Shah & another v I & M Bank Limited (Commercial Case 435 of 2017)
[2024] KEHC 16303 (KLR) (Commercial and Tax) (16 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16303 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 435 OF 2017

JWW MONG'ARE, J

DECEMBER 16, 2024

BETWEEN

BIMALROY CHHOTALAL SHAH ..... 1ST PLAINTIFF

MEERA SHAH ..... 2ND PLAINTIFF

AND

I & M BANK LIMITED ..... DEFENDANT

JUDGMENT

1. The facts giving rise to the present suit are largely common ground and can be gleaned from the pleadings, the court's ruling of 11th May 2018 and the Court of Appeal's ruling of 19th July 2019 (Bimalroy Chhotalal Shah & Meera Shah v I & M Bank Limited [2019] KECA 496 (KLR). At the time of filing the suit, the Plaintiffs were the registered owners of the property known as LR No. 209/7501("the suit property") which served as their family home from 1987. Sometime in 2014 the Plaintiffs approached the Head of Business of the Defendant ("the Bank") with a proposal for financing the conversion of the suit property from a single dwelling residential property into multi dwelling residential houses. This proposal was accepted and the parties executed a Letter of Offer dated 10th March 2014 for two loan facilities being a first term loan of Kshs. 47,000,000/- and a second term loan of Kshs. 196,000,000/- which facilities were secured by a legal charge dated 2nd February 2015 over the suit property. The first term loan was for purposes of taking over of an existing loan facility provided by Giro Bank, whereas the second term loan would finance the development of 6 town houses.

2. Matters did not proceed as planned as the Plaintiffs' loan accounts almost immediately fell into arrears and the intended construction over the suit property did not begin as scheduled. This led to the Bank expressing its unwillingness to continue with the facility and it issued the Plaintiffs with a demand letter on 3rd April 2017 followed by statutory notices dated 13th June 2017 and 25th September 2017 where the

Bank evinced its intention to exercise its statutory right of sale over the suit property. This prompted the Plaintiffs to file the present suit in a bid to forestall any sale of the suit property, however, these attempts were thwarted by the court through its ruling of 18th May 2018 and by the Court of Appeal in its ruling of 19th July 2019 in Bimalroy Chhotalal Shah & Meera Shah v I & M Bank Limited(supra).

3. After the ruling of the Court of Appeal and after the Bank re-issued the statutory notices dated 24th May 2018 and 1st October 2018 as directed by the court in the ruling of 18th May 2018, the Bank proceeded to sell the suit property on 3rd September 2019 by way of public auction to a third party, EK. In its amended Plaint dated 1st September 2020, the Plaintiffs now claim that the Bank willfully and deliberately breached the terms of the offer letter and defaulted on its own express acknowledgement that the banking facilities extended to the Plaintiffs had not yet reached the maturity stage and further the entire substratum and viability of the offer of financing was hinged on the successful execution of the construction. They accuse the Bank of failing to disburse funds to a maximum of Kshs. 25,000,000.00/- against all necessary approvals and startup expenses and failure to confirm the amount to be paid in respect to confirmed sales of at least two townhouses.

4. The Plaintiffs state that on or about 15th August 2016, they informed the Bank of their challenges in getting the approvals and demonstrated through projected cash flow estimates of the revenues, outflows and residuals demonstrating that the credit facilities would be paid over the period of construction and of final completion of the project. That in complete breach of the express and implied terms of the agreement between the parties, the Bank, in a blatant act of failure to comply and meet with their bargain as per the agreement, rejected the Plaintiffs' proposal on 13th September 2016 and declined to extend the facilities due to what it termed "current market environment'.

5. While acknowledging that the Bank issued them with the requisite statutory demands and notices, the Plaintiffs accuse the Bank of computing interest on the arrears illegally and not in accordance with provisions of the *Banking Act* (Chapter 488 of the Laws of Kenya) as evidenced by the fact that the Bank is claiming Kshs. 52,088,842.06 as interest against the disbursement of Kshs. 13,655,200.00. Further that the said statutory notices were illegally and maliciously issued by the Bank in breach of the agreements between the parties.

