



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

Civil Case 1785 of 2002

WALTER EDWIN OMINDE

**GRACE SELINA OMINDE.....
.....PLAINTIFFS**

VERSUS

**EAST AFRICA BUILDING SOCIETY.....
.....DEFENDANT**

JUDGMENT

This claim arises out of a loan facility offered by the defendant to the plaintiff at the plaintiff's request in the year 1991.

The plaintiff's case is that in April 1991 he applied for a loan facility of Shs.750,000/= to enable him extend his house situate at Ngei Estate LR. NO. NAIROBI/BLOCK 60/447 which he offered as security. The defendant agreed to advance him the said loan and the loan agreement was reduced into writing and the charge document was signed by both parties on 22nd May 1991. The terms and conditions of repayment were stipulated in the said charge document.

The interest rate was agreed at 18% and the mode of calculating interest was contained in Clause 4 of Charge Document which provided as follows:

Clause "4" It is hereby agreed that the interest payable by the chargor to the chargee shall be calculated as follows:

(1) from the date of Appropriation specified in the schedule hereto until the Thirty First day of December next following upon the whole of the principal sum; and

(2) thereafter in each succeeding year on the aggregate amount of all sums owing by the chargor to the chargee on the last day of the preceding calendar year such interest to be debited to and become payable by the chargor on the first day of the said succeeding year provided that if the principal sum or any part thereof shall not be advanced by the chargee to the chargor 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 the calendar year in which such Date of Appropriation falls.

(3) No part of any payment made by the chargor to the chargee shall be treated as a payment of the principal money until all interest due or deemed to be due or accrued has been paid.

The schedule provided the rate of interest at 18% per annum and the monthly instalment of the principal and interest at Shs.12,227.50. The charge document also provided for a default clause and the action to be taken by the chargee in case the chargor defaulted:

Clause “7”

If the chargor shall make a default in payment of any of the said instalments or other payments herein before agreed to be made at the time and in the manner aforesaid or in the observance or performance of any of the agreements or obligations on the part of the chargor (not being a corporal) shall become bankrupt or a receiving order shall be made against the chargor or the chargee shall enter into any composition with creditors or (being a corporation) shall enter into liquidation whether voluntary or compulsory, then the whole of the moneys’ payable or to become payable to the chargee hereunder shall become forthwith due and payable.

Further it is the plaintiff’s case that they repaid the loan sum vide instalments and that as at 28th February 2002 the plaintiff’s had repaid into the Defendant the sum of Sh.2,504,001.15. But despite repaying the said sums into the Defendant, the Defendant still claimed over Shs.1,146,241/84 on account of the charge document.

On going through the Statement of Account the plaintiffs discovered that the excess amounts were due to debiting into the plaintiff’s Account of additional and default interest as well as valuation fees, lawyers fees and auctioneers fees which were unlawful.

As a result of the position taken by the defendant the plaintiffs were constrained to refer the issue of additional interest, default interests and other debits to **Interests Rates Advisory Centre** for purposes of recalculating the interests that had been charged and debited by the Defendant into the Charge Account. And after recalculation by the said centre, it compiled a report which showed that the chargor had overpaid the chargee by Shs.15,558.56. This finding triggered the plaintiffs to file this suit claiming the following reliefs:

- (i) A declaration that the plaintiffs had fully paid and/or settled the charges due under the Charge Instrument executed on the 22nd May 1991 and an order that the Defendant do refund to the plaintiffs the excess overpaid sum of Shs.15,558.56 and Discharge the charge.
- (ii) In **the alternative** the Honourable Court be pleased to order the taking of accounts as between the plaintiff and the Defendant.
- (iii) An order of permanent injunction restraining the Defendant either by itself, agents, assigns from selling and/or in any other manner disposing of the plaintiffs property known as LR NO. NAIROBI/BLOCK 60/447, either in exercise of the statutory power of Sale or at all.
- (iv) Costs of the suit.
- (v) Such further and/or other relief that this Honourable Court may deem fit and expedient.

In this claim the plaintiffs relied heavily on the expert evidence of PW2 WILFRED ABINCHA ONONO, the Managing Consultant of **Interest Rates Advisory Centre**.

The witness testified to the effect that he is an Accountant holding a **CPA (K)** and he had worked in the civil service as a Deputy Secretary, Ministry of Agriculture and Rural Development and also Auditor General, State Corporations. He was requested to carry out an independent re-calculation of interests charged and debited by the Defendant into the plaintiffs’ Loan Account. Upon receipt of such instructions, he wrote to the Defendant to avail copies of the Charge Document and all other relevant

materials to enable him to carry out the re-calculation exercise. Upon obtaining the Charge Document proceeded to prepare a Preliminary Report concerning the issue of interests levied into the Plaintiffs' Loan Account which was forwarded to the Defendant. The defendant made available a detailed Statement of Arrears in respect of the Plaintiffs' Charge Account. He then proceeded to prepared a Final Report which showed an over payment on the part of the plaintiffs by the sum of Shs.15,558.56. On the issue of the re-calculation of interests levied into the Plaintiffs' Loan Account the Defendant had debited various interests items including additional and/or default interests which were however not chargeable as per charge document.

Having found additional and/or default interests not chargeable he proceeded to subtract and/or omit the same in the re-calculation exercise. He further stated that he had calculated the interests on the basis of the interests rates provided by the Defendant as shown in the various letters addressed to the plaintiff and the statements and the interests were calculated on annual rests in accordance to the terms of the letter of offer.

The Defendant denied in its defence the plaintiffs claim in its entirety. It went further to state that the Plaintiffs and the Defendant were bound by three documents namely:

1. Letter of Advance dated 27th March 1991 and accepted by the plaintiffs on 10th April 1991.
2. The Charge Document dated 22nd May 1991.
3. The Rules of the Society.

The only contentious issue in this claim is the reference to the Rules of the Society upon which the defendant based the calculations of the additional and/or default interests. The defendant gave evidence through THOMAS KANANA (DW1) who told the court that the Society has its own Rules and Regulations and Clause 7 of the Offer of Advance refer to the Rules of the Society and the plaintiffs had signed both the offer of Advance and the Charge Document with full knowledge of what was contained in the documents.

Rule 32 (d) of the Societys Rules provides 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 thereto on such arrears.

This is the rule the defendant applied to calculate the additional and/or default interests.

The witness went further to state that there was assumption that the plaintiffs were aware and indeed had 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 the additional and/or default interest on them and therefore any interests and additional debits on the Loan Accounts of the Plaintiffs based on those Rules of the Society were unlawful and were properly omitted from the calculations.

In view of the foregoing the plaintiffs claim succeeds and judgment is entered in favour of the plaintiffs as under:

1. I declare that the plaintiffs have fully paid and settled the charges due under the Charge Instrument executed on 22nd May 1991 and order that the Defendant do refund to the Plaintiffs the excess overpaid sum of shs.15,558.56 and accordingly the charge is discharged.
2. I also order that a permanent injunction do issue restraining the Defendant either by itself, agents

assigns from selling and/or in any other manner disposing of the plaintiffs property LR NO. NAIROBI/BLOCK 60/447.

3. The plaintiffs are also entitled to the costs of this suit and it is so ordered.

Dated and delivered at Nairobi this 22nd day of September 2006.

J.L.A. OSIEMO

JUDGE