



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO. 575 OF 2006**

**ISAIAH NYABUTI ONCHONGA ..... PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**ISAAC GODFREY ARERI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The issues raised in this Lender – Borrower dispute are not unfamiliar. Isaiah Nyambati Ochonga (The Plaintiff or Customer or Onchonga) was at all material times to the suit a customer of Housing Finance Company of Kenya (The 1<sup>st</sup> Defendant HFCK or Bank). By way of a letter of offer dated 7<sup>th</sup> September 1993 (D1 Exhibit Pages 1-7), the Bank agreed to advance to the customer an aggregate sum of Kshs.1,260,000.00. As part security for the facility a charge dated 7<sup>th</sup> September 1993 (P. Exhibit 2) was duly registered in favour of the Bank on 24<sup>th</sup> November 1993.

2. It is common ground that for purposes of managing the borrowed facility and effecting repayment, the customer opened and operated account number ML-600-000 2407 with the Bank. It is not in dispute that by way of private treaty, the Bank as chargee, sold the property to Isaac Godfrey Areri (The 2<sup>nd</sup> Defendant or Areri). A copy of the certificate of title to the property shows that it was transferred to Areri on 29<sup>th</sup> November 2006. The events leading to the sale of the said property and the circumstances of transfer are at the heart of the controversy herein.

3. In the Further Amended Plaintiff dated 30<sup>th</sup> May 2007 and filed on 31<sup>st</sup> May 2007, the customer raises various complaints in regard to the manner in which the Bank levied interest and charges to his account. It alleges that in breach of a fiduciary duty owed to him, the Bank charged penalty interest, interest on arrears, default charges and other charges that were oppressive and unconscionable. The particulars are set out in paragraph 15 of the pleading and reproduced below:-

15. The Plaintiff avers that in breach of the terms of the contract, fiduciary duty, the 1<sup>st</sup> Defendant have fraudulently and negligently managed and or operated the Plaintiff's account.

**PARTICULARS OF BREACH OF CONTRACT, FIDUCIARY DUTY, FRAUD AND NEGLIGENCE:**

- a) Acting perversely and in bad faith in the management and conduct of the Plaintiff's account;
- b) Conducting the Plaintiff's account with material arithmetical and mathematical calculation errors as reflected in various adjustments in the statements of account.
- c) Compounding the arithmetical errors on a monthly basis.
- d) Knowingly failing and/or refusing to correct mathematical and arithmetic errors in good time to avoid compounding these to the detriment of the plaintiff.
- e) Knowingly distorting the course of repayment of the facilities by debiting the Plaintiff's account with illegal and unconscionable "penalty interest", interest on arrears' and 'default charges';
- f) Knowingly compounding these illegal, con-contractual and unconscionable 'penalty interest, interest on arrears' and 'default

charges' on a monthly basis;

g) Fraudulently causing the Plaintiff account to reflect arrears which were not due to the Defendant by the arbitrary imposition of illegal and unconscionable 'penalty interest', interest on arrears' and 'default charges';

h) Running the Plaintiff account on faulty computer software leading to numerous adjustments, corrections, double charging and triple-charging of 'default charges' in the same month and other erroneous entries in the said account;

i) Applying varied rates of interest and reflecting monthly repayments and repayments arrears before the same became due under the terms of the legal charges securing the loan to the Defendant;

j) Conspiring to make it impossible for the Plaintiff to redeem their loan account within the contractual terms;

k) Acting contrary to the express provisions of the Banking Act (Cap 488, Laws of Kenya).

4. It is the case of the Customer that had it not been for misconduct and breach on the part of the Bank, he would have redeemed his account and the Bank's purported exercise of its statutory power of sale was therefore illegal. Further allegations are said to be:-

(16) The Plaintiff further avers that the 1<sup>st</sup> Defendant have on various occasions made attempts to illegally dispose of the suit premises with the sole intention of defeating the Plaintiff's interest contrary to the provisions of the Registration of Titles Act and The Transfer of Property Act.