6. The Plaintiffs contend that these actions have caused them a lot of mental anguish, stress and loss owing to the nature of the agreement of the parties as the Plaintiffs have lost the intended proper use and value land for which they now claim damages. That the total loss of the Plaintiffs caused by the Bank's failure to perform, or observe the covenant, express or implied is Kshs. 465,000,000.00/- which the Plaintiffs now claim. The Plaintiffs also claim that the Bank sold the suit property at an undervalue of Kshs. 9,950,000.00/- and they seek the same as special damages. In summary, the Plaintiffs seek the following prayers:

    a. A declaration that the Defendant has acted in contravention of the *Banking Act* (Cap 488 Laws of Kenya) and that the Defendant has applied interest rates on the Plaintiffs facility in breach of the specific terms of the contractual documents governing the facility.

    b. A declaration that the Defendant is in breach of the express and implied terms of the covenant and the Plaintiffs be awarded General Damages for the loss of user of the suit premises and value thereof as may be assessed by this Honourable Court.

    c. Damages for breach of contract on account of the cancellation of financing in the sum of Kshs. 465,000,000/- less any interest and financing being the lost profits on the project.

    d. A declaration that Defendant is not entitled to interest accrued from the date of breach by the Defendant and any excess interest illegally charged be refunded immediately to the Plaintiffs.

e. Damages for the loss of property through an unlawful, irregular, illegal and immature Auction.

f. Special damages of Kshs. 9,950,000/-.

g. Costs and interest.

7. The Bank responded to the Plaintiffs' claim through the Amended Statement of Defence and counterclaim dated 19th October 2020. The Bank states that after the execution of the Letter of Offer and the security documents, it disbursed the funds through three main accounts but that after disbursement, the Plaintiffs failed to make good the repayment of the installments. That the Plaintiffs failed to regularize their accounts even after being issued with the requisite statutory demands and notices and that contrary to the Plaintiffs' assertion, the Plaintiffs had warranted under Clause 13(a) of the Letter of Offer that all necessary approvals of the construction had been procured.

8. The Bank further stated that from the communication presented by the Plaintiffs to it, the Plaintiffs were trying to enter into a joint venture with other third parties, a clear demonstration that they were not keen to make good the repayment of the facilities. That the Plaintiffs have been evasive as to the amount repaid to the Bank and that they have not demonstrated how much they had paid to the Bank. The Bank asserts that it duly complied with the law prior to the sale of the suit property as requisite notices by both the Bank and the auctioneer were duly issued and that a valuation on the suit property had been done prior to the sale which returned a forced sale value of Kshs. 82,500,000.00/-. That the suit property was sold at an amount of Kshs. 100,050,000.00/- to the highest bidder and at a higher value than that of the assessed forced sale value.

9. The Bank denies that exorbitant and illegal interest rates and charges were computed as averred by the Plaintiffs and the Bank confirms that the interest loaded on the Plaintiffs accounts on disbursed facilities was in full compliance with the provisions of Clause 4 of the letter of offer. It further denies any illegality, malice, loss or breach as claimed by the Plaintiffs. In its counterclaim, the Bank states that after applying the proceeds of the sale to the Plaintiffs' outstanding sums, they were still in arrears of Kshs. 51,887,051.23/- as at 31st January 2020 which is what the Bank now claims from them.

10. At the hearing, the Plaintiffs called Wilfred Abincha Onono(PW 1) and the 1st Plaintiff(PW 2) as witnesses. PW 1, an accountant and Managing Consultant of Interest Rates Advisory Center Limited(IRAC) relied on his witness statement dated 5th May 2021 and produced his letter dated 29th April 2021 and an Interest Recalculation Report (Pex 1). PW 2 relied on his witness statement dated 1st September 2020 and produced the Plaintiffs' List and Bundle of Documents dated 23rd May 2022(Pex 2-18). The documents include the suit property's title, the Letter of Offer dated 10th March 2014, the Charge dated 2nd February 2025, Letter dated 7th January 2016, email dated 20th May 2016 and time stamped 3.32pm, Letter from the National Construction Authority dated 15th July 2016, Letter from the Bank dated 2nd August 2016,Letter from the 1st Plaintiff dated 15th August 2016, Letter from the Bank dated 13th September 2016, Agreement & Conditions for Contract for Building Works, Letter from ALFAYAZ dated 15th January 2016, the Statutory Demand Notices dated 13th June 2017 and 25th September 2017, the application dated 25th October 2017, the Ruling of the court dated 11th May 2018, the ruling of the Court of Appeal dated 19th July 2019 and the Valuation Report dated 30th October 2018.

