kshs.1,712.922/90 with interest thereon at the rate of 20% p.a. from 30th November, 1999 until payment in full. The 1st defendant too shall have the costs of this suit and the counter claim.

Dated and delivered at Nyeri this 17th day of September, 2009.

M.S.A. MAKHANDIA

JUDGE