#### PARTICULARS OF ILLEGALITY

1. Failing, ignoring and or refusing to serve the Plaintiff with the mandatory ninety (90) days notice.

2. Failing, ignoring and or refusing to serve demand notice to the Plaintiff.

3. Making arrangements to dispose off the property by private treaty.

4. Failing to issue forty five days notice of sale.

5. Ignoring to serve the Plaintiff with the notice of advertisement of sale.

6. Failing to adhere to the terms and conditions of the charge contract.

7. Attempting to dispose off the suit property secretly.

8. Attempting to sell the suit property below the market value.

16(a) That on or about 29<sup>th</sup> November 2006 the 1<sup>st</sup> Defendant illegally, fraudulently and maliciously, in total breach of its fiducially duty to the Plaintiff and in breach of contract transferred the suit premises to the 2<sup>nd</sup> Defendant.

5. On the transaction between the Bank and Areri, the Customer asserts that the sale was illegal and fraudulent with the sole purpose of defeating the claim by the Customer to the suit property. Particulars of illegality and fraud on the part of the Bank and Areri are said to be:-

a) The Plaintiff reiterates the particulars contained in paragraph 15 and 16 hereinabove;

b) Disposing off the property without conducting a public auction;

c) Failing, ignoring and refusing to serve the statutory notices.

d) Fraudulently executing a sale agreement dated 24<sup>th</sup> October 2006 and executed on 16<sup>th</sup> October 2006.

e) Contemptuously disobeying the consent orders of this Honourable Court dated 30<sup>th</sup> October 2006 and 29<sup>th</sup> November 2006.

f) Secretly entering into conveyance by private treaty without the leave of the Honourable Court.

g) Transferring the property without any consideration.

h) Lodging the transfer when there were Court orders inhibiting any transaction.

i) Transferring the property without following the provisions of the Registration of Titles Act and the Indian Transfer of Property Act.

6. In the end the customer prays for the following multiple prayers:-

a) A declaration that the 1<sup>st</sup> Defendant is not entitled to charge the Plaintiff any penalties by whatever name called and cumulative interest thereon and that such penalties that the 1<sup>st</sup> Defendant has charged the Plaintiff in the past are illegal and contrary to the provisions of the Banking Act (Cap 488 Laws of Kenya) illegal null and void and constitutes a clog and fetter on the Plaintiff's right of redemption.

b) An order of specific performance that the 1<sup>st</sup> Defendant do render a true and just account for the money received by it in the Plaintiff's Account No. ML 600-0002407.

c) A permanent injunction to restrain the Defendants whether by itself, its employees servants, agents Advocates or auctioneers or any of them or otherwise from doing the following acts or any of them, that is to say, from advertising for sale, selling by public auction or private treaty or otherwise howsoever and any other manner or by completing conveyancing or transfer of any sale concluded by public auction or otherwise howsoever or leasing, alienating or in any way parting with possession of the property comprised in the premises known as LR NO. 209/8343/94 without issuing the statutory notices and or in breach of the charge contract.

d) A declaration that the actions of the Defendant, its employees servants, and or authorized agents are in breach of the express and or implied terms of the contract and the Defendant's attempt to dispose off, sell, auction or in any other manner transfer the suit premises contrary to the terms of the contract and the express provisions of the law is illegal and null and void ab ignition.

D1) A declaration that the Plaintiff have(sic) redeemed his loan account and his right of redemption and equity of redemption have accrued and the Defendant have(sic) no further right against the suit property.

D2) An order of specific performance directed to the Defendant, its authorized servant employee and or agent to discharge the land reference LR NO. 209/8343/94 and return the title document to the Plaintiff forthwith.

D3) A declaration that the transfer of the property LR NO. 209/8343/94 by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant is fraudulent, illegal, null and void ab initio and of no legal consequences and incapable of passing any good title to the 2<sup>nd</sup> Defendant.

