



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 787 of 2003

JAMES NJUGUNA WAINAINA.....1ST PLAINTIFF

ROSEMARY NJERI WAINAINA.....2ND PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY.....DEFENDANT

RULING

On 18.7.2006, the parties recorded the following consent order before Hon. Ochieng J:

- 1) This Honourable court be pleased to interpret the provisions of the charge document dated 26.4.1995 (hereinafter “*the charge document*”) with regard to the charging and calculation of interest initially.
- 2) The parties be at liberty to make submissions in aid of the above interpretation of the provisions of the charge document dated 26.4.1995 as to charging and calculation.
- 3) Thereafter the matter be submitted to the firm of auditors namely Ernst & Young for purposes of computation of the interest in accordance with the interpretation of the Honourable Court, as to the charging of interest.
- 4) The costs shall be in the cause.

Written submissions were duly filed in accordance with paragraph 2 of the consent order and this ruling is in respect of the 1st part of the consent. I have perused the charge document and considered the submissions of the Learned counsels appearing. I have also read the authorities referred to me by counsel. Having done so, I take the following view of this matter.

The charge document was executed on 26.4.1995. It was preceded by the offer of Advance which the plaintiffs accepted on 20.3.1995. In paragraph 12 of the offer of advance the plaintiffs acknowledged that their representations contained in their Application form and the terms and conditions in the offer of advance would constitute the terms and conditions of the Agreement to Advance. Paragraph 4 and 5 of the offer of advance provided as follows:-

“4. That the amount of advance, initial rate of interest, the approximate period of repayment, the amount of monthly installment towards repayment of the said amount of advance and interest thereon and the amount of insurance for which the above mentioned property shall be insured for respectively be shown as below:-

Amount of Advance	Initial Rate of Interest	Period of Repayment	Monthly Installment	Amount of Insurance

3,000,000.00	26% P.A.	10 YEARS	KSHS.72,154.00	KSHS.12,000,000/=
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5. That the society will charge interest from the date the amount of advance is disbursed to the Society's Advocates at the rate specified above on the said amount of advance and such interest shall be calculated on annual rests."

Those paragraphs were incorporated in the charge document in Clauses 1 (b) and (c). The initial applicable interest rate as shown in the schedule to the charge document was 26% p.a. Under Clause 1 (c) (i) and (ii) interest at the above rate was payable "from the date of appropriation specified in the said schedule until the 31st day of December next following upon the whole of the principal sum and

"thereafter in each succeeding year on the aggregate amount of all sums owing by the Borrower to the society on the last day of the preceding calendar year such interest to be debited to and become payable by the Borrower on the 1st day of the said succeeding year PROVIDED THAT if the principal sum or any part thereof shall not be advanced by the society to the borrower until the calendar year following that in which the date of appropriation falls the principal sum shall be deemed to have been advanced in full on the last day of calendar year in which such date of appropriation falls."

It is clear therefore that in the 1st instance interest would be calculated for the period between the date of appropriation and the 31st day of December next following the date of appropriation i.e. from 26.6.1995 to 31.12.1995 and for each succeeding year interest would be calculated on the aggregate amount of all sums owing by the plaintiffs to the defendant on the last day of the preceding year and would be debited and become payable on the 1st day of the succeeding year.

It is plain that for the period between 26.6.1995 to 31.12.1995, interest at 26% p.a. was to be calculated on the whole of the principal sum from the date of appropriation. Subsequently interest would be calculated on the aggregate amount owing by the borrower on the last day of the preceding calendar year and be debited to and become payable on the 1st day of the said succeeding year. Those provisions were in consonance with Clause 5 of the offer of advance i.e. that interest was to be calculated on annual rests.

The defendant understood the clauses to mean that interest for the whole calendar year be calculated and the resulting total figure be divided by 12 months to obtain the monthly payments. That method of calculation would be applied if interest was not to be calculated on a reducing balance basis. But it is not the method the documents allowed. Both the offer of Advance and the charge document in my view although not as succinctly stated as one would have expected provided for calculation of interest on a reducing balance basis. The monthly repayments of course included an element of interest but that did not alter the method of calculating interest on a reducing balance basis with annual rests.

On interest rate variation, it is clear to me that the charge document provided for the same under Clause 1 (d) subject to a notice of the variation being served and to the limit that the interest would not be increased to an amount exceeding the rate normally charged by the society on new advances which are in the opinion of the Board of the same type as the advance secured at the date of the notice.

Additional interest was also provided in Clause 1 (e) (I) which reads as follows:

"(e) (i) If and whenever any monthly installment payable hereunder or any part of such installment shall remain unpaid after 7 days from the date upon which the same shall have fallen due it is hereby agreed by and between the parties hereto that a reasonable pre-estimate of the loss suffered by the society by reason of such non-payment will so long as such non-payment shall continue be a sum equal to interest at the rate aforesaid on the full amount for the time being remaining unpaid."

