REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 85 OF 2016

ISAAC MUCHIRI GITHINJI..PLAINTIFF

VERSUS

DAVID WAINAINA GACHOKA...DEFENDANT

JUDGMENT

Summary of facts

By a Plaint dated 13th June 2016, the Plaintiff herein sued the Defendant for a refund of the purchase price of Rice Holding No. 280B Tebere Section Unit 19 (hereinafter referred to as the Suit Property) together with interest thereon at the agreed rate of 50% per annum or in the alternative, a transfer of one acre out of the suit property. It is the Plaintiff's case that he entered into a contract with the Defendant on 12 th June 2013 in which the Defendant agreed to transfer 1 acre of the Suit Property to him, for a consideration of Three Hundred and Sixty Thousand Shillings (Ksh.360,000.00). That the Plaintiff on various dates made payments to the Defendant amounting to Two Hundred and Fifty-Five Thousand, Two Hundred and Seventy Shillings (Ksh. 255,270.00). That the Plaintiff was to pay the balance of the purchase price once the Defendant gave him a tenant card and licence to the suit property, but that in any case, the Plaintiff was to take possession of the suit property on 1st August 2014. It is the Plaintiff's case that the Defendant after receiving the totals amounting to the said Two Hundred and Fifty-Five Thousand, Two Hundred and Seventy Shillings (Ksh. 255,270.00) refused to transfer the suit property to him, despite demand and notice to sue. It is on this basis that the Plaintiff approached the court, seeking a refund of the deposit and interest thereon or in the alternative for a transfer of the agreed one acre in the suit property.

The Defendant entered appearance on 5th July 2016 but did not file his defence. On 9th December 2016, the Plaintiff obtained an *ex-parte* judgement against the Defendant for the refund of Two Hundred and Fifty-Six Thousand, Two Hundred and Seventy Shillings (Ksh. 256,270.00) plus interest thereon at the rate of 50% from the date of agreement as well as costs of the suit. The Defendant in spite of service of the taxed bill of costs failed to make the necessary payment to the Plaintiff/Judgement-creditor. He was thus committed to civil jail. On 9th April 2018, the Defendant by way of a Notice of Motion Application prayed for a stay of execution of the decree and release from civil jail. He blamed his Advocate for failing to turn up in court and for failing to update him on the goings-on of the case. On the same date, he filed his defence wherein he admitted receipt of Two Hundred and Fifty-Five Thousand, Two Hundred and Seventy Shillings (Ksh. 255,270.00) but averred that he had indeed given possession of one acre in the suit property to the Plaintiff. He further contested that since the Plaintiff is not a licensed money lender, he was not entitled to charge excessive or oppressive interest rates to members of the public. He prayed for the suit to be dismissed with costs.

By consent of the Parties, the judgement in default of the Defendant's appearance was set aside on 25th October 2018. The matter proceeded for hearing on 9th October 2019 and the Parties agreed for judgement to be entered in favour of the Plaintiff for Two Hundred and Fifty-Five Thousand, Two Hundred and Seventy Shillings (Ksh. 255,270.00) and for the Parties to negotiate and agree on costs and interest. The Parties failed to agree on the issue of costs and interest and canvassed the matter by way of written submissions.

Submissions

The Plaintiff filed his submissions on 21st May 2020. On the issue of interest, it is the Plaintiff's submission that the court ought to give effect to the agreement of the parties and is not allowed to rewrite the contract. The contract having provided for 50% interest, the Plaintiff's prayer is for the court to give effect to the agreed interest rate. The case of *National Bank of Kenya Ltd Vs Pipe Plastic Smakolit (K) Ltd & Another (2001) e KLR* is cited in support. On the question of costs, the Plaintiff submits that costs ought, by provision of *Section 27 of the Civil Procedure Act, Cap 21*, to follow the event. Being the successful party, the Plaintiff is of the view that he is the one entitled to costs.

The Defendant filed his submissions on 16th June 2021. He submits that the agreement between himself and the Plaintiff is void since the property to be transferred was not personal property, but merely a licence in the rice holding, belonging to the National Irrigation Board. He

cites the decision in *Republic Vs Chairman Advisory Committee Mwea Irrigation Scheme & 2 Others Misc. No 67/2006 Embu and Catherine Wambui Muriithi Vs Mwea Irrigation Scheme & Another (2014) e KLR* in support. He further submits that he cannot be said to have breached the agreement, as the agreement did not have any attaching timelines. He cites the case of *Gurder Singh Birds & Another Vs Abubakar Madhubuti E.A***.** It is the Defendant's further submission that the agreement was dependent on the authority of the scheme manager. He further challenged the interest rate of 50% as being unconscionable and excessively high. The decision in *Elijah Wachira Mugo Vs John Muriithi Kinyua Kerugoya HCCA 192/13 and Danson Muriuki Kihara Vs Amos Kithua Gatongo (2012) e KLR* are cited in support. It is the Defendant's further submission that he did not in any way restrain the Plaintiff from cultivating but that it was in fact his wife and sisters who had placed a caution on the rice holding. Finally, on the issue of costs, the Defendant encourages the court to exercise its discretion in ordering for each party to bear its costs.

Issues for Determination

1. **Whether the interest rate of 50% contained in the Parties agreement ought to be upheld;**

2. **To whom costs ought to be awarded.**

Legal analysis and opinion

The Court has anxiously considered the Parties pleadings and rival submissions. It is noted that the Defendant has introduced several issues in his submissions which issues were not pleaded. These include the validity of the sale agreement, the caution placed on the rice holding held by the Defendant and the question of the timelines associated with the transaction. It is trite law that cases must be decided on the issues pleaded and that submissions do not constitute pleadings.