D4) An order of specific performance directed to the Defendants to retransfer the property to the Plaintiff and in default the Registrar of Titles to be authorized to deregister the Defendant title and register the Plaintiff as the owner of property No. 209/8343/94.

D5) An injunction restraining the Defendants from interfering with the Plaintiff's quiet possession of the suit premises or from alienating, transferring, selling, disposing, using, charging, mortgaging, developing on or in any manner dealing with the suit property LR NO. 209/8343/94.

e) Costs of this suit.

f) Such further or other relief as this Honorable Court may deem fit and just to grant.

7. For the Bank, its defence is premised on the Amended Statement of Defence. It denies any wrongdoing and avers that all or any charges levied by it upon the Customer's mortgage was in accordance with the charge and other instruments executed by him as well as in tandem with Banking trade, practice and customs. On the different rates of interest applied, the Bank contends that they were applied with notice to the Customer and in the terms of the charge and other contractual documents. It further asserts that it has always acted within the provisions of Banking Act.

8. On the legality of the process of sale, the Bank states that it duly served the Customer with the 90 day mandatory notice and the 45 notice amongst other notices. It argues that there is nothing illegal in disposing of the property by private treaty. On another front, the Bank avers that it had made all attempts to sell the property at the best possible value. Ultimately, it is the Bank's position that the Customer's equity and/or right of redemption of the suit property has been extinguished.

9. Areri denied committing any illegality and/or fraud in purchasing the suit property which he alleges was sold to him at Kshs.5,400,000.00. He denies disobeying any Court orders and contends that the provisions of the Registration of Title Act were followed in transferring the property.

10. Areri is aggrieved that the customer has refused to vacate the suit property and mounts a Counterclaim for vacant possession and/or eviction order from the suit property. Further, he prays for general damages for mesne profits during the challenged occupation by the customer.

11. At the hearing Onchonga and one Wilfred Abincha Onono testified in support of the Plaintiff's case. Mr Onono is a certified Public Accountant CPA (4) and Managing Consultant of Interest Rates Advisory Centre Ltd (IRAC). IRAC boasts as specializing in financial consultancy and undertaking audit of borrowing contracts and interest recalculations. His evidence was that interest on arrears was not provided for in the legal charge or in the offer to advance and that on recalculating the debt (excluding the interest on arrears), there would have been a debit amount of Kshs.2,233,326.65 owed by the Customer to the Bank as at 1<sup>st</sup> July 2006. Because of his evidence, the scope of the Customer's case on the question of illegal charges is considerably narrowed. The Customer simply questions the legality of the default rates charged on arrears.

12. The Bank called two witnesses being Jeremy Mutero and Alice Weru. Jeremy Mutero is a Conveyancing Advocate in the firm of Mamicha & Co. Advocates who were the Advocates who handled the conveyancing aspect of the sale of the suit property to Areri. Alice Weru is an employee of the Bank employed as a Recoveries Officer Debt Management. Areri gave evidence on his own behalf.

13. There shall be a detailed discussion of the evidence of the witnesses as is relevant in resolving the following issues which call for determination:-

- i Was there a legal basis for the Bank to impose penalty interest on arrears and default charges?
- ii Was the Bank entitled to exercise its statutory power of sale?
- iii If the answer to (ii) above is in the affirmative, did the Bank exercise its power of sale in accordance with the law?
- iv If the answer to (ii) is in the affirmative and regardless of the answer to (iii), did the Bank disobey a Court order in transferring the property to Areri?
- v Depending on the answers to the above, is the sale and transfer of the property to Areri lawful and if so, is Areri entitled to the orders sought in the counterclaim?
- vi What are the appropriate orders on the main prayers and costs?

Of power to impose penalty interest on arrears and default charge:

14. The letter of offer in conjunction with the charge document forms the contract between the Bank and the Customer. The Customer is unequivocal that the contract did not provide for imposition of penalty interest on arrears and default charges. The Bank on the other hand relies on clauses 1 and 5(i) of the charge as express authority for such imposition.

