



Jedrome Building and Civil Engineering Limited & another v Oriental Commercial Bank (Civil Case 70 of 2018) [2023] KEHC 18960 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18960 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 70 OF 2018
RN NYAKUNDI, J
JUNE 16, 2023**

BETWEEN

JEDROME BUILDING AND CIVIL ENGINEERING LIMITED ... 1ST PLAINTIFF

WILLIAM KIPKURUI 2ND PLAINTIFF

AND

ORIENTAL COMMERCIAL BANK DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 28th July 2015 and an amended plaint dated 16th August 2019 seeking the following orders;
 - a. Declaration that the 1st plaintiff is not indebted to the defendant and parcel of land no. Uasin Gishu/Illula/1024 registered in the names of the 2nd plaintiff be discharged and the title documents be released to him.
 - b. The defendants be ordered to refund a sum of Kshs. 5,200,022.69/- to the plaintiffs
 - c. Costs and interest.
 - d. Any other relief that this honourable court may deem fit to grant.
2. The parties were directed to prosecute the claim vide written submissions.

Plaintiff's Case

3. Learned counsel for the plaintiff filed submissions on 18th January 2023. Counsel submitted that the plaintiff had obtained credit facilities through three accounts as envisaged in the letter of offer dated 21st April 2011, namely;
 - a. Operation account no. xxxxxxx33(with over draft)



- b. Term loan account no. xxxxxxxx98
 - c. Asset finance account no. xxxxxxxx10
4. Further, that the guarantee of Kshs. 1,000,000/- was not a loan and no credit was advanced in that respect. He laid out the loan facilities as follows;
- a. Overdraft -Kshs 4, 000, 000
 - b. Asset finance -Kshs 1, 960,439
 - c. Term loan - Kshs 4, 500, 000
 - d. Guarantee -Kshs 1, 000, 000
5. Learned counsel submitted that different interest rates were applicable to the different facilities as follows;
- a. The overdraft facility was to attract an interest of 5 % over the base rate at the time the base rate was indicated by the defendant as 14.75% p.a so interest rate at the time was effectively 19.75% p.a.
 - b. The asset finance loan had a flat rate of 9% p.a
 - c. The term loan was to attract interest of 2% over the base rate which was 16.25% p.a
6. Counsel stated that there was a statutory notice issued on 7th August 2012 for Kshs. 3,161,757.85/- but the defendant agreed to call off the auction and allow the plaintiffs to sell one of the properties by private treaty. He submitted that they had agreed to sell parcel of land no. Eldoret Municipality block 10/686 to Samji Pindoria and Dilip Vekaria of Darshan Plastics Ltd for Kshs 10, 000, 000 (Ten million) and the funds would be utilized to offset the entire liability with the bank although the same was not captured in writing. It is the plaintiff's case that when the sale was concluded on 4th February 2014,
7. instead of defendant releasing the plaintiffs after receiving the money they proceeded to demand a further payment of about Kshs 4 million.
8. The plaintiff's protested the same vide a letter and appointed an audit firm to conduct an audit which was produced as evidence in court by PW2, wherein
9. observations were made but the same were not challenged by the defendant. Counsel urged that they produced evidence that the operations account no. xxxxxxxx33 was being operated in the absence of funds and was mismanaged.
10. Further, that the incidences of mismanagement led to the plaintiffs being overcharged for the loan.
11. The plaintiff contended that the amount of interest rate charged on the account rose to 27.5% from 16.25% without explanation and contrary to the letter of offer. Further, that the interest which was being charged was in contravention of section 33B (i) and 2 the Banking Act. Counsel urged that the auditors report produced by the plaintiffs dated 16th May 2019 has given the CBK rates for the period between 1/2/2009 and 1/11/2013 and it is clear that when the bank was charging 27.5% p.a which was contrary to the specifications of the law especially section 44 of the Banking Act which states that "No institution shall increase its rates of banking or other charges except with the prior approval of the minister".
12. Counsel submitted that by the time the defendant bank instructed Auctioneers on 30th October 2013 the loan facilities by the plaintiff had long become non-performing so the defendant bank resulted in



charging suspended interest debit and reflecting the same in the plaintiff accounts to the detriment of the plaintiffs. These type of interests are against the provisions of section 44 of the *Banking Act* (cap 488) and also section 52 (3) of the same act. He also stated that the bank has to justify how a loan of Kshs. 4.5 million and an overdraft of Kshs. 4 million resulted in a figure of over Kshs. 20 million owing. Counsel urged the court to allow the plaint as prayed.

