REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 49 OF 2006

PETER ADAMS LUDAVAA.....PLAINTIFF

VERSUS

HOUSING FINANCE CO. OF KENYA LIMITED.....DEFENDANT

J U D G M E N T

1. In this suit the plaintiff prays for a permanent injunction against the sale of the suit property being Mombasa/Mainland South/Block 1/526, a declaration that the plaintiff has discharged his obligations to the defendant by payment of the due sums, release of the document of title and a discharge thereof together with costs of the suit.

2. The suit is grounded on the facts that, having obtained a loan of Kshs.188,260/= secured by a charge dated 17/3/1980 and a further charge dated 31/8/1981, the plaintiff paid to the defendant an aggregate sum of Kshs.1,151,702.95. Documents of such payments were then tendered in evidence

3. The plaintiff contend and pleads that despite the payment of the sum the defendant still failed to consider the debt redeemed and demanded further sums hence clogging his right to redemption. To the plaintiff the additional sums were the result of exorbitant and uncontracted interest and other charges applied to the account contrary to the agreement between the parties in that no notice to vary interest rates was ever served.

4. The claim in the plaint was supported by the witness statement by the plaintiff himself and that of his auditor one Benard Mugune who maintained that the plaintiff had paid the debt six times over owing to the defendants breach of the terms of the lending agreement. The two witness statements equally exhibited documents in support of the assertions and at trial the statements were adopted as evidence in chief and documents referred to produce as exhibits.

5. For the defendant, a defence was filed which admitted the description of the parties and the contract between them but denied that the plaintiff had been regularly paying the debt and in the contrary asserted that as at 2/7/2004 the plaintiff was owing to the defendant the sum of Kshs.1,859,989/=. On the assertion by the plaintiff that letters dated 31/3/1993 and 15/12/1994 were not dispatched to the plaintiff, the same was denied with the witness stating that the letters were in fact dispatched but he conceded to have had no evidence of such dispatched. It was additionally conceded that all the notices on variation of interest rates were shorter than the covenanted period of three (3) months. the fact of the appointment of the auditor was termed a purely personnel affair however it was admitted in the defence that upon re-computation the defendant came up with a balance of Kshs.504,977.90 as opposed to the plaintiffs computation of Kshs.430,262/25= and the difference thereof and equally exp lained to the plaintiff by the Keplan and Stratton Advocates to the satisfaction of the plaintiff auditor. It was then denied that the agreement named '*Notional Rent Agreement*' was forced and coerced upon the plaintiff by the defendant with additional pleading that the same was executed voluntarily at the plaintiffs request and in the presence of counsel for the plaintiff but the plaintiff breached the terms thereof.

6. On the charge that the defendant had purported to issue a statutory notice demanding payment within 3 months and showed intention to proceed with exercise of statutory power of sale, in a manner that clogs and fetters the equity of redemption, the defendant pleaded that the notice was issued in accordance with the law but any scheduled sell was denied together with the need to have the property valued and have notification of sale served. The assertion that the suit was premature owing to the fact that the statutory notice had not expired was refuted and the defendant prayed that the suit be dismissed with costs. In support of the statement of defence the defendant filed a witness statement by one Nicholas Kisara, the Relationship Business Manager, of the defendant, together with a bundle of document comprising some 59 documents. It is to be noted that the witness statements and lists of documents by both sides were filed pursuant to the directions by the court given on the 14/6/2017.

7. The same directions were to the effect that only witnesses who had filed witness statements would be called at trial to adopt the witness statements as evidence in chief, produce the documents relevant thereto and be cross examined, and further that the matter would commence

de novo with the documents being produced without the need to call the makers. It was further directed that the plaintiff would call two witnesses while the defendant would call only one witness.

Evidence by the plaintiff

8. As directed by court at the case conference, the plaintiff and his witness adopted their witness statement in entirety, produced the documents filed and were then subjected to cross examination. In his evidence the plaintiff stressed the point that it was a term of the loan agreement that it would last 15 years; that the payment would by deduction by his employer of the monthly installments from his salary; that the interest rate was 12%p.a. which would only be reviewed with a notice of not less than 3 months and without covenant for any penalty interest being charged in both the agreement and the instrument of charge.