15. Clauses 1 and 5(i) read as follows:

1. The Borrower hereby covenants with the Company to pay to the company on the contractual date for redemption specified in the schedule hereto the principal sum with interest thereon calculated as hereinafter stated and if the principal sum or any part thereof shall not be paid on the said date to pay to the Company (as well as before any judgment) interest calculated as aforesaid on so much of the principal sum as shall for the time being be unpaid by equal monthly payments on the first day in every month.

5(i) For the better securing payment to the Company of all principal money interest and other moneys due or to become due under this charge the Borrower HEREBY CHARGES the property described in the Schedule hereto together with the buildings and improvements thereon with payment to the Company of such principal money interest and other moneys.

16. Clause 1 provides that if the account falls into arrears that interest shall be calculated “**as aforesaid**”. Yet the only interest rate in the charge is the interest referred to in the same clause and which is to be found in the schedule to the document. That rate of interest is 21% per annum. No other rate of interest is set out nor is a default rate provided. Second, it does not help to rely on Clause 5(i). The wording of that provision does not prop up the Bank’s argument that the charge document expressly contemplates imposition of penalty interest on arrears and/or default charges.

17. There is then further argument by the Bank that even in the absence of express provision, the concept of levying default/penalty interest is part of Bank trade usage and customs. In support of this proposition the Bank cites the Judgment of Ibrahim J (as he then was) in National Bank of Kenya Limited –vs- Beth Ngunyo Ngengi & Another [2012] eKLR in which the Judge stated;

“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. 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”.

18. The issue as to whether the concept of levying default/penalty interest is part of Bank trade usage and custom in Kenya is a fairly well beaten path. There are two schools of thought. One holds that it is and **National Bank of Kenya (supra)** would fall in this league.

19. Then another is that the imposition of penalty interest/default rate is a contractual matter which must be expressly provided in a contract before it can be implemented. See for example the decision of Odunga J in Francis Joseph Kamau Ichacha –vs- Housing Finance Company Limited [2014] eKLR in which he expressed himself as follows:-

“Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1)(b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of **Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133** and the other decisions which in any case are not binding on this Court”.

20. I recently joined on this side in Esther Getambu & another v Housing Finance Company of Kenya Ltd [2019] eKLR when I held as follows:-

“This court takes a view that all costs and expenses properly incurred by the Bank in relation to the premises referred to in this provision would charges such as insurance premium on the premises which are set out in the latter part of the contract.

19. The rule that it is not the business of a court to rewrite a contract between parties in the absence of special circumstances such as fraud continues to endure. To be asked in this matter is whether, in the absence of clear provisions obligating the customer to pay default interest, there a basis on the strength of trade custom and usage, for the Court to read such obligation into the contract.

20. This question has vexed the courts before and somewhat different positions have been taken in answering it. On one end of the spectrum is the High Court decision in Orion East Africa Ltd. –vs- Housing Finance Co. of Kenya Ltd. HCC No. 914 of 2001 in which the Court held that penalty or default interest is normally chargeable on an amount in default.

21. However, Odunga J rejected the notion that default interest not expressly provided for could amount to a trade usage. The Judge in Francis Joseph Kamau Ichatha –vs- Housing Finance Company of Kenya Ltd. [2014] Eklr reasoned thus;

***Paragraph 66: Can it therefore be said that a practice in which the Banks unilaterally decide to load the customer’s account with penalties at their own discretion whose rates are only known to the Bank is such a certain practice that it can be said to amount to trade usage? In my view that would amount to stretching the word “certain” too far. For one to say that the penalty is certain not only ought there be certainty as to the levy of the interest but since the rate is not contained in any contractual document, the rate also must be certain and must be known in the market otherwise such levying of interest would violate the provisions of Article 46(1)(b) of the Constitution. To argue otherwise would in my view open an avenue in which the right of redemption may easily be clogged or fettered. I would apply the same reasoning to the case of Maithya vs. Housing Finance Co. of Kenya and Another [2003] 1 EA 133 and the other decisions which in any case are not binding on this Court.***

