



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 1644 OF 2001

WILLIAM M. KHAMASI

LEONIDA J. KHAMASIPLAINTIFFS

VERSUS

HOUSING FINANCE CO. (K) LTD.....DEFENDANT

J U D G M E N T

1. The Plaintiffs in this matter, William Khamasi and Leonida Khamasi are husband and wife respectively and the registered proprietors of Title No. L.R. No. NRB/Block 82/767. They filed a Plaint on 28th September 2001 and in that Plaint they seek an order of: -

“Injunction restraining the Defendant, its servants, agents and other persons claiming through it from advertising, selling, alienating or transferring the Plaintiffs’ property L.R. No. NAIROBI/BLOCK 82/767.”

2. The other prayers are for the usual costs and interest thereon.

3. The Plaintiffs aver in their Plaint and in evidence before this court that the property above mentioned was charged to the

Defendant to secure a sum of Kshs.320,000 or sometimes Kshs.333,000. A charge document was registered against the title on 22nd April 1987. It was agreed that interest would be charged on the principal amount at 13.5% p.a. The Plaintiffs made periodic payments so that by 1st January 1995, the balance was Kshs.168,610.05.

4. The 1st Plaintiff was an employee of M/S Pharmadex East Africa Limited and the said company issued a cheque for Kshs.168,610.05 payable to the Defendant on 22nd December 1994 to pay off the loan balance. The said money was part of the 1st Plaintiff’s redundancy dues as his employer company was winding up. Having done so, the balance due to the Defendant is reflected as having been Kshs.3,250.45.

5. Apparently from 1995 to the year 2001 a period of over 6 years, the Plaintiffs kept quiet, thinking (or so they say) that the matter was now finalized. They deny knowledge of the fact that the cheque for Kshs.168,610.05 was dishonoured and that their account reverted to a debit status.

6. In any event, they contend that when the property was advertised for sale in early 2001, they approached the Defendant and it transpired that interest had been accumulating on the account and the amount due was in excess of Kshs.800,000. They negotiated payments by installments and did so as follows: -

a) On 4.4.2001 – Kshs.18,000.

b) On 7.6.2001 – Kshs.18,000.

c) On 8.8.2001 – Kshs.16,000.

The Defendant then tried to sell the property on 1.1.2001.

7. Subsequently they filed this suit and chief among their complaints is the one that, the interest charged on the principal sum was arbitrary, unlawful and oppressive. Further, that they received no statements of account for the period 1.1.1995 to the date of filing suit and therefore did not know that they owed the Defendant any money.

8. They admit that they owe Kshs.3,205.45 plus interest at 1.1.1995 to the date the full amount is finally paid. They did not calculate what this amounts to and therefore still do not know what they owe, or what they admit they owe.

9. The evidence of the Defendant through its Assistant Manager/Legal Officer, Janet Wawuda Mwadime was to the effect that the cheque for Kshs.168,610.05 was paid but it was dishonoured. The said cheque was sent to the Plaintiffs at the address they had given plus a notice that the balance owing as at 22.2.1995 was Kshs.192,163.35. (Defence exhibit 1). Statements were thereafter sent to the Plaintiff's monthly as is the practice of the Defendant also showing that the cheque aforesaid had been dishonoured. This practice was not new to the Plaintiffs as Defence exhibit 2, Defence exhibit 3, Defence Exhibit 4 and 5 are all letters enclosing cheques that the 1st Plaintiff had issued which later "bounced" over varying periods between 1992 and 2001

. 10. On the sticky question of interest chargeable, I was referred to page 3 of the charge document and clause 5(2) which allows the Defendant the discretion to increase interest with notice and the increase cannot be questioned. The interest throughout the operation of the Plaintiffs account kept varying and at no time till the hearing of the suit was the same questioned.

11. Lastly, I am told that there cannot be an order of discharge of a charge by way of an injunction as is claimed by the Plaintiffs. 12. I have looked at the matter and to my mind I should answer a number of questions before determining the matter:

i) Was there any money outstanding on the Plaintiffs' account as at 1.1.1995? If so, how much?

ii) What rate of interest rate, if any, should the account attract at any one time?

iii) Who is at fault for the state that the parties now find themselves in?e issued in the circumstances of this case? v) Who is to bear the costs of this litigation?

13. Firstly, it is not disputed that as at end of December 1994, the balance outstanding on the Plaintiffs' account was Kshs.168,610.05. Payment was made but that credit was soon thereafter debited on account of the "bounced" cheque for the same amount. The 1st Plaintiff admitted that soon thereafter he left Nairobi and set up shop at his rural home. He did not inform the Defendants of change of address, as is the practice. The Defendant continued to send statements to an address, which the Plaintiffs no longer used. One cannot blame the Defendant in such circumstances. The amount of Kshs.168,610.05 continued to accumulate interest and penalty. The fault lies squarely with the Plaintiffs. They ought to have made contact with the Defendant to ascertain that their account was in the clear. I cannot understand how two well-educated people can sit on their laurels for six years and think that their title has been discharged and yet they have not received the discharged title!