9. On the notices for variation of interest rates the plaintiff said none ever reached him and he only came by then when PW 2 sought to audit the accounts. The notices were additionally challenged on the basis that the same were for a shorter period than the contractual period. In the absence of covenanted notices the plaintiff said that he continued to pay the agreed instalments for the 16 years and then complained about the outstanding balance which complaint the defendant responded to by asserting that he had been under-paying. The auditor, PW 2, was then retained to audit the books and it was then agreed that the plaintiff pays Kshs. 481, 000/= but ended up paying Kshs.511,516.60 but the defendant still refused to discharge him. Even upon payment of the said sum the plaintiff complained that the debt did not come down but continued no grow on account of the uncontracted high interest rates and penal interests and other charges. On the basis of application of non-contractual interest rates and failure to serve contractual notices the plaintiff prayed that his suit be allowed as prayed.

10. On cross examination he admitted having readily entered into the agreement and that the bank was at liberty to vary interest rates provided the notices thereof were served in terms of the agreement and that he did not receive any notices varying interest rates applied which notices were in any event defective and invalid for being shorter than the contracted period. PW 2 on this part equally adopted his witness statement and produced the documents attached thereto as exhibits. When cross-examined he admitted there having been interest regime changes between the year 1980 and when he was giving evidence but underscored the fact that by contract, a review of rates applicable demanded a notice of at least three months being given to the borrower. Part of the documents he produced was his audit report and various correspondence which owned up to the fact that there was money outstanding and due to the defendant but the same depended on the interpretation of the contract between the parties on variation of interest chargeable. The evidence of PW 2 having been put on record, the plaintiff's case was closed and it was the chance of the defendant to lead evidence.

Evidence by the defendant

11. The only evidence by the defence was that by DW 1 Nicholas Kisara, the defendant Relations Manager. He adopted his witness statement dated 27/7/2017 as evidence in chief and produced the documents in the bundle of documents dated the same day. To that witness penal interest was applicable wherever there was a default but according to the documents evidencing the contract between the parties, there was no agreement on penalty interests in case of default. He then referred to letters dated 18/7/1981, 27/12/1982 that of 27/3/1987 and another dated 1/3/2005 which he said adjusted interest rates upwards.

12. He also acknowledge that the plaintiff contracted an auditor to audit the accounts and that he had seen the report but asserted that the report only captured the principle sum and agreed interest before adjustments. The witness then added that even after the audit the plaintiff continued to pray the loan severally and even wrote a letter dated 29/7/2003 proposing a payment plan hence he prayed that the suit be dismissed.

13. On cross examination, the witness said that the bank stopped charging interests when the debt hit Kshs.3, 623,058/= in July 2016. He then admitted that charges on interest rates would not take effect before the customer was informed and that notices were indeed issued but there was no evidence of service of the letters so issued. He even admitted that the letters gave shorter period of notice than the covenanted three months. He then said that the sum outstanding as at July 2016 did not take into account the sum paid by the plaintiff and that the sum was comprised interest calculated at varied rates including penalty interests and that he principal had been paid in full. He repeated that in both the letter of offer and the legal charges, there was no contract to charge penal interests just as much as there was no agreement in the said documents for the payment of rent. On the notice to vary interests the witness repeated that it was a mandatory term of the charge that notice had to be for a period not less than three months. In re-examination, the witness stated that a borrower cannot be excused from payment of interests but admitted that the notice varying interest dated 27/3/1987 did not comply with the contract between the parties.

14. When questioned by the court, the witness was clear that the entire contract between the parties was to be found in the conditions of the loan and legal charges exclusively. He said that there was no agreement to charge penal interests and that he had no evidence of service of the various notices increasing the interest rates.

Submissions offered by the parties

15**.** For the plaintiff, the written submissions were filed on 5/4/2018 and on the date set for highlighting counsel opted to rely on the same wholly without more. Emphasis was placed on the fact that as at 19/3/1997 parties re-calculated the debt due and come to debit balances of Kshs.430,262.25 and Kshs.504,977.90 respectively as a result of which the plaintiff did write a letter dated adverting to a discussion of 15/7/1988 and sent a cheque for Kshs.81,516.60 thus having a balance of Kshs.400,000/= of the sums found to be due from the plaintiff. That sum is said to have been paid in full to come to an aggregate payment of Kshs.1,051,702.95 out of the borrowed sum of Kshs.188,360/=.

16. It was then submitted that the debt bludgeoned due to application of non-contractual interest rates and that the loan was advanced on strict terms that the same would be paid by deductions from the plaintiff salary. It was emphasized that the agreement between the parties made it mandatory that no variation of interest rates would occur without issuance and service of a notice of at least three months.