22. On this debate, I associate myself with the position of Odunga J. If a Bank seeks to impose certain charges or interest, then it must make that intention clear in the contract it enters with the customer. There must be clarity on what the charges and interest are and how they are to be imposed. In the matter before Court, the Bank which is admittedly the author of the contract made it clear that it would charge an interest rate at 26% per annum or at such reduced or increased rate as the Bank would deem as fairly representing the rate of interest commonly chargeable in Kenya (See clause 4). The Bank choose not to include a charge of default interest and to impose such interest through judicial fiat or craft would be to re-write the contract to the detriment of the borrower. It is for this reason that the Court is unable to agree with the conclusion of Trial Court. It may well be laudable that a penalty interest be charged so as to discourage borrowers from defaulting in repayment of their obligations yet unless such charges are expressly provided for and defined, then the lender would have to make do with imposing the contracted interest rates even on the arrears. The alternative would be for the Bank to call up payment of the debt immediately there is default.

21. I make further reference to the decision of the Court of Appeal 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”.

22. Even if I were to hold that the levying of default penalty interest and/or charge was on the basis of custom and usage in the mortgage industry in Kenya, the same needed to be proved by the Bank. The Bank failed to provide any proof that levying of such interest or charges was so commonplace and certain as to form a custom and usage. Further there was need for evidence as to the rate or sort of rate to be applied as default charge or interest.

23. Let me turn to another argument by the Bank. It is submitted, on its behalf, that the Customer, in several letters, acquiesced to the imposition of the default charges and cannot resile on it. It is an argument that the customer has waived his right to challenge the imposition of the charges. In this regard I was asked to follow the holding of the Court of Appeal in Serah Njeri Mbobi vs John Kimani Njoroge [2013] eKLR in which it held;

“In our understanding, the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See *Seascapes Limited v Development Finance Company of Kenya Limited*, Nai Civil Appeal No. 247 of 2002.

The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-

“Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him.”

It therefore follows that where one party by his words or conduct, made to the other party a promise or assurance which was intended or affect the legal relations between them and to be acted on, the other party has taken his word and acted upon it, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him but he must accept their legal relations subject to the qualification which he has himself introduced. In the instant case, it is uncontroverted that the learned Judge disqualified herself when the matter was placed for the first time before her. Almost four years later, she proceeds to preside over the trial. None of the parties objected to the judge conducting the trial and the Judge only raised the issue at the time of delivering the judgment. In our view, and we agree with the learned Judge on this one, the parties had long forgotten about the issue of her disqualification and they proceeded before her as if nothing had ever happened about the propriety of the judge conducting the case. It therefore follows, as submitted by Mr. Mogaka that none of the parties can raise the issue of disqualification now. It can be said rightly that the parties by their conduct had waived their right.

In our understanding, the term 'acquiescence' is used where a person refrains from seeking redress when there is brought to his notice a violation of his rights of which he did not know at the time. Halsbury's Laws of England, 4th Edition, Volume 16 at page 994 states the following about the term 'acquiescence':-

“The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act.”

24. I am afraid the doctrines of waiver or estopped or acquiesce are not available to the Bank as they are not expressly or specifically pleaded (see ***Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 others* [2015] eKLR**). If they were to be set up as a defence then they needed to be specifically pleaded as required by the provisions of Order 3 Rule 4 which reads;

Or.3. r4. (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.

(2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished. (3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.

Of Bank's right to exercise its statutory power of sale:

25. Having concluded that the imposition of penalty charges or interest by the Bank was illegal, then that Court accepts the report of Mr. Abincha on the quantum of debt that was due to the Bank after the exclusion of the illegal charges or penalty. His report was not successfully challenged and his findings were not debunked. The debt as on 1<sup>st</sup> July 2006 was on the sum of Kshs.2,333,326.65. That said as this sum remained unpaid up to the time the Bank sold the charged property, then I have to find that the Bank was entitled to exercise its statutory power of sale as there was default.