Respondent's Case

13. Learned counsel for the respondent filed submissions on 10th February 2023. He urged that the Plaintiff and defendant all agreed that several banking facilities were advanced to the plaintiff. Further that it is not in dispute that
14. the facilities were not serviced at all and that the plaintiff admitted to falling in arrears immediately they took the facilities and even wrote to the Defendant requesting the bank to sell ELDORET MUNICIPALITY/BLOCK 10/686.
15. Further, that this parcel was eventually sold by private treaty at the request of the defendants and fetched Kshs 10 Million.
16. Learned counsel submitted that the plaintiff's allegation that the proceeds of the sale were to be in full and final settlement of all liabilities was not proved by evidence and, that the bank could not have waived Kshs. 5.9 million without a written agreement. He stated that in any event, there was no such request for waiver of interest or part of the loan by the Plaintiffs. The 10 Million realized only reduced the outstanding loan, leaving a balance of Kshs 5,937,903.90.
17. Counsel for the defendant submitted that the auction of securities was stopped at the request of the plaintiff and thus the costs incurred with respect the halted auction was to be borne by the Plaintiffs as per the provisions of the charge document. Thus, the debiting of the account with auctioneers' charges were legitimate.
18. Learned counsel submitted that the interest in the offer letter was the normal interest rate and the offer letter further provided for excess rate of 26.5% in the event of default of repayment of the loan facility. Further, that the Plaintiff admitted to failing to service the loans, thus default/excess interest rate became applicable as a consequence. There was no evidence led by the Plaintiffs to prove that the Bank charged a rate higher than 16.25% when the loan accounts were not in arrears and as the plaintiff admitted not servicing the loan, this explains the application of the default rate of 26.5%.
19. The defendant disputed that the balance accrued offended the in duplum rule and submitted that the plaintiffs were advanced various facilities aggregating to Kshs. 10,460,439. The Plaintiffs did not repay the loans and as such they
20. accrued interest at agreed rates, that is at 16.25% and then at 26.5% being default rate when the accounts fell into arrears. The Plaintiff paid Kshs. 10 Million from proceeds of sale, leaving balance of Kshs 5,937,903.90 in the year 2014 and as such, the sums demanded do not exceed the permitted limits. With regard to mismanagement of accounts, learned counsel for the defendant explained that the plaintiffs either did not seem to understand how
21. the overdraft account operates or at least they feigned ignorance. He urged that the defence witness explained that the Operations account was the main account from which all monies would be disbursed to the various loan
22. accounts. These details are well captured in the terms contained in the offer letter. The main account is the account in which the customer would receive cash from his customers and from the same account



that loan sums would be debited with instalments. The Bank debited the account to pay terms and asset finance loan. The Plaintiff was allowed to overdraw up to the limit of Kshs. 4 Million. At his request to the Bank, he would exceed the overdraft limits by issuing cheques to his customers. The argument that the debits resulted in excess interest is frivolous. To the contrary, the net effect was that the loan account to which money is paid reduced the loan balances hence lesser interest at normal rate of Kshs 16.5%.

23. Learned counsel for the plaintiff submitted that the auditors report was incompetent as PW2 did not have a practising license when he purported to prepare the report. He purported to use some other persons licence to prepare the alleged audit report. The report is therefore incompetent in so far as it was prepared and presented by an unqualified person. He relied on the case of Apollo Niru Munyi Vs Kenya Power & Lighting LTS 2021 eKLR to support this submission. The Plaintiffs prayer for refund has not proved as the PW2 was not qualified or licensed to do accounts or audit and as his report is not admissible, his findings in the purported that there was an overpayment of the loan is inadmissible. He urged the court to have the suit dismissed with costs.

Issues for Determination

24. Upon considering the plaint, attendant pleadings, documentary evidence and submissions by both parties, the following issues arise for determination;

- a. Whether the plaintiff(s) are indebted to the defendant
- b. Whether the declarations sought should issue

Whether the plaintiff(s) are indebted to the defendant

25. To contextualise the facts of this case I am persuaded by the general principle made by Lewison J in Law Debenture Trust Corporation plc v Concord Trust

(2007) EWHC 1380 (ch) paragraph 53” “The essence of the equitable right to redeem is that the mortgagor is allowed to perform his contract, but late. Apart from time stipulations, I do not consider that the court, in the exercise of its equitable jurisdiction, can or should rewrite the contractual terms of redemption in favour of the mortgagor. To do that would in effect allow the mortgagor to benefit from his own breach of contract. So the question I must answer is: what liabilities are secured by the security?” Page 7 As the passage itself indicates, the mortgagee was maintaining that the securities which it held, but which the mortgagor was trying to recover, continued to be required to cover outstanding liabilities. The mortgagor could be given more time in which those liabilities should be met, but could not be relieved of them. The Board accepts that as the standard rule, but the issue in this case is whether exceptional circumstances may make it inequitable or unconscionable to apply the general rule in the latter situation identified in the previous paragraph”