17. To the plaintiff none of the notices reviewing interest rates met the contractual terms and in any event the mode of calculation was unilaterally changed from annual rests to monthly rests contrary to the contract just as penalty rates of 5% was charged contrary to the

contract. To the plaintiff the changes made contrary to the contract had the effect of being clog and fetter to the equity of redemption and therefore entitled the plaintiff to the prayers sought in the suit.

18. Lastly the plaintiff threw in Banking (Amendment) Act No. 25 of 2016 which mandated that full disclosure be made to the borrower on all charges due and that a failure to so disclose amounted to a clog and fetter on the equity of redemption. On such submissions the plaintiff contended that he had proved his case to the requisite standards and that he was entitled to the remedies sought.

19. For the defendant written submissions were dated 11/6/2018 and filed on 11/6/2018. Those submissions stressed and emphasised the fact that there was indeed a voluntary contract between the parties which imposed an obligation upon the plaintiff to pay but while obligation the plaintiff did not meet hence the plaintiff could not be shielded from payment of interest as part of the debt advanced and secured.

20. The defendant in particular submitted that there was an agreement and a right upon the defendant to increase interest rates and further that the due notices were issued and served on the postal address provided by the plaintiff at P.O. Box 87274, Mombasa. It was then submitted that the use of the word ***may*** on the duty to serve three months' notice was discretionary and not mandatory.

21. On whether the plaintiff as the borrower discharged his obligation in payment of the debt the defendant submitted that there was sufficient proof that there was repeated default leading to several notices to that effect and acknowledgment by the plaintiff on such defaults.

22. On the audit report and the sum arrived at, it was submitted that by conduct in continuing to pay thereafter showed that the plaintiff acknowledge the debt and forfeited any rights accruing from the exercise. The defendant then delved into the question whether the remedies sought were available particularly injunction and that no prima facie case had been established. In arguing the court to reject and dismiss the plaintiff suit the defendant cited to court several decisions including ***Mrao Ltd vs First American Bank Ltd [2003] eKLR***, ***Nguruman Ltd vs Nielsen Caca No. 77 of 2012***, ***Cieni Plans Co. Ltd vs Ecobank Ltd CACA No. 310/2016***, ***National Bank of Kenya Ltd vs Cador Investment Ltd HCC No. 2015 of 2000*** and ***S.K. Macharia vs KCB SCCA No. 2 of 2012*** on the law that statutes should not be applied retrospectively unless the intention of the legislature be clear on such application as far as the Banking (Amendment) Act 2016, on alteration of interest rates.

23. Having read the pleadings, the evidence tendered and submissions offered together with the separate issues filed by the parties, it is clear to me that the existence of the borrowing contract between the parties and the terms thereof are not in issue. The only bone of contention is whether or not there was compliance with the contractual terms on both sides and what was the sum outstanding, between the parties, when the suit was filed.

24. In seeking to determine the said issues this court stands reminded that it is not part of its duty to renegotiate contract between the parties rather its duty is limited to interpreting such contracts and to give effect to the intentions of a parties based on the freely negotiated and clinched terms.

24. With that roadmap being set, I consider the following issues to present themselves for determination by the court.

- Did the defendant breach the terms of the contract between the parties by charging interest contrary thereto?
- Has the plaintiff proved a prima facie case against the defendant?
- Is the plaintiff entitled for the remedies sought or any of them?
- What orders should be made as to costs?

Analysis and determination

Terms of the contract

25. It is common ground, at least from the evidence of DW , that the entire corpus of the agreement between the parties is incorporated in the document called the letter of offer dated April 1979 incorporating the conditions of loan [1988] edition, the Charge and Further Charge dated 17/5/1980 and 31/8/1981 respectively.

26. Whatever else followed between the parties must be construed to follow from those instruments as the foundation and basis of the engagement between the parties and spelling out their respective rights and obligations. Those documents are important as they disclose the loan advanced, the terms of repayment, the rate of interest chargeable and how that interest rate could be altered. Noting that it is admitted that a sum in excess of Kshs.1,151,000/= had been paid prior to the suit being filed, towards the payment of the principal sum of Kshs.188,000/=, I do consider that this dispute is essentially narrowed down to whether or not the interest was charged in consonance with the contract between the parties. With that view in mind, it is important to set out what the contract between the parties provided for the imposition of interest.