Of the procedure in exercising the statutory power of sale:

26. At the time material to the dispute, the suit property was registered under the provisions of the now repealed Registration of Titles Act (Chapter 281). In regard to property registered under the provisions of the repealed statute, the manner by which a mortgagee exercises its power of sale was regulated by Section 69A (1) of the Transfer of Property Act also now repealed. The provisions read;

S. 69A. (1) A mortgagee shall not exercise the mortgagee's statutory power of sale unless and until-

(a) notice requiring payment of the mortgage-money has been served on the mortgagor or one of two or more mortgagors, and default has been made in payment of the mortgage-money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

(c) there has been a breach of some provision contained in the mortgage instrument or in this Act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage-money or interest thereon.

27. The Bank asserts that it followed procedure by serving the Customer a three month statutory power of sale on 26<sup>th</sup> April 2004 (See D.1 Exhibit 1 Page 42). The notice was served by way of registered post. See copy of certificate of posting (See D.2 Exhibit 43). The customer on the other hand denies receipt of the Notice. But the evidence available does not bear out that denial because by a letter dated 29<sup>th</sup> June 2004 he acknowledged receipt of a letter of 26<sup>th</sup> April 2004. The Customer does not say that the acknowledged letter is any other than the statutory notice. On a balance, I believe the Bank. This acknowledgement taken together with the evidence of service by way of registered post is accepted by this Court as sufficient proof of service of the prescribed statutory notice upon the customer.

28. Whilst the statutory notice may have been a demand for more money that was due because of inclusion of the now impugned penalty charges and interest, still there is no evidence that the Customer had paid what would have been the lawful due. In other words, even after exclusion of the illegal charges, there was still default.

29. It is common ground that the property was sold by way of private treaty. The Bank defends this procedure and relies on Section 69(1) of the Transfer of Property Act as allowing it as follows:-

S. 69. (1) A mortgagee, or any person acting on his behalf where the mortgage is an English mortgage, to which this section applies, shall, by virtue of this Act and without the intervention of the Court, have power when the mortgage-money has become due, subject to the provisions of this section, to sell, or to concur with any other person in selling, the mortgaged property or any part thereof, either subject to prior encumbrances or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned thereby; the power of sale aforesaid is in this Act referred to as the mortgagee's statutory power of sale and for the purposes of this Act the mortgage-money shall be deemed to become due whenever either the day fixed for repayment thereof, or part thereof, by the mortgage instrument has passed or some event has occurred which, according to the terms of the mortgage instrument, renders the mortgage-money, or part thereof, immediately due and payable.

30. The Customer has not been able to present any law that would have barred the Bank from selling the property by way of private treaty. The Bank cannot be faulted in choosing that mode of sale.

31. Yet, the Court has little difficulty accepting the Customer's submission that in the exercise of its power of sale whether by private treaty or public auction, the Bank is under a duty to act in good faith. The Customer cites this passage in the decision of Cuckmere Brick Company Ltd –vs- Mutual Finance Ltd [1972], All ER 633:

“A mortgagee was not a trustee of the power of sale for the Mortgagor and, where there was a conflict of interest, he was entitled to give preference to his own over those of the Mortgagor, in particular in deciding on the timing of sale, however, the Mortgagee was not merely under a duty to act in good faith i.e. honestly and without reckless disregard for the Mortgagor's interest, but also to take reasonable care to obtain whatever was the true market value of the mortgaged property at the moment he chose to sell it”.

32. So has the Customer demonstrated that the Bank failed in this duty? That is, did the Bank fail to act in good faith?

33. One issue raised is that the sale was below the market value. This however remained a mere allegation as the Customer did not provide proof of any valuation to demonstrate that alleged sale was at an under value. In the absence of such proof, the Bank was under no obligation to defend the consideration of Kshs.5,400,000.00 yielded in the sale to Areri.

34. The next issue is that the sale and transfer of the property was in disrespect of the Court orders of 30<sup>th</sup> October 2006 and 29<sup>th</sup> November 2006. On 30<sup>th</sup> October 2006, this matter came up before Azangalala J (as he then was) and a Court order was made to the effect that;

“The status quo to be maintained in the meantime until then”.

