



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 198 OF 2018**

**COMPANY FOR HABITAT & HOUSING IN AFRICA**

**(SHELTER AFRIQUE).....APPELLANT**

**VERSUS**

**SUNSET PARADISE APARTMENTS LIMITED.....RESPONDENT**

**J U D G M E N T**

**Outline of background facts and pleadings**

1. Before the trial court was a dispute between the two parties, a lender and borrower. According to the plaint filed before the trial court, the parties agreed on a loan facility of 380,000,000 intended for specified activities and disbursable on the basis of need and upon terms and conditions agreed between them. Pursuant to the said agreement, the Appellant disbursed a sum of 164,000,000/= by the 18<sup>th</sup> December 2013 when the Appellant wrote and informed the respondent that it would put all disbursements on hold pending re-appraisal and recommendations.

2. The respondent feared disruption of its project, sought and obtained a new financier and thus sought to terminate the agreement with the Appellant by repaying all the moneys already advanced together with interests. The termination notice was pleaded to have been acknowledged by the Appellant who calculated the sum due in the sum of Kshs.170,816,131.30 made up of:-

- Kshs.164,000,000/=being the disbursed sum.
- Kshs. 6,613,939,33/= being the interest thereon.
- Kshs. 202,191,97.00/= being the management fees due as at 31/3/2014.

3. Subsequent to the acknowledgment of the termination notice and demand of the specific sums above, it was additionally pleaded that the Appellant then demanded further sum calculated at 4.5% of the total disbursed sums and therefore made a fresh demand of 179,603,331.30 allegedly pursuant to **clause 74 and 94** of the loan agreement. That sum was paid in full but the Respondent then grounded its suit on the position it held that the demand for the extra 8,787,200/= being the early repayment fee and cancellation fees, was a contract which had been illegalized by statute pursuant to section 62(1) of the Consumer Protection Act, No. 46 of 2012.

4. On the basis of that position, the Respondent then sought to recover the said sum of Kshs.8,787,200/= together with interest thereon at 20% p.a. together with costs and interest on costs at 14%. When served the Appellant filed a statement of defence whose gist was that it was entitled to demand and receive the payment of early repayment and cancellation fees being contractual and that the cited law did not affect the contract owing to the fact that the contract between the parties did not amount to a credit contract under the consumer protection act.

5. Parties also filed witnesses statements and documents in support of respective pleadings upon which the matter was heard before the trial court who upon considering the evidence led and submission offered found for the Respondent by a judgment dated 21/09/2018. The foundation of the judgment was expressed in the following words.

**“Having stated as hereinabove, the next issue for determination is whether consumer protection act no. 42 of 2012 is applicable to this suit. The plaintiff counsel based his submissions on this issues under sections 2 of the consumer protection act. The said section provides that a credit agreement means;**

*“a consumer agreement under which a lender extends credit or lends money to a borrower and includes a supplier credit agreement under which an extension of credit, loan of money or supplier credit agreement may occur in the future, but does not include an agreement under which a lender extends credit or lends money on the security of a mortgage or real property or consumer agreements of a prescribed type”*

The plaintiff's counsel submitted that the agreement dated 25/10/2012 the basis of the suit herein was a charge and not a mortgage and as such section 62(1) of the consumer protection act is applicable in this matter. He submitted that section 2 of this act defines what a credit agreement is, and it excludes mortgage but not charge. It is the plaintiff's counsel's submission that if the parliament intended to exclude charge it would have done it explicitly in the section. Accordingly section 62(1) of the act applies to this matter which states that the borrower is entitled to pay full outstanding balance under the credit agreement at any time without any pre-payment charge or penalty.

The defendant counsel on the other hand submitted that the plaintiffs interpretation of security, charge and mortgage is wrong and thus relied on the Consumer Protection Act is misplaced. He cited land act, blacks law dictionary on definition of conveyance. He further cited the law of real property interpretation page. As 1085 on the meaning of charge and submitted that a charge and mortgage mean one and the same thing.

I have considered the aforesaid submission. The issue which arises for determination is what is the nature of the transaction between the plaintiff and the defendant section 2 of Land Act 2002 defines charge as;

*“An interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a surcharge and the installment creating a charge”.*

There was no evidence of the transfer of title from the plaintiff to the defendant hence the transaction cannot be a mortgage. However, there was interest in land passing from the plaintiff to the defendant. That interest is found in clause 6.1.1(e) of the loan agreement which provides for opening of Escrow account acceptance by the defendant to secure part of the sale proceeds. This is what constitutes interest on land.

I therefore find that the transaction between the plaintiff and the defendant is not a mortgage but a charge. And as rightly submitted by the plaintiff's counsel nothing would have made it hard for the parliament to explicitly include charge in section 12 of the consumer protection act. I therefore find that section 62(1) of the consumer protection act is applicable to the transaction between the plaintiff and the defendant.

The issues which I have now to determine whether the loan agreement herein falls within the period in which the Consumer Protection Act can be invoked by the plaintiff. The Consumer Protection Act came into operations on 14/3/2013. The loan agreement herein was executed on 25/10/2012 the plaintiff counsel submitted that since clause 7.4 and 9.4 became effective after the operationalization of the Consumer Protection Act, the provision of section 62(1) of the act is applicable to this transaction between the plaintiff and the defendant.

