



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. 213 OF 2012**

**JESSE MBURU GITAU.....1<sup>ST</sup> PLAINTIFF**

**ZELIPHAH NJERI MBURU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

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

**JUDGMENT**

1. The plaintiffs through an amended plaint dated 17<sup>th</sup> March 2015 sued the defendant seeking judgment for the following:-

- a) A mandatory injunction compelling the Defendant to release and Discharge the Plaintiffs original Title Deed in respect of L.R. No. Nairobi/Block 111/982.
- b) An order for the refund of Kshs.874, 792.59 plus interest thereon at 18.25% P.A from 8<sup>th</sup> September, 2011 until payment in full.
- c) Costs of the suit plus interest.
- d) Any other relief that this Honourable Court may deem fit and just to grant.

2. The defendant filed an amended statement of defence dated 23<sup>rd</sup> April 2015 denying the plaintiff's claim and praying for the same to be dismissed.

**Brief facts**

3. The brief facts of this suit are that the plaintiff's are husband and wife, registered owners of all that parcel of land situated and known as **L.R No. Nairobi/Block III/982, Komarock Estate, Phase 1**. That on 5<sup>th</sup> February 1991, the plaintiff charged the said property to the defendant securing a sum of Kshs.440, 000/- repayable in a period of 20 years. That as of 31<sup>st</sup> August 2011, a sum of Kshs.330, 600 was allegedly owing to the defendant.

4. On 16<sup>th</sup> August 2011, the defendant through M/s Nguru Enterprises advertised for sale of the plaintiffs suit property despite protests from the plaintiffs, forcing the plaintiffs to part with the claimed balance of Kshs. 330,608/-, plus auctioneers fees of the sum of Kshs.14,000/-. That despite all the aforesaid payments and several demands from the plaintiffs to discharge the suit property absolutely, the defendant declined to do so and continued to heap further charges upon the plaintiffs felting the equity of redemption.

5. On 4<sup>th</sup> April 2012 the plaintiffs approached Interest Rates Advisory Centre (*hereinafter IRAC*) for accounts scrutiny and interest reconciliation and found that the sum of Kshs.874,792.92 had been overcharged as per Report dated 5<sup>th</sup> March 2015 filed in court.

6. The defendant on its part denied the plaintiffs allegations, but admitted receipt of Kshs.330, 608/- and alleges it is holding the plaintiffs securities pending payment of auctioneers charges.

7. At the hearing the plaintiffs called two witnesses, Mr. Wilfred Abincha Onono, a certified public Accountant currently managing consultant of interest rate Advisory Centre, Ambassador Court; who testified that he specializes in interest calculation on loans and overdrafts borrowing accounts. He testified that they obtain from the borrower the contract documents; get loan statements for the facility in question for which they capture all the transactions, apply the terms from the charge document and then proceed to carry out the interest re-

calculation and that they compare their findings and what the Bank had debited into the account. That any differences will be brought out which is reported to the borrower. He testified that the method is very correct and that in doing so they use computer software due to the complications.

8. In this matter **PW1**, was approached by the plaintiffs about their borrowing from the defendant Kshs. 440,080 on 9/4/1991 at a rate of 18% for repayment within 20 years at a rate of instalment of Kshs.6, 795, plus insurance charges of Kshs.592 making a total of Kshs.7, 387. The security was **Plot No. L.R NRB/BLOCK III/982, Komarock Estate Phase I**. He testified that the Bank reserved the right to verify the loan and advice. He testified that in summary he found the defendant had overcharged interest to the tune of Kshs.973, 292/59, by levying unilaterally what it called a default rate. That under clause 7 of the charge document notice was required to be given but that was flouted.

9. **PW1's** evidence is that the plaintiffs paid fully the loan as of May 2007 but due to the default charges the account reflects to be in force. That the amount of Kshs. 98500/- debited on 14/9/2011 had been excluded. **PW1** adopted his witness statement marked "**WAO-1**" and calculation marked "**WAO-2**" as his evidence in chief.

10. **PW2**, Jese Mburu Gitau, the 1<sup>st</sup> plaintiff testified that he is a joint owner of **L.R NRB/Block III/982** with the 2<sup>nd</sup> plaintiff and adopted his witness statement "**JMG-3**" and documents "**JMG-4**" as his evidence in chief.

11. The defendant called one witness, **DW1**, Doreen Mwenda, a debt Recovery officer with **HFCK**, who testified that she recorded a witness statement on 6/12/2016 filed on the same day and that she adopted the same as her evidence in chief (**Exhibit DM-1**). That she further relied on the bundle of documents dated 15<sup>th</sup> may 2012 (**Exhibit "DM-2"**).