35. By that date, i.e 30<sup>th</sup> October 2006, the Bank had already entered into a contract by sale with Areri, the same having been entered on 24<sup>th</sup> October 2006 (D2. Exhibit Pages 6-8). This is of significance because by this date the status was that the Customer had already lost his equity of redemption as the equity of redemption was extinguished upon the execution of a valid contract of sale. In this regard the passage of the Court of Appeal decision in Nancy Kahoya Amadiva –vs- Expert Credit Limited & Another [2015] eKRL is instructive;

“Property passes to the purchaser and thus the mortgagor loses his equity of redemption upon execution of a valid contract of sale. It is not allowed to continue until conveyance or registration notwithstanding that some time elapses before conveyancing formalities are completed vesting the legal title to the purchaser. (See **Fisher and Lightwood Law of Mortgages** and **James Ombere Okoth case (supra)**”.

36. This Court has recently had opportunity to restate the proposition captured in Nancy Kahoya Amadiva case (*supra*) in the **Kelly Petroleum v East Africa Building Society Limited & another[2019]eKLR** as follows;

37. A difficult question that confronts Mrs. Muritu is whether the prayers she seeks in regard to the Thika property are available to her. Not

only does she seek nullification but also the setting aside, cancellation and reversal of the transfer that has been made to Juja 49. The difficulty stems from the law on extinction of the right of redemption as it existed at the time material to this suit.

38. The law was emphatically stated by Shah JA in Patrick Kanyagia & Another –vs- Damaris Wangechi & 2 others [1995] Eklr to be as follows:-

“When does the title pass; or putting it another way: when does the right of redemption vested in the mortgagor come to an end?”

Section 60 of TPA as amended by Act No 20 of 1985 sets out the right of a mortgagor to redeem. This section says where relevant:

“60. At anytime after the principal money has become payable, the mortgagor has a right, on payment or tender ..... or to execute ..... that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a court and is exercised before the mortgagee has under the provisions of this Act, either by public auction or private contract entered into a binding contract for sale of the mortgaged property”. (emphasis mine).

It is to be noted that the emphasised part was brought in by way of amendment in 1985. Until then the equity of redemption remained in the mortgagor until the date of registration of the transfer in the name of the buyer.

39. The position is further contextualized by Akiwumi JA in the same decision when he says:-

“This statement of the law does not take into account certain statutory provisions of the laws of this country. The present legal position was enunciated in the celebrated case of Mbuthia v Jimba Credit Finance Corp and another civil appeal No.111 of 1986 in which the bench was unanimous on what happens on the fall of the hammer at a public auction where the mortgagee is exercising his statutory right of sale. Apaloo J.A. as he then was then stated the legal position as follows:

“Since reporting this judgment, my attention has been drawn to the statute Law (Miscellaneous Amendments) Act 1985 (No.19 of 1985) which amends section 60 the Indian Transfer of Property Act 1882, by adding to the words “a Court” in the second paragraph of the proviso to the section of the following:

“And is exercised before the mortgagee, has under the provisions of this Act, either by public auction or private contract entered into a binding contract for the sale of the mortgaged property.”

This means that the mortgagor’s right of redemption is lost as soon as the mortgagee either sells the mortgaged property by public auction or enters into a binding contract in respect of it. ” Masime J.A. also put the matter succinctly when he stated as follows:

“In this regard I respectfully agree with Platt and Apaloo JJ.A. that the effect of the long line of English authorities and decisions of this court in respect of mortgages under the Indian Transfer of Property Act is that the equity of redemption is extinguished the moment a valid contract is concluded in exercise of the statutory power of sale. ”

These statements of the law reflect fully the purpose of the amendments to S. 60 of the transfer of Property Act which were expressed as follows in the memorandum of objects and reasons of the Statute Law (miscellaneous amendments) Bill, 198 which introduced the amendment:

“The amendment to the transfer of Property act will remove an anomaly where the right of a mortgagor to redeem the mortgage could be exercised even after the mortgagee had contracted to upon the foregoing, it is clear that the law as stated by Shields J. is wrong”

37. The effect is that the status quo order could not resuscitate what was already extinguished or at an end in law.

38. In respect to the transfer, there was a Court order made on 29<sup>th</sup> November 2006 as follows;

“The application dated 29.9.2006 shall be heard on 23.1.2007. There shall be stay of transfer of the suit property until then”.