I do not agree with the plaintiff counsel's view. The law of contract is clear that the executions date of a contract is the date when obligations of a contract are performed. In any case the effective date is presumed to be the execution date unless otherwise stated in the contract. In the present case, clause 3 of the loan agreement expressly states;

*“Notwithstanding any date contained herein, for all purposes of the agreement the effective date thereof shall be the date of execution hereon which shall be the date upon which the last of the parties appends their signature herein”.*

In the instant case, the loan agreement was entered into on 25/10/2012.

That is effective date. There is no provision in the consumer protection in the consumer protection act that is shall operate retrospectively. In the circumstances I find that it is wrong for the plaintiff to involve the act as the loan agreement was entered into before the operationalization of the consumer protection act.

However, having made a finding that the defendant by making the initial disbursement of the loan it made the plaintiff behalf that all conditions precedent had been complied with early pre-payment charges I hold that the plaintiff is entitled to refund of the sum of Kshs.8,787,200/= with interest.

The plaintiff counsel submitted that the aforesaid sum should attract interest from 7/4/2014 arguing that this was a commercial transaction where the defendant was charging interest rate of 21%. In the circumstances of this case, I shall allow interest rate of 20% from the date of filing the suit.

In therefore enter judgment for the plaintiff against the defendant in the sum of Kshs.8,787,200/= with interest at the rate of 20% from the date of filing this suit. The plaintiff shall also have the costs of the suit”.

6. It is that judgment that the Appellant challenges by the 8 grounds of appeal set out in the Memorandum of Appeal dated 27/9/2018 and filed on 01/10/2018.

7. From the pleadings filed, and the prayers made, my view is that the question of whether there was a breach of the agreement was really not an issue between the parties. To me the issue was whether or not the Appellant was entitled to demand and receive the contractual early

repayment and cancellation fees on the face of Section 62(1) of the Consumer Protection Act. That issue would have been determined by simply asking whether the agreement between the parties was subject to the Act with a subsidiary and collateral consideration whether the Act applied to the dispute between the parties. Put the other way, the dispute was purely whether the agreement was a consumer agreement and whether the contract having been executed on 25/10/2012, before the Act came into operation on 14/3/2013, was subject to the Act.

8. Accordingly even though the trial court identified three issues for determination, clearly away from the issues proposed by parties, I do find that the issue of breach was not one born out of the pleadings and was thus not before the court for determination. Following that view and opinion it follows that grounds 1, 2 & 3 of the appeal are themselves not for my determination and I will thus not apply myself towards their determination. Ultimately, this appeal must be determined on whether or not the Act applied to the dispute between the parties.

### **Analysis and determination**

9. In its preamble, the Consumer Protection Act 2012, is an act of parliament to provide for protection of the consumer, prevent unfair trade practices in consumer transactions and for connected purposes.

10. The same statute defines a consumer transaction to be any act or instance of conducting business or other dealings with a consumer include agreement for the supply of goods and services and include a consumer agreement.

11. At trial the Appellant took the firm position that based on the definition of the term Credit Agreement which excludes an agreement under which a lender extends credit or lends money on the security of a mortgage of real property, the Act did not apply to the transaction between the parties and that the Act was not expressed to have retrospective effect.

12. To the contrary the Respondent took the position that the contract between the parties was bound by and subject to the provisions of the Act and that the cause of action pleaded was subject to the Act having occurred after the Act came into operation.

13. I will start with the question whether or not the Consumer Protection Act was applied to the case to imply retrospective effect.

14. As pleaded, the cause of action is the act by the Appellant by which it demanded and received payment for early payment and cancellation fees. It sought the determination whether that was legal or illegal. In my view by time that cause of action was pleaded by Respondent and acknowledged by the Appellant, as being the 25/3/2014 and 7/4/2014, the Act was in operation and the question was due to determination under the Act.

15. Of course if the cause of action was the execution of the agreement, before the Act was enacted, then it would have been outside the dates of operation of the Act and applying the Act to the happening before enactment and coming into operation would have been retroactive in nature. In this matter, I do find that the cause of action as pleaded concerned acts during the reign of the Consumer Protection Act and the Act was indeed properly applicable to the cause thus pleaded. To this extent, the trial court fell in error when it found that it was wrong for the plaintiff to invoke the statute in the matter.

16. On the second issue whether the Act applied to the transaction pleaded the trial court in its determination found and held that what was excluded was a mortgage and not a charge over a realty.

17. In the judgment the trial court correctly found that there has not been a definition of the term mortgage in our land statutes and therefore concluded that if parliament intended to exclude charges then nothing would have been easier than to say so in the Act.

18. I do find no error or mis-direction in the finding by the trial court. It is noteworthy that while the Consumer Protection Act was enacted in December 2012, the Land Act, which legislates on securities for loans, had been enacted the same year in May. In my view therefore when parliament enacted the Consumer Protection Act, it had legislated on what our securities created over real property would be called. The Land Act only recognizes a security over land as a charge and not otherwise. On the same vein when the parties negotiated and draw their contract subject matter here, they were clear that the instrument to be used to secure the facility would be a first legal charge not a mortgage.

19. Legislation must be left to parliament as mandated by the constitution and therefore when parliament excluded securities by way of mortgage from those to be subject to the Act, this court cannot infer that the parliament intended to use the words mortgage and charge interchangeably. Only mortgages are excluded but not charges.

20. I do find that the trial court was right in its determination and therefore, I find no merit in the appeal which I hereby order to be dismissed with costs to the Respondent.

**Dated and delivered at Mombasa this 13th day of December 2019.**

**P.J.O. OTIENO**

**JUDGE**