12. I have very carefully considered the pleadings, the evidence, submissions by counsel and the issues arising thereto for consideration may be summed up as follows:-

**a) Whether the plaintiff has met the threshold for granting orders of injunction?**

**b) Whether the interest charged and other penalties including auctioneers charge are a clog and fetter to the plaintiffs equity of redemption?**

**c) Whether the plaintiffs were overcharged on the mortgage account No.60000028 97 by a sum of Kshs.874, 792.59 and whether the plaintiffs' title should forthwith be discharged and the recalculated amount of Kshs. 874,792/59 paid to the plaintiffs?**

**A. Whether the plaintiff has met the threshold for granting orders of injunction?**

13. It is now settled law on the principles to be considered for the grant of an injunction, as well set out, in the celebrated case of **Giella Vs Cassman Brown (1973) CA 358**, which are:- that first, an Applicant must show a prima facie case with a probability of success; secondly an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not ordinarily be compensated by an award of damages; and lastly if the court is in doubt, it will decide an application on a balance of convenience.

14. In the instant case, there is no dispute the plaintiffs were advance with a loan payable within 20 years since 1991. The defendant contention is that the plaintiff defaulted severally in payment and refused to pay the sum sought on allegation of overpayment and on being charged illegal interest. The plaintiffs hired services of **PW1**, Wilfred Abincha Onono, managing consultant of interest rate Advisory Centre, a specialized in interest calculation on loans and overdraft borrowing accounts; who testified that upon obtaining from the plaintiffs the account documents and loan statements for the facility in question, and upon capturing all the transactions and upon applying the terms from the charge document, and upon carrying out interest re-calculation and upon comparing his findings with what the Bank had debited into the account, he noted the difference which he passed over to the plaintiffs. **PW1's** conclusion was that **HFCK** had overcharged interest to the tune of Kshs. 973,292/59 as per his Report "**WAO-2**". The defendant did not produce a report from an expert to counter **PW1's** Report or controvert the same. The defendant did not demonstrate that **PW1's** Report was a misapprehension on the calculation of interest nor did they justify the basis for the interest charged. In view of the above I am satisfied the plaintiffs have established a prima facie case with probability of success. Secondly I am satisfied that continuing holding of the plaintiffs title would result to the plaintiffs suffering irreparable damages which cannot be compensated by way of damages. The plaintiffs have therefore met the threshold for granting orders of injunction.

**B. Whether the interest charged and other penalties including auctioneers charge are a clog and fetter to the plaintiffs equity of redemption?**

15. In the instant case there is undisputed evidence that the plaintiffs were advanced with an amount of Kshs. 440,080/- as of 5<sup>th</sup> February 1991, at interest rate of 18% p.a; with monthly repayment of Kshs. 738/- for a period of 20 years, the charge produced in the case did not have a provision for any variation of interest and even the charging of the penalties and default interest as alluded to by the defendant. The interest agreed up in this case was 18% p.a; appearing on both the offer to advance and the charge instrument. I therefore find and hold that the various unilateral letters written to the plaintiffs cannot be a basis for altering the interest rate agreed upon in the letter of advance and the charge. Where an agreement has specific terms and conditions mutually agreed upon by parties and duly executed by both parties, none of the parties can unilaterally be allowed to change the terms to the disadvantage of the other. Parties must learn to stick to the terms of the agreement and agree on the change of the terms, if they so, agree but not otherwise.

16. Having stated the above, I am of the view that unilateral variation of interests charged, including penalty on default, not provided for in the letter of advance and the charge, if allowed to stand, would be a clog and fetter to the equity of redemption.

17. In this case, the auctioneer was instructed by the defendant, who subsequently issued a redemption notice dated 8<sup>th</sup> August 2011, to the plaintiffs, for the payment of a sum of Kshs. 330, 608/- only, which sum was duly paid to the auctioneer. The plaintiffs, though they paid Kshs.330,608/- alleged to be the outstanding loan, they have through the evidence of **PW1**, been able to demonstrate as of then, they had not only paid the total outstanding loan but had over paid the loan due to being overcharged on the interest. The plaintiffs in view of the above were coerced to pay Kshs.330, 608/- not because they were in arrears but to evade the impending illegal sale and the auctioneer charges for Kshs. 14,000/-.

18. It is of great significant to note the auctioneers demand for sum of Kshs.180,000/- to collect a sum of Kshs.330,608 is unconscionable; unjustified, an abuse of the auctioneers position and a further clog and fetter to the equity of redemption. No reason has been given as to why the defendant, at the point of payment of Kshs. 330,608 did not discharge the suit property. I find the auctioneers at the same time was paid Kshs.14,000/- as per the scale as regards the auctioneers fees and if the auctioneer felt aggrieved by the amount paid, they should have taken their grievance before a court of law for their costs to be assessed rather than the defendant refusing to discharge the charge. I find that the plaintiffs have demonstrated that the defendant is not justified to keep the plaintiffs property charged. That even if the auctioneers charges are the basis of keeping the title; which in view, should not, the plaintiffs have not been served with certificate of taxation for the alleged auctioneers charges.

