



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 49 OF 2006**

**PETER ADAMS LUDAAVA.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE COMPANY OF KENYA LTD.....DEFENDANT**

**R U L I N G**

1. In the judgment of the court delivered on the 2/4/2019, the court did find, hold and direct as follows:

- **“However, there is no conclusive material that the debt secured by the suit property had or has been paid in full to entitle the plaintiff to a declaration to that effect and order for discharge. In order that it be established how much was due on the account as at the date the suit was filed, I do order that the books be audited by a licensed practicing auditor appointed by both parties within 30 days from today.**
- **Once appointed the auditor, whose fees shall be shared equally between the parties, shall file his report in court within 30 days. In conducting the audit let it not be lost to the auditor of this court’s finding to the fact that there was no valid notice to vary the rate of interest and the period of calculation.**
- **Accordingly, the audit exercise be conducted on the basis that the rate remain 12% p.a for the entire period and on the basis of annual rests. It is also to be observed that no penal interest or indeed any other charges save for those in the letter of offer and conditions of the loan are due from the plaintiff”.**

2. Pursuant to that judgment, the parties appointed **Ms. Ambale & Company, Certified Public Accountants of Kenya** who prepared a filed and audit report dated 16/01/2020. That report returned a verdict that the plaintiff had overpaid the loan by a sum of Kshs.629,583/= as at **5/4/2004**. That report was subjected to verification by **Ms. PKF Consulting Ltd** appointed by the defendant for that purpose, who confirmed that indeed there had been the overpayment.

3. In referring the matter to audit, the court considered it appropriate that the task of computing the accounts between the parties would best be done by an experts with the ultimate goal of establishing what was outstanding as due between the parties.

4. Now that the sum has been established, I do find and hold that the plaintiff has fully settled his indebtedness to the defendant and infact overpaid by the sum of Kshs.629,583/=. I therefore do make a declaration that the debt has been paid in full and that the plaintiff is entitled to an order that the legal charge dated 17/3/1980 and a further charge dated 31/8/1981 registered over the plaintiffs properly known as Mombasa, Mainland South/Block 1/526 be discharged forthwith.

5. It being adjudged by the expert appointed by the parties that there has an overpayment to the defendant, I do consider it that it would be unequitable and an injustice to allow the defendant to keep the sum it ought not to have received but did receive on its breach of the terms and conditions of the contract of lending between the parties. In the interests of substantial justice, I order that the sum of overpayment, being **Kshs.629,583/=**, be paid to the plaintiff by the defendant forthwith and in all events within 30 days from today. Having been wrongly received and retained, I do order that the sum be refunded with interest at 12% p.a. from the 5/4/2004 till payment in full.

6. On costs, the plaintiff has been vindicated on his complaints against the defendant and I award to him the costs of the suit.

**Dated, signed and delivered this 6<sup>th</sup> day of October 2020**

**P J O OTIENO**

**JUDGE**