11. PW 2 also produced the Plaintiffs' Supplementary List and Bundle of Documents dated 24th May 2022 (Pexhibit 19-22) which documents are the statements of the Plaintiffs' various accounts domiciled at the Bank. On its part, the Bank called one witness, Andrew Muchina, its Senior Manager-Legal Department who relied on his witness statement dated 13th December 2022 and produced the Bank's

List and Bundle of Documents dated 16th July 2018(DExhibit 1-14) and the Supplementary List of Documents dated 19th October 2020(Dexhibit 15-36). The documents include the Letter of Offer, the Charge, statements of accounts, the Bank's letters to the Plaintiffs dated 3rd April 2017 and 30th May 2017, the Plaintiffs' Letter to the Bank dated 15th May 207, the statutory notices dated 13th June 2017 and 25th September 2017, the Valuation Report dated 25th March 2013, the court's ruling of 11th May 2018, the statutory notice dated 24th May 2018, Copies of certificate of postage dated 29th May 2018, the Notice to sell dated 1st October 2018, the certificates of postage dated 2nd October 2018, the valuation report dated 30th October 2018, copy of the 45 days redemption notice dated 27th November 2018 by Garam Investments to the Plaintiffs, copy of Notification for sale dated 27th November 2018 issued by Garam Investments, copy of certificate of postage dated 28th November 2018, copy of certificate under section 15 of the Auctioneer Rules, copy of a letter dated 29th November 2018 from Garam Investments to the Bank, copy of a letter erroneously dated 29th November 2018 from Garam Investments to the Bank, a copy of the Court of Appeal's ruling dated 19th July 2019, copies of the Daily Nation newspaper extracts dated 22nd July 2019 and 2nd September 2019, copy of public auction attendance list prepared by Garam Investments on 3rd September 2019, copy of memorandum of sale between Garam Investments and EK dated 3rd September 2019, copy of KCB Bank Application for funds transfer of Kshs. 23,012,500.00/- dated 3rd September 2019, copy of certificate of sale dated 3rd September 2019 by Garam Investments Auctioneers and copies of the Plaintiffs' statements of accounts.

12. After hearing the parties, the court directed that they exchange written submissions which are now on record. As the evidence and submissions is a mirror of the parties' positions that I have already summarized above, I will not rehash the same but I will make relevant references in my analysis and determination below.

Analysis and Determination

13. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In Miller .V. Minister Of Pensions 1947 ALL E.R 372, Lord Denning aptly summarised the application of the standard in the following terms:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

14. The Court of Appeal in James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR) simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'

15. From the parties' submissions, the court is being called to determine the following issues:-

    1. Whether the Bank was in breach of the express and implied terms of the covenant between the parties.

    2. Whether the Bank acted in contravention of the *Banking Act* by applying interest rates on the Plaintiffs' facility in breach of the law and the specific terms of the contractual documents governing the facility and whether the Bank is entitled to the interest accrued from the date of the breach.

    3. Whether the Plaintiffs are entitled to the damages sought for

    4. Whether the Bank legally exercised its statutory power of sale

5. Whether the Bank is entitled to the prayers sought in the counter claim

6. Who should bear the costs of this suit?

Whether the Bank was in breach of the express and implied terms of the covenant between the parties.

16. The Plaintiffs submit that the Bank was in breach of its obligations having pulled out of the transaction prematurely and at the 11th Hour under fictious reason as the 24-month repayment period had not lapsed by the time they pulled the rug under the feet of the Plaintiffs. That the actions of the Bank in knowing that all repayments would come from the sale of the proceeds of the houses, which houses were to be constructed using the facility, effectively breached the contract when it declined to make the payment to the National Construction Authority and facilitate the commencement of the project. In addition to the above, that having only disbursed Kshs. 13,665,200/-, the Bank unscrupulously created fictional accounts outside the letter of offer, fabricated loan disbursements, and demanded a colossal sum with a view of unfairly and illegally exercising a statutory right of sale over the suit property. It is the Plaintiff's contention that the Defendant at all times, had the end game of selling the suit property with a view of collecting more than they were entitled to. It thereafter created the fictional accounts, relied upon the same in their Statutory Demands and made a profit by selling the suit property.

17. The Bank answered the above assertion by submitting that Clause 3 of the Letter of Offer provided that the facilities were due immediately after drawdown as

follows:

> "All amounts drawn and outstanding under the facilities and all interest and other sums payable in respect of the facilities shall be due and payable at any time forthwith on demand. However, without prejudice to the Bank's right to make demand at any time, it is agreed that:-
>
> The Facilities are repayable immediately should an Event of Default....occur. However without prejudice to the Bank's right to make demand at any time, and provided that no Event of Default has occurred, the Facilities will be repaid by way of bullet payment and/or lump sum payment(s)within a maximum period of twenty four(24) months...."