According to the defendant, Rule 32(d) of the Defendant's Rules authorized the charging of additional interest on any monthly installments due from the plaintiffs that remained unpaid. The rule reads as

follows:-

“32 (d) The Board may charge fines upon arrears of repayments up to a maximum of one shilling per week per every pound or fraction thereof on such arrears.”

But was that rule incorporated in the Offer of Advance or the charge document? The defendant argued that by virtue of paragraph 8 of the offer of advance and Clause 2 (1) of the charge document the plaintiffs agreed to comply with and observe and be bound by the defendant's rules. I note that the offer of advance did not contain the Rules of the Society and Clause 2 (i) of the charge document merely provided that the **“Borrower will at all times during the continuance of this security observe perform and be bound by**

the Rules of the Society for the time being in force.” But those rules were not incorporated in the charge document. There is no affidavit evidence to show that the Rules were read or availed to the plaintiffs. In fact the Advocate who attested the plaintiffs' signatures only explained the provisions of Section 69 (1) of the Transfer of Property Act 1882. In the circumstances, I find and hold that the society's Rules not having been read, explained, or availed to the plaintiffs could not bind them. I am not alone in that view of the matter. Osiemo J in **Walter Edwin Ominde & Another – vs – East African Building Society: HCCC NO.1785 of 2002 (UR)** was of the same view. The learned Judge made the following observation at page 7 and 8 of his Judgment:-

“The witness went further to state that there was assumption that the plaintiffs were aware and indeed read the Rules of the Society before they signed the Letter of Advance and the charge document. I find this to be an interesting assumption because since the defendant did not incorporate the same in the charge document and they were made available to the plaintiff, there was no way the plaintiff could access them. The said Rules of the Society cannot be imported into the charge documents after the parties had pended their signatures on the same and therefore the defendant cannot base calculations of additional and/or default interest on them”

In the matter at hand, therefore additional interest can only be the reasonable pre-estimate of the loss the defendant suffered due to non-payment of monthly installments by the plaintiffs and that loss was equal to the reigning interest rate which was charged on the amounts remaining unpaid by the plaintiffs for the period that the non-payment continued. The interest was payable subject to their being default and prior notice in writing having been served.

On other debits or charges, I have found as follows:-

- (i) Clause 2 (e) of the charge document made provision for the defendant to charge to the loan account amounts paid by the defendant on behalf of the plaintiffs in respect of insurance cover for the charged property. Such amounts attracted interest at rates applied on the principal.
- (ii) Clause 2 (f) of the charge document allowed the defendant to charge to the Loan account premiums under the mortgage protection policy paid by the defendant on behalf of the plaintiff and the sum attracted interest at applicable rates at the time of the charge.
- (iii) Clause 2 (g) allowed the defendant to charge interest at the applicable rate of interest on any rates, taxes, duties charges assessments and outgoings paid by the defendant on behalf of the plaintiff in order to keep the premises in good and substantial repair.
- (iv) Clause 3 (l) of the charge document allowed the defendant to make such payment as it considered expedient in connection with completing, maintaining, repairing, amending, altering or improving the charge property or for the enforcement protection or improvement of the security and the monies so paid would be deemed to be the principal monies secured by the charge and would attract interest at the applicable rates.

SUMMARY:

- 1) Both the Offer of Advance and the charge document provided for calculation of interest initially at the rate of 26% p.a. on a reducing balance basis with annual rests.
- 2) Clause 1 (d) of the charge document provided for variation of interest rate subject to prior written notice having been served and the variation would not be in excess of the rate normally charged by the society on new advances which in the opinion of the defendant's Board of Directors were of the same type as the advance made to the plaintiffs.
- 3) Additional interest was provided for in Clause 1(e) (i) of the charge document. Rule 32 (d) of the defendant's Rules was not applicable.
- 4) Clause 2 (e) of the charge document permitted the defendant to pay on behalf of the plaintiff money in respect of insurance cover for the charged property and that payment was classified as a charge on the charged property and attracted interest at applicable rates.
- 5) Under Clause 2 (f) of the charge document money paid as premiums under the mortgage protection policy was a charge on the charged property and attracted interest at applicable rates.
- 6) Under Clause 2 (g) of the charge document rates, taxes, duties, charges, assessments and outgoings made by the defendant on behalf of the plaintiff were classified as a charge on the charged property and the same attracted interest at the applicable rates.
- 7) Under Clause 3 (l) all expenses incurred by the defendant for the enforcement protection or improvement of the charge were classified as principal sum and attracted interest at applicable rates.

On the basis of my above findings, and in terms of paragraph 3 of the consent order recorded on 18.7.2006, M/S Ernst & Young auditors should now compute the interest accordingly.

Order accordingly.

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:-

Omondi for the defendant.

F. AZANGALALA

JUDGE

13/6/07