26. I have considered the submissions by both parties and the evidence tabled and it is clear that there were loan facilities that were issued to the plaintiff by the defendant. It is also clear that there were two parcels of land that were used to secure the loan facilities being LR No. Eldoret/Municipality/Block 10/686 and LR NO. Uasin Gishu/Illula 1024. The plaintiff does not dispute the issuance of these facilities and the same is evidenced by the plaintiff's agreement to have the first piece of land that was the subject of a charge to be auctioned in order to settle the debt. The loans disbursed to the plaintiff were an asset finance loan of Kshs. 1,960, 439/-, overdraft facilities of Kshs. 4,000,000/- and a loan facility of Kshs. 4,500,000/-.
27. The plaintiff did not provide any evidence that any of the loan facilities had been serviced and this is compounded by the request to have the charge



28. property being LR No. Eldoret/Municipality/Block 10/686 sold to settle the debt.
29. There is no evidence that the sale was to settle all the debts owing. Further, the plaintiff exceeded the overdraft limit resulting in a demand of the figure of Kshs. 3,161,757.85 on 7th August 2012.
30. In addressing the issues in the context of the evidence by the plaintiff and a rejoinder by the defendant witness any considerations from the questions
31. involved must, it seems to me proceed upon an appreciation of the fact the right of entry or exercise of the power of sale by the Bank and the claim by the plaintiff the plaintiff rights which in a loan agreement are mutually independent and separate rights. The statutory power of sale is contained in the Land Act of 2012 the mortgage is a charge on the land and the bank is entitled to exercise the power of sale in the event the borrower defaults in meeting his or her own obligations. Section 90 empowers the defendant bank to sale the mortgaged land upon default in payment or performance of the covenant set out in the deed. Whereas Section 96 of the same act provides:
- “Where a charger is in default of the obligations under a charge and remains in default at the expiry of the time provided for the rectification of that default in the notice served on the charger under section 90(1), a charge may exercise the power to sell the charged land, Before exercising the power to sell the charged land, the charge shall serve on the charger a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell”
32. The plaintiff in his evidence invited this court to make a finding that by the nature of the transactions with the bank he has fully fulfilled his obligations of settling the debt conditioned in the agreement. That in the present case the defendant bank has no money owed if anything the overpayment should be refunded back based on the records from the evidence. In contrast, the defendant witness countered the assertion by the plaintiff by stating that the bank is still owed the loan from the mortgage instrument respectively signed
33. by both parties. In my evaluation of the facts of this case there is no evidence of an overpayment in support of the plaintiff’s claim.
34. The authenticity of the documentary evidence on the repayment of the debt remains largely elusive. There is an acknowledgement of the debt by the plaintiff and on the total balance agreed with the defendant. These acknowledgements ought to be supported by clear precise evidence from the date of the first to the last repayment outlining the principle amount and corresponding interests. It is unclear when the last repayment was made in compliance with the mortgage deed. Additionally, there were no receipts,
35. standing orders, cheques, or other documentary evidence tendered by the plaintiff covering the stipulated period
36. in the letter of offer. Similarly, upon considering the evidence by the Plaintiff the chronology as to when the first interest payment was due and paid in consonant with the loan agreement remained sketchy weighing all the facts and the truthfulness of his testimony. These assertions on full settlement of the debt were repeated in his witness statement and an oath before court but on addressing the issues on full account of the evidence it came out clearly that he still owes the defendant bank in relation to the mortgagee instrument the defendant bank is entitled to whole the sums including interest due to it in accordance with the instruments of the mortgage.



37. It is my considered view that the aggregate sum of the loan facilities issued to the plaintiff was Kshs. 10,460,439/-. Further, that the loans accrued interest rates that were agreed upon by virtue of plaintiff accepting the offer from the defendant. The interest rate of 16.25% was correctly charged at 26.5% pursuant to the default by the plaintiff and subject to the provisions of clause 5.1-5.6 and the schedule at page 15 of exhibit D1, the offer letter.
38. Therefore, the defendant has a right to recover the balance of the loan facility advanced to the plaintiff according to the rates that were agreed upon in the offer letter. It is crystal clear that the plaintiff defaulted on the loan facilities, and consequently, is indebted to the defendant.