18. From the above provision of the Letter of Offer, I am in agreement with the Bank that the facilities were repayable immediately after drawdown and that the Bank had a right to demand for any payment once a default occurred. That whereas the facilities were repayable in within 24 months, this did not preclude the Bank from demanding repayment from the Plaintiffs once a default occurred. From the Letter of 15th August 2016, the Plaintiffs admit that they are clearly in default as they had neither started construction of the projected nor begun repayment of the facility. I also note that by this time,

the 24-month repayment period was almost coming to an end and the Plaintiffs remained in default. In the said letter, I note that the Plaintiffs do not blame the Bank for the delay in commencing the project and repayment of the facilities but "....unprincipled and unnecessary hindrances in attaining approvals for the project by the regulatory authorities". Nowhere in the said letter do the Plaintiffs claim that the Bank had disbursed the facility late or below what was expected and they do not dispute the demanded sums indicated in the Bank's letter of 2nd August 2016. They also do not claim that the loan accounts opened by the Bank were fictitious and if anything, their email of 20th May 2016 is seeking an enhancement of the disbursement due to changing economic circumstances. I agree with the Bank that as per the statement of account produced by the Plaintiffs at pg. 118-125 of their Bundle of Documents, disbursements were effected on various dates between 2014 and 2016 in the Plaintiffs' favour. The Plaintiffs do not also blame the Bank for not obtaining the requisite approvals for the construction and I am in agreement with the Bank's position that as per Clause 13(a) of the Letter of Offer, the Plaintiffs represented and warranted to the Bank that all such approvals, consents or authorizations had already been obtained and were in full force and effect.

19. At this point and as the Plaintiffs were clearly and admittedly in default, the Bank was entitled to demand repayment of the same which it did, as evidenced by the Demand Letters dated 3rd April 2017 and 30th May 2017. It is therefore not true that the Bank pulled out of the transaction prematurely as at this time, the 24-month period for repayment had already lapsed. In the response to the demand letter of 3rd April 2017 through the letter of 15th May 2017, I note that the Plaintiffs do not dispute or protest the existence of the impugned loan accounts or the amount demanded by the Bank. If anything, at the penultimate paragraph of the letter, the Plaintiff assure the Bank that the advanced sums will be repaid to it once they secure another financier for the project, which is another admission of the Plaintiffs' default and indebtedness to the Bank. Again, upto this point I am yet to find fault in the Bank so as to conclude that it has been in breach of the Letter of Offer and the Charge as advanced by the Plaintiffs. If anything, I find that it is the Plaintiffs who were in breach of the covenants for failing to repay the facilities as agreed.

20. The Bank was therefore entitled to issue the statutory notices dated 13th June 2017 and 25th September 2017. In the court's ruling of 18th May 2018, the court noted that the Bank admitted that the sum of Kshs. 15,847,891.76/- indicated in the notice of 13th June 2017 for account number xxxxxx was different from the one indicated in the subsequent notice to sell of 25th September 2017 which indicated a sum of Kshs. 33,150,705.72/-. In the ruling, the Bank was directed to re-issue the statutory notices in compliance with section 90 and 96 of the *Land Act*(Chapter 280 of the Laws of Kenya). This is the reason why the Bank issued the statutory notices dated 24th May 2018 and 1st October 2018. At this point, the Bank's statutory power of sale had crystallized and the Plaintiffs were now racing against time to redeem the suit property by repaying the demanded sums therein. From the record, there is no evidence that the Plaintiffs repaid any of the amounts demanded by the Bank therein nor did they offer any explanation as to why they were not repaying the same. In their case, it appears they are challenging the interest applied by the Bank on the loan and they relied on PW 1 and his report to challenge the same.

21. On its part, the Bank stated that the interest applied on the facilities were as per Clause 4 of the Letter of Offer and the Charge and they denied any illegal charges that were not in accordance with the *Banking Act*. It is indeed correct that since the Plaintiffs advanced the contention that the interest applied was unlawful, they bore the burden of proving the same. In his testimony, PW 1 admitted that his report was based on documents provided by the Plaintiffs alone and not the Bank. He also admitted that he was paid the Plaintiffs to prepare the report. Whereas the Bank urges the court to disregard this testimony as was held by the court in Kenya Commercial Bank Limited v Rupa (K) Limited, David

Karanja Kamau & Cyrus Buimwe Kamau [2014] KEHC 4048 (KLR) I note that this decision has since been overturned by the Court of Appeal in Rupa Kenya Limited & 2 others v Kenya Commercial Bank Limited [2024] KECA 1140 (KLR). Therefore, PW 1's testimony cannot just be disregarded for the reasons that he only relied on documents presented to him by the Plaintiffs and that he was paid by them.