27. The letter of offer, in summary, pegs the interest rate at 12% without more. However the explanation is to be found at clauses 7 and 16 provide:-

> **"Clause 7: You will be required to pay interest only on**
>
> **advances from the day they are advanced until the**

house is completed or eight months from the date of

the first advance whichever is the earlier. A statement

will be issued showing the amount payable on the first

of the month following the advance, showing the

interest calculated and requiring you to pay in crest

monthly in advance. Subsequently you will be

required to pay monthly instalments of principal and

interest as shown in the offer.

Clause 16: Interest will be charged from the day the advance is

released to the Company's advocates to enable them

to lodge your Mortgage/Charge for registration to the

next 31st December, and thereafter annually on the balance outstanding on the previous 31st December. THE COMPANY'S ADVOCATES WILL NOT RELEASE THE ADVANCE MONEY UNTIL THE DOCUMENTS HAVE BEEN RECEIVED DULY REGISTERED. The Company will have the right to increase or decrease the rate of interest by the giving of notice".

28**. THAT** spirit in retained and furthered in the legal charge dated

17/3/1980 in the following words:-

"It is hereby further agreed that the rate of interest payable on all money hereby secured shall be determined as follows:-

1. Until the service of such a notice as is hereinafter referred to interest shall be at the rate of Twelve `(12) per centum per annum.

2. The Chargee may from time to time serve on the Chargor not less than three months' notice requiring payment of interest at such increased or reduced rate as shall in the decision of the Directors of the Chargee fairly represent the rate of interest commonly chargeable in Kenya having regard to any circumstances which they consider to be relevant and the decision of the Directors of the Chargee in this behalf shall not be questioned on any account whatsoever.

3. In the event of the Chargee requiring an increase in the rate of interest under the provisions of sub-clause (2) of this Clause the Chargee may further require the said monthly instalments to be increased by such amount as will provide for payment of the balance of the moneys hereby secured and varied interest thereon within the same period as the said balance would have been paid if there had been no such variation".

That provision is repeated word for word in the 2nd charge dated 31/8/1981.

29. In my interpretation and understanding of the contractual documents between the parties the right upon the defendant to vary the rate of interest chargeable would only arise after a notice in that regard, being a notice or not less than three months, had been issued and served.

30. In the evidence led by the defendant there is evidence that the notices were indeed issued. Once so issued, and the contract having placed the burden on the defendant to effect service when the defendant contended that the notice had been served, it was its onus to prove the service. When cross-examined and questioned by the court the defendants witness said, at least three times, that he had no evidence of service of the notices varying the interest rates nor did he have evidence of agreement to change the mode of calculation from annual rests to monthly rests. That to me is more than enough proof that the defendant varied the contractual interests chargeable contrary to the contract and therefore the resultant calculation and burden upon the plaintiffs account and person was unlawful and in breach of contract.

31. In **Nyagilo Ochieng & Another vs. Kenya Commercial Bank Limited [1996] eKLR** the Court of Appeal when dealing with the issue of service of notices made the observation that:

"It would have been a very simple exercise for the bank to produce a slip or slips showing proof of posting of the registered letter or letters containing statutory notice or notices. The bank did not do so. Instead an officer from the bank simply produced file copies of the notices to prove that the same were sent. Even on a balance of probability it is not sufficient to say that a file copy is proof of posting. Unless the receipt of statutory notice is admitted, posting thereof must be proved and upon production of such proof the burden of proving non-receipt of such notice or notices shifts to the addressee as is contemplated by section 3(5) of the Interpretation and General Provisions Act, Cap 2, Laws of Kenya."

32. Here it was asserted very positively that the plaintiff did not receive the notices reviewing the rate and calculation of interest until the same were obtained from the bank by his auditors. It was thus incumbent upon the Defendant to prove not only that proper notices giving the plaintiff the contractual period but also that the same was indeed served. Instead of discharging that burden the defendant witness instead said that there was evidence of service with him.

33. Based on this finding alone, I do find that there was breach by the defendant in serving the notices for variation of interest rates and mode of calculation thereof whether on annual or monthly rests and therefore the plaintiff has proved a violation of his entitlement under the contract. That alone is enough for this court to grant an injunction to the defendant.

34. 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.

35. 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 on the fact that there was no valid notice to vary the rate of interest and the period of calculation.

36. 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 rest. 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.

37. This matter shall be mentioned on the 15/5/2019 for further orders. I will make orders on costs once the auditor report is filed and made an order of the court.

Dated and delivered at Mombasa this 2nd day of April 2019.

P J O OTIENO

JUDGE