Whether the declarations sought should issue

39. Given that it is evident that the plaintiff failed to service the loans and that it was an agreed term of the facility that the interest rate would vary after default, the order for recalculation cannot issue.
40. As the plaintiff admitted indebtedness, the court cannot declare that he is not indebted and further, the guarantor's parcel of land cannot be discharged as it was purposely provided as a security to recover the sums owed in the event of default by the borrower. Whether the defendant should refund the sum of Kshs. 5,200,022.69 to the plaintiff
41. The plaintiff's claim on this is based on the auditor's report that was produced
42. in court by PW2. The same was dated 16th may 2019. The report was opposed by virtue of the claim that the auditor was not licensed to conduct said audit and as such it was not admissible as evidence.
43. Having determined that the plaintiff was in default and had never serviced the loan facilities resulting in the statutory notices and the claim on the balance of the facilities after the agreed sale of the securities by private treaty, it is my considered view that the plaintiff(s) failed to prove that there was any sum due to them.
44. On the issue of debiting the recovery fees to the auctioneers account, it was also a term of the charge document that legal and recovery expenses would be paid by the defaulting borrower and as such the defendant did not err in doing the same.

Whether the interest claimed was in breach of the in duplum rule

45. "In duplum" is a Latin phrase derived from the word "in duplo" which loosely translates to "in double". Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Section 44 of the *Banking Act* incorporated the in duplum rule which limited the amount a bank or financial institution could recover from a non-performing loan. In the case of National Bank of Kenya Limited –vs- Beth Ngonyo Ngengi & another (2012) Eklr in which the charge stated that: " I have my own doubts on application of penalty interest for breach of commercial contracts. However, I am aware that it is a known trade usages and custom within the banking industry to charge penalty when a borrower defaults. In this case I need not rely on the implied terms as it was expressly provided for.
46. In my understanding whether or not a charge applied is a "penalty" in a Commercial Contract is a determination of the court notwithstanding the fact that the charge applied is styled penalty interest. " The court of Appeal on this issue in Housing Finance Company of Kenya vs John Silas Lenana Ole Puleiy (2019) EKLR in which the judges of Appeal stated:

The respondent agreed to meet the repayment installments as and when they fell due, inclusive of the interest accrued and lawfully levied, and in default allowed the appellant to



realize the security within the terms of the charge and the law. (See of Kenya Commercial Bank Ltd v. Osebe (supra) and Mbuthia v. Jimba Credit Finance Corporation & another (supra). The contractual rate of interest as provided for in the two charges was 18% & 19% respectively. The respondent's contention is that the appellant levied irregular, illegal, unlawful and wrongful default penalty charges/ or interest without the sanction of the Minister for Finance under section 44 of the Banking Act as read with section 39 of the Central Bank Act. The appellant does not deny that the levied default penalty charges or interest were not provided for in the two charges. Neither does it dispute that these were indeed levied. The explanation it gave and which the trial judge rejected was that the default penalty charges or interest were levied pursuant to custom and usage in the mortgage industry in Kenya.

The appellant did not adduce any evidence of established custom and usage supporting the charging of default penalty charges or interest, which the respondent was charged. We seriously doubt whether such custom and usage, even if proved, could prevail over the express provisions of the law. In any case, the appellant did not contest the finding by the learned judge that the default penalty charges or interests were levied without the sanction of the Minister for Finance under section 44 of the *Banking Act* as read with section 39 of the Banking Central Bank Act.

Accordingly, we cannot fault the learned judge for holding that the appellant irregularly, illegally, unlawfully and wrongfully levied default penalty charges or interest on the respondent's mortgage account and that the exercise of the statutory power of sale was, in the circumstances, unjustified".

47. In the case at bar to my mind, the question which begs to be asked here is whether the plaintiff on a balance of probabilities answered the interrogatory as to the overcharging of interest. My analysis of the evidence in the mortgage secured by the plaintiff and advanced by the defendant bank tells a different story as to the interest charged. In the view of the court the principle of estoppel as propounded by Lord Denning in *Amalgamated Investment & Property v Texas Commerce International Bank Ltd* (1981) 3 All ER 577 is applicable to the concerns adverted to by the plaintiff:

When parties to transaction proceed on the basis of an underlying assumption (either of fact or law and whether due to misrepresentation or mistake, makes no difference) on which they have conducted the dealings between them, neither of them will be allowed unfair or unjust to allow him to do so. If one of them does seek to go back on. It the courts will give the other such remedy as the equity of the case demands." The plaintiff raised the issue of in duplum but in my considered view, given the loan amount due to the defendant bank, the same is nowhere near twice the facility advanced and as such the same was clearly raised as an afterthought. Based on all the above considerations, I conclude that this was an unwinnable plaint and the reason the entire claim against the defendant bank fails. In the premises, the suit is hereby dismissed with costs to the defendant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF JUNE 2023

In the Presence of:

Mr. Mwetich & Co. Advocates

Mr. Kariuki for the Plaintiff

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R. NYAKUNDI
JUDGE