22. In his report, PW 1 stated that the Plaintiffs only owed the Bank a sum of Kshs. 47,072,481.58 and not Kshs. 106,955,560.43/- as stated by the Bank. He averred that Interest is calculated on a 365-day calendar year on daily cleared balances and debited monthly by way of compound interest. That Interest rates are applied as advised in the Offer Letter i.e. base rate of 18% p.a. plus 1% p.a. until the date of maturity and thereafter the interest control regime of Central Bank Rate(CBR) plus a margin of 4% p.a. is applied. He stated that he took into account that additional 10% interest rate in case of default and he took into account the factor that there was no payment from October 2016. He also stated that he used the interest rate indicated at Clause 4(b) of the Letter of Offer on a reducing balance mode. As such, he was adamant that the Plaintiffs were overcharged interest and in his conclusion, he stated that the overcharge was due to the Bank applying interest in excess of the provisions of section 33B of The Banking (Amendment) Act 2016 that caps the rate of interest at the CBR plus a margin of 4% p.a. However, I note that this amendment to the *Banking Act* was introduced on 14th September 2016 which was after the parties had already executed the Letters of Offer and the Charge on 10th March 2014 and 2nd February 2015 respectively. It was therefore not reasonable to expect the Bank to apply a rate that was not in existence at the time of granting the facilities. I also note that the said section 33B of the *Banking Act* was repealed by the Finance Act of 2019, therefore, it was also not expected that the Bank was to apply the provisions of a repealed statutory provision.

23. Thus, since PW 1's report faults the Bank's application of the interest rate based on the repealed section 33B of the *Banking Act*, the said report is flawed and cannot be taken to be a reflection of the correct position of the Plaintiffs' indebtedness to the Bank. Save for the application of the rate under section 33B of the *Banking Act* which I have found was not applicable to the Bank at all times material to this suit, PW 1 admitted that the Bank applied the interest rate as provided in the Letter of Offer including lawfully charging the penalty interest rate of 10%. It should not be lost that section 176 of the *Evidence Act* creates a presumption in favour of the Bank's entries in its statements of accounts and since the Plaintiffs have failed to rightly challenge the entries therein, it follows that the statements of account issued by the Bank are the true reflection of the Plaintiffs' indebtedness. The statements therein indicate that the Plaintiffs are still indebted to the Bank to the total tune of Kshs. 51, 887,051.23/-.

24. On the issue of the undervaluation of the suit property, I am in agreement with the Bank that what it is the forced sale value and not the market value is applicable in a sale in exercise of a Bank's statutory right. I note that the valuation report relied on by both parties had a forced sale value of Kshs. 82,500,000.00/- whereas the suit property fetched a sum of Kshs.100,050,000.00/- which was higher than the forced sale value. As the Plaintiffs did not produce any alternative valuation report challenging the one procured by the Bank, it follows that there is no evidence that the suit property was undervalued and sold as such (see Palmy Company Limited v Consolidated Bank of Kenya Limited [2014] KEHC 4811 (KLR).

25. My findings above dispose of the other issues for determination. I hold that the Bank did not act in contravention of the *Banking Act* by applying interest rates on the Plaintiffs' facilities in breach of the law and the specific terms of the contractual documents governing the facility. Further, the Bank was entitled to apply default interest of 10% once there was breach as the same is provided for in the Letter of Offer and the Charge. These findings determine the Plaintiffs' suit in the negative and I find that the Plaintiffs are not entitled to the prayers sought therein as the Bank legally exercised its statutory

power of sale. I am satisfied therefore that the Banks counterclaim of the sum of Kshs. 51,887,051.31/- has merit and that the same has been proved to the required standard. Subsequently, I allow the same as prayed.

26. On the other hand, I find that the Bank's counterclaim has merit and the court ought to award it the sum of Kshs. 51,887,051.23/-.

Conclusion and Disposition

27. In conclusion, the court makes the following dispositive orders:

    a. The Plaintiffs' suit is dismissed in its entirety.

    b. The Defendant's counterclaim dated 19th October 2020 is allowed.

    c. Judgment be and is hereby entered for the Defendant against the Plaintiffs for the sum of Kshs. 51,887,051.23/-

    d. The Defendant is awarded interest on c) above at the court rates from the date of judgment till payment in full.

    e. The Defendant is awarded costs of the suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY at NAIROBI this 16TH DAY OF DECEMBER 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Kimathi for the Plaintiff.

Mr. Kimani for the Defendant.

Amos - Court Assistant