To be noted is that the order was made in the presence of advocate Gichuhi acting for the Bank. The transfer shows that it was registered on the very same day that is on 29<sup>th</sup> November 2006. In his written statement Mr. Mutero who acted for the Bank in the conveyance made the following explanation;

“10. We believe that the said firm of JM Rioba & Co. Advocates lodged the documents for registration on 29th November 2006.

11. We believe this to be the case because in the ordinary course of business at the lands office, the dates or registration of any instrument (including a transfer) is the date as the booking date for the said transaction. We note that the date of registration of the transfer appearing on the title document is 29th November 2006.”

39. But this explanation does not state the exact date when the transfer was effected. And if the consent to transfer was issued on 19<sup>th</sup> December 2006, then it would seem unfeasible, in the absence of explanation and facts as in this case, that the registration was effected before 19<sup>th</sup> December 2006. The Court Order was made in the presence of the Bank's lawyer on 29<sup>th</sup> November 2006 and the Bank was duty-bound to immediately inform the lawyers of Areri of this order. The evidence, however, is that it only informed them of the order on 20<sup>th</sup> December 2006 (D. Exhibit 2 Page 10), a day after the consent to transfer had been issued. I hold that in acting that late, the Bank did not act in good faith in the process of transfer of the suit property.

40. Yet because I have been unable to fault the Bank's exercise of its statutory power of sale and that the Customer's equity of redemption was extinguished on 24<sup>th</sup> October 2006 when a valid contract was entered between the Bank and Areri, it may be profitless to reverse the transfer. However, for purposes of striking a blow for the dignity of Court process and its orders, the Customer was at liberty to mount an application for contempt. But as no such application is before me, I say no more of the issue.

41. In the end, I find no fault on the part of Areri. He is an innocent purchaser for value and has demonstrated how he paid for the property. A substantial portion was through finance advanced by the Bank. The Customer wrongly remains in possession of the suit property and that unlawful possession commenced when he lost his equity of redemption. Yet on mesne profits, Areri failed to provide any proof whatsoever under this head. Indeed, his lawyer made no submissions on it. I take it that the prayer was abandoned.

42. Ultimately, I make the following orders;

42.1 The 1st Defendant such render a true and just account of the debt as it stood on 24th October 2006 when the property was sold to the 2nd Defendant. The account must exclude all penalty interest and default charges levied and give regard to this Court's holding that the Plaintiff owed the 1<sup>st</sup> Defendant Kshs.2,233,326.65 at 1<sup>st</sup> July 2006.

42.2 Thereafter the Court shall make final orders including those of costs in respect to the claim by the Plaintiff against the 1st Defendant.

42.3 Judgment is entered for the 2nd Defendant as against the Plaintiff for vacant possession of all that property known as LR NO. 209/8343/94 situated in the City of Nairobi and registered as I.R 37621/13 in favour of the 2nd Defendant.

42.4 Vacant possession ordered in 42.3 above shall be given within 30 days of this order.

42.5 The 2nd Defendant claim for general damages for Mesne profit is dismissed.

42.6 The Plaintiff shall meet the 2nd Defendant's costs on the counterclaim.

**Dated, Signed and Delivered in Court at Nairobi this 17<sup>th</sup> Day of January 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Wafula for Karungo for 1<sup>st</sup> Defendant

Chacha for Mogeni for Plaintiff

Omwenga for 2<sup>nd</sup> Defendant

Court Assistant: Nixon