**C. Whether the plaintiffs were overcharged on the mortgage account No.6000002897 by a sum of Kshs.874, 792.59 and whether the plaintiffs' title should forthwith be discharged and the recalculated amount of Kshs. 874,792/59 paid to the plaintiffs?**

19. According to the evidence of **PW1**, Wilfred Abincha Onono, who gave a detailed evidence and a Report ("**WAO-2**") he was able to scrutinize and recalculate the plaintiffs mortgage account with the defendant; extracting the applicable interest rates over various periods and on agreed mode of repayment as had been set in the contract. He averred that he subjected the extracted contractual terms into **IRAC** Credit verifier, which calculate the interest chargeable on figures in the statement of account. He testified that its accuracy is verified on mathematical basis, urging the software has been approved by the University of Nairobi and certified.

20. **PW1** evidence is that the offer to advance dated 5<sup>th</sup> February 1991 together with the charge instrument provided for a single advance of Kshs. 440,000.00 at the interest of 18% pa. payable in 20 years at agreed instalment of Kshs. 7,387/- per month inclusive of insurance and ledger charges. The defendant's schedule of residential charges was applied throughout. That as per the Report on 31<sup>st</sup> May 2005 the plaintiff's mortgage account had been fully reduced and had a credit of Kshs.11, 761/34; however the account continued in debit and as of 31<sup>st</sup> August 2011, the account had a debit of Kshs. 874,792.92.

21. I have very carefully considered the uncontroverted evidence of **PW1**, and note it is alleged between 31<sup>st</sup> May 2005 to 31<sup>st</sup> August 2011, no penalty interests or instalments were payable to the defendant, simply because as per evidence of **PW1**, the loan had fully been redeemed.

22. The evidence of **PW1** and the Report by **PW1**, ("**WAO-2**"), which has been uncontroverted; was corroborated by evidence of **PW2** in material particulars. According to **IRAC** report by **PW1**, he used and applied Housing Finance Schedule of residential rates, contrary to the defendants submissions, that the report had erroneous interest calculation. The defendant should have contested the report by **PW1** by preparing and filing a report by an expert but not to challenge the report by way of submissions.

23. According to **PW1**'s evidence the normal rates of interest should not have gone upto 24% p.a. There is evidence the defendant was applying a further 19.9% as penalty interest and an additional rate of 4% as default interest. The penalty and default interest was not provided for in either offer to advance or in the charge instrument. That it has emerged, that on default alone the defendant was applying a rate of 24% p.a, over and above the normal interest rate on loan contrary to the parties agreement. These errors were noted and in re-calculation of interest, **PW1**, observed the plaintiffs account to be in credit of Kshs.874,792/59 which amount he found was due to be repaid to the plaintiffs. In the case of **Givan Okallo Ingari & another Vs Housing Finance Company of Kenya Limited Hccc No. 79 [2007] eKLR** Hon. Justice Warsame, as he then was; held:-

**"The charge document in its entirety does not provide for default charges that was levied on the account of the applicants. The consequence of such a conduct is that it is an act outside the contractual agreement, hence there is no legal basis for doing so. The imposition of penal interest or default charges without the permission or knowledge of the applicants greatly impedes or inhibits the redemption rights of the applicants. I think it is pertinent to give a chance to the parties to contest their dispute at a full hearing, where evidence will assist the court to reach a proper verdict as to the rival positions."**

24. Similarly in the case of **Francis Joseph Kamau Ichatha Vs Housing Finance Company (K) Limited (2014) eKLR** Justice Odunga observed as thus:-

**".....I have gone through the charge document and there is no provision that allowed the Defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the Plaintiffs. In my view if the Defendant applied default charges on the Plaintiff's account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal. There is nothing as prevailing customs or trade usages which can allow the defendant to commit acts of fundamental breach to the contractual document. The charges debited in the Plaintiff's account were done without any legal basis and in my humble view made the account irredeemable."**

25. I have very carefully gone through the letter of advance and the charge, forming the basis of terms and conditions of advancing of the loan to the plaintiffs and have been unable to find any provision allowing the defendant to unilaterally charge or vary the rate of interest or to levy or vary rate of interest so charged in the plaintiffs account. The defendant also purported to apply normal rates above 24% p.a and was further applying a further 19.9% as penalty interest and an additional rates of 4% as default interest, which interest was not permitted nor provided for by the charge document. The charges and interest levied against the plaintiffs is illegal and not based on the contract. The introductions of the so called default interest; penalty interest and levy interest above the aforesaid agreed terms cannot be allowed to stand as it was imposed without the permission or knowledge of the plaintiffs, which greatly impedes the redemption rights of the plaintiffs.

26. The upshot is that I find the plaintiffs have proved their case on balance of probability and I proceed to make the following orders:-

- a) **A mandatory order of injunction compelling the defendant to release and Discharge the plaintiffs Original Title Deed in respect of L.R. No. Nairobi/Block III/982 be and is HEREBY issued forthwith.**
- b) **An order for refund of Kshs. 874,732/59 plus interest at court rate from 8<sup>th</sup> September 2011 until payment in full be and is HEREBY issued.**
- c) **Costs of the suit to the plaintiffs.**

**Dated, signed and delivered at Nairobi this 6<sup>th</sup> day of December, 2018.**

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**J .A. MAKAU**

**JUDGE**