14. Secondly, on the interest question, like all courts in Kenya confronted with this question, I am alive to the dictates of law that parties must be held to their contract. The charge registered on 22nd April 1987 is duly signed by both parties in acceptance of its terms. Clause 5 thereof provides 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 from time to time serve on the chargor on demand notice requiring payment of interest at such increased or reduced rate as the charge 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 chargee will notify the chargor of the amount of the resulting varied 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 month 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 customed and have effect as referring to interest as fixed or altered by the provisions of this clause.”

15. I would have expected counsel to dissect this clause into useful ammunition but neither did. I shall limit myself to the fact that the interest rate in the schedule is said to be 13½% p.a. (variable). I shall also take the simplistic view that parties thereof in the absence of submissions to the contrary are generally in agreement that the Defendant could vary interest and give notice to the Plaintiffs of such variation and the same cannot be challenged for whatever reason. I was not addressed on the notice and how it should have been worded. I therefore, take it that the “certificate of mortgage interest charged” in each year and found at the bottom of the Bundle of Statements of Accounts for each month is such notice.

16. For avoidance of doubt, that certificate, for example for the year 1994, reads as follows: -

“CERTIFICATE OF MORTGAGE

INTEREST CHARGED IN THE YEAR 1994.

NAME OF MORTGAGEE

- KHAMISI WILLIAM WANYONYI

- KHAMISI JUDITH LEUNIDAH

PROPERTY L R NUMBER – NBI/BLOCK 82/767

ACCOUNT NUMBER – 098443

TOTAL ADVANCES – 333,000

RATE OF INTEREST – 26.000% INTEREST

ON MONTHLY REDUCING BALANCE

We certify that the amount of interest charged to the above account was Kshs.71,185.00 for the year ended 31st December 1994.

Yours faithfully

FOR MORTGAGE MANAGER – HFCK

THIS CERTIFICATE SHOULD BE ATTACHED

TO YOUR INCOME TAX RETURN”

17. The statements of Accounts were addressed to the Plaintiffs at P.O. Box 53476 Nairobi and it is presumed that they had notice of the variation of interest.

18. I am told by Mr. Lubulellah that the interest rate was unconscionable. He did not extrapolate on the matter but I presume that what he meant is what most chargors in that position say; that the interest forms the bulk of the claim; that interest is more than the principal sum; that that proposition is surely unconscionable!

19. I am aware of my Brother Onyango Otieno’s words in *Pelican Investment vs. National Bank of Kenya Ltd.* {1998} LLR 173 where he discussed the South African “Duplum Rule” which is really to the end that the interest on a mortgage should not exceed the initial capital or the principal sum. Closer home, this is what can be termed in our time as the “Donde Principle”. Onyango Otieno however had this to say on the thorny issue: -

“I do agree that such a legal proposition might be ideal in this country as it would ensure that the debtors do not suffer the requirements upon them to pay extra large interest caused by the indolence and lapse or deliberate failure by the creditors so as to let the unserviced loans accumulate interest to unimaginable levels. It will protect the debtors as well as ensuring that the creditors get their money back for further circulation and hence the economy will be healthy. However to introduce this Dutch Law by way of judgment or a ruling into the common law of this country will in my opinion be too drastic a step to take as it will not be based on any existing legal authority or statute whatsoever in our country. It is law that had better be introduced by way of legislation.” I agree.

20. The Plaintiffs knew or ought to have known that by not discharging their property, interest would always accumulate. This is what my brother above referred to as “indolence and lapse”. They cannot now be heard to be saying that they should be treated with kid gloves. Equity, it has been repeated for the umpteenth time, does not aid the indolent.

21. Thirdly, the parties find themselves where they are because of the Plaintiffs own actions. I have indicated above what caused the excessive interest to be levied. I must note however that when sale was attempted in 2001 the Plaintiffs did not question why and how the amount escalated but made payments to reduce the same. They subjected themselves to the amount claimed by the Defendant – see page 3 paragraph 6 of this Ruling. The contract is however

intact and as they agreed. Viscount Simon in *British Movietone News Ltd. vs. District Cinemas Ltd.* {1952} AC 166 at page 185: -

“The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events, which they did not all anticipate- a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this itself does not affect the bargain they have made. If on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point- not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction, it does not apply in that situation.”

See also the comments on “just and reasonable” by Lord Wright in *Constantine’s case* – {1942} AC at 186

22. Fourthly, as I have now shown the Plaintiffs' case is quite wanting. The statutory power of sale was properly applied and I heard nothing from the Plaintiffs to persuade me to think that there was breach on the part of the Defendant. In the circumstances I am certain that I cannot issue an injunction to stop statutory power properly used. This is the main prayer in the Complaint and it has collapsed. The suit must also collapse.

23. In the circumstances, the Plaintiffs' suit is hereby dismissed. 24. The Defendant shall have costs thereof.

Dated and delivered at Nairobi this 24th day of February 2004

I. LENAOLA

Ag. JUDGE

24.2.2004

Before Lenaola Ag. J.

Amos CC

Mr. Mureithi for the Defendant

Mr. Ashimosi for the Plaintiff

Judgment is read at 9.05 a.m.

I. LENAOLA

Ag. JUDGE