Order 2 Rule 4 of the Civil Procedure Rules, 2010 provides as follows:

"***Matters which must be specifically pleaded.***

> *4. (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality —*
>
> *(a) Which he alleges makes any claim or defence of the opposite party not maintainable;*
>
> *(b) Which, if not specifically pleaded, might take the opposite party by surprise; or*
>
> *(c) Which raises issues of fact not arising out of the preceding pleading.*

The decision in ***Republic Vs Chairman Public Procurement & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] e KLR*** *i*s instructive:

> "*The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored."*

See also the Court of Appeal's findings in ***Elizanya Investments Limited Vs Lean Energy Solutions [2021] e KLR:-***

> "*The respondent however did not address the said issue in its statement of defence or by calling evidence. The said issue cannot be resolved by way of submissions as the respondent's Counsel attempted to do."*

Based on the foregoing the Court will limit its determination to the issues raised by the Parties' pleadings, which issues have already been framed above.

The first issue is on whether or not the Court ought to award the interest rate of 50% in accordance with the agreement drawn up between the parties. The Defendant's position is that the interest rate in unconscionable and excessively high, a situation that invites the court to interfere with the parties' contract. An unconscionable bargain is defined in ***Black's Law Dictionary; 9th Edition*** as follows:

> "*A bargain is said to be unconscionable in an action at law if it was such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other".*

The Court of Appeal decision in ***Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) e KLR*** cited with approval the case ***Commercial Bank of Australia Ltd Vs Amadio [1983] 51 CLR 447*** the Court in Australia stated that:

> "*Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. [Such disability includes] …"poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of*

education, lack of assistance or explanation where assistance or explanation is necessary". … the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other."

In the same decision, the Court of Appeal cited with approval the ***UK*** decision in ***Strydom Vs Vendside Ltd [2009] EWHC 2130 (QB***) which set out the necessary ingredients for finding a clause to be unconscionable:

"In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient – all three elements must be proved, otherwise the enforceability of contracts is undermined…. Where all these requirements are met, the burden then passes to the other party to satisfy the court that the transaction was fair, just and reasonable."

The court agrees with the decision in ***Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) e KLR*** *it was stated:-*

"It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd Vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.

Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the/a procedural abuse during formation of the meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case."

The Defendant averred that he was in dire need of money and would not have entered into such an oppressive contract were he not so desperate. The Court has reviewed the agreement and notes that while 50% p.a in interest is very high, it was not one sided. Clause 5 and 6 of the contract are captured below for emphasis:

'5. In case of breach of this agreement by the Vendor, he shall refund the amount paid with an interest of 50% p.a, calculated from the date of this agreement.

6. In case of breach of this agreement by the Purchaser, he shall receive refund of the amount paid less 50% p.a calculated from the date of this agreement.'

The attempt by the Defendant therefore to show that he was in a weaker bargaining position and was thus taken advantage of cannot stand. It is clear that should the tables have turned; it would be the Plaintiff who would be visited upon by the high interest rate. Following the decision in ***Strydom Vs Vendside Ltd [2009] EWHC 2130 (QB)*** *captured* above, courts interference is justified to stop one party from oppressing the other weaker party. From the facts of the case and the contents of the contract, the Parties held equal bargaining power and the Courts intervention is therefore in my opinion, unjustified.Succor is found in the Court of Appeal decision in ***Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited (2014) e KLR,*** which cited with approval ***Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298:***

"Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. The jurisdiction of the court to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident." (Underline, mine)

It is the Court's finding therefore that the Defendant ought to pay the agreed interest from the date of the agreement as provided in the contract. On the second question relating to the costs of the suit, the Court agrees with the Defendant that the court is vested with discretion to determine which party ought to bear costs.

Section 27 of the Civil Procedure Act, Cap 21 provides as follows in relation to costs of a suit:

"(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.'

The Court in ***Republic Vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd*** *(Judicial Review Application No. 6 of 2014)* pronounced itself as follows on the issue of costs:

"The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event…. It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

Again, the Supreme court of Kenya in the case of ***Jasbir Singh Rai & 3 others Vs Tarlochan Singh Rai Estate of & 4 others [2013] e KLR*** *observed that:*

"……in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs……"

The decision in ***Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & another [2016] e KLR*** citing the decision in ***Republic Vs Kenya National Highway Authority & Others, Ex parte Kanyingi Wahome (J.R No. 466 of 2014*)** provided a useful guide in the matters to be considered in exercising discretion**:**

*"**(i)** The conduct of the parties, **(ii)** the subject of litigation, **(iii)** the circumstances which led to the institution of the proceedings, **(iv)** the events which eventually led to their termination, **(v)** the stage at which the proceedings were terminated, **(vi)** the manner in which they were terminated, **(vii)** the relationship between the parties and **(viii)** the need to promote reconciliation amongst the disputing parties pursuant to Article **159 (2) (c)** of the Constitution."*

In the present case, it is not lost on the court that the Plaintiff indulged the Defendant's application to set aside a judgement entered in his favour on the default of appearance by the Defendant. Secondly, the Defendant is in agreement that he was given the deposit but that the Plaintiff has since not gotten back the full refund nor the rice holding, 8 years after the conclusion of the agreement. In any case, following the event, it is the Plaintiff who emerges victorious. Based on the foregoing, it is my view that costs ought to be awarded to the Plaintiff which I hereby do.

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 11TH DAY OF JUNE, 2021.

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E.C CHERONO

ELC JUDGE

In the presence of:-

1. *Ms Ndorongo holding brief for Mrs Makworo*

2. *Mr. Wanyike holding brief for Ann Thungu*

3. *Kabuta – Court clerk.*