



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**CASE NO. 111 OF 2009**

**HAMISI NZOVU MZUNGU.....PLAINTIFF**

**= VERSUS =**

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

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

1. By a Plaint dated 15<sup>th</sup> August 2008 and amended on 18<sup>th</sup> May 2017, the Plaintiff instituted this suit against the Defendant. It is pleaded that the Plaintiff was a client of the Defendant, a financier, through his former employer Kenya Railways. That on 27<sup>th</sup> January 1987 the Plaintiff purchased a three bedroomed house on Plot No. 2281 Original No. 187 Section II/MN for a consideration of Kshs.180,000 which the Defendant financed to the tune of Kshs.162,000.

2. It is the Plaintiff's case that a charge was registered against the suit property on agreement that the Plaintiff would remit to the Defendant monthly instalments of Kshs.2,686 inclusive of interest until the recovery of the entire sum of Kshs.162,000. The Plaintiff avers that he paid the agreed installments but despite the payments made the Defendant fraudulently charged unconscionable interest rates to his account resulting in the escalation of funds owed. The Plaintiff lists the particulars of fraud as follows:

*(i) Charging interest rates in excess of those agreed on the charge document*

*(ii) Illegally inflating the outstanding figures in the Plaintiff's account so as to make it impossible for the Plaintiff to redeem the property*

*(iii) Charging excessive penalties.*

3. The Plaintiff avers that he made several efforts to clear the outstanding sum on his mortgage account. That he paid a total of Kshs.405,497.50 which was over 200% above the amount advanced yet the Defendant went ahead and exercised its mortgagee's right to sell the property. Pursuant to a notice dated 5<sup>th</sup> February 2004, the Defendant alleged that the outstanding balance was Kshs.3,149,024 and sold the property for Kshs.720,000. The Plaintiff contends that due process in accordance with the Indian Transfer of Property Act was not followed and that the effect of sections 69(1) and 100 (A) of the Act had not been explained to him by the Defendant at the time of signing of the mortgage documents hence the entire sale was void. The property is currently registered in the name of one Samuel Muriungi Kabui.

4. The Plaintiff claims that he suffered mental anguish from losing his only investment in life. Consequently. He seeks the following reliefs:

**(i) A declaration that plot No. 2281 section II Mainland North Mombasa by the Defendant was unlawful**

**(ii) A declaration that Kshs.405,497.50 paid by the Plaintiff to the Defendant was sufficient consideration for the purchase of Plot No. 2281 Section II Mainland North.**

**(iii) A declaration that the Plaintiff is the lawful and beneficial owner of the suit property.**

**(iv) An order directing the Registrar of Lands to issue the Title Deed of the suit property in the name of the Plaintiff herein.**

**(v) The current market value of Plot Number 2281 Section II Mainland North.**

**(vi) General damages.**

**(vii) Costs of and incidental to this suit.**

5. Vide its amended defence filed on 6<sup>th</sup> June 2017, the Defendant admitted to advancing the Plaintiff a loan but averred that the total amount repayable cannot be computed at loan inception because the interest rates charged are subject to changes determined by the prevailing market rate. The Defendant denied the particulars of fraud enumerated by the Plaintiff. The Defendant admitted further that the sum of Kshs.405,497.50 was paid by the Plaintiff but fell short of the amount due as per the charge documents he executed on 26<sup>th</sup> and 28<sup>th</sup> January 1987. That the property now belongs to a 3<sup>rd</sup> Party as stated by the Plaintiff.

6. The Defendant averred that all procedures and formalities in the charging and sale of the property were followed to the letter. Consequently, there was no breach of contract hence damages are payable. Moreover, there was a previous suit between the Plaintiffs namely Mombasa CMCC No. 214 of 2008 which suit was dismissed.

7. The hearing proceeded on various dates from 23<sup>rd</sup> November 2017. The Plaintiff presented evidence as the sole witness in support of his case. **PW1** testified that in January 1987, he bought a three-bedroom house located at Bamburi, Kiambeni from Forty Properties Limited at a consideration of Kshs.180,000. He produced a sale agreement marked as P.Ex 1 and the title to the house as P.Ex 2. **PW1** paid a deposit of Kshs.51,000= and the balance of Kshs.162,000 was payable the check-off system by deduction of his monthly salary by the employer then Kenya Railways Corporation. The letter of offer from the defendant was produced as P. Ex 6. That the duration of the loan was 15 years and every month he paid Kshs.2,686 which would be deducted from his salary and directly remitted to the bank. He produced bank statements to that effect marked as P.Ex 7.

8. **PW1's** further evidence was that sometime in 1999, he discovered that some of the monthly payments he deducted from his salary did not reach the Defendant. He wrote to his employer about the issue then decided to make cash payments which he intended to raise to monthly instalments of Kshs.5,000. **PW1** stated that he rented out the house in the year 2000 and his tenant paid the Kshs.5,000 rent directly to the Defendant as demonstrated by PEx 7. **PW1** knew that the interest on the loan was 13.5%. That he did not receive any communication in respect of any changes.

9. Later on, he received a letter from the bank stating that he owed them Kshs.3,001,000 which letter he produced as PEx 8 and which amount he disputed. The plaintiff testified that by the time he was given the letter, the house had already been sold. That when he took the loan he was not informed that the house would be sold in the event that he did not pay all the instalments. He later discovered that the house had been sold to one Samuel Kabui for Kshs.720,000 as demonstrated by P.Ex 9. That as a result of the sale, he suffered greatly because the house was his only property. He denied being notified of the intention to have it sold.

10. On cross-examination, **PW1** said he read the documents before signing. That he understood the content of the charge document. He admitted that at some point the employer did not remit the monthly instalments making the account to be in arrears. That in the year 1999, he decided to be making cash payments to the defendant. He said that the suit property's utility bills, water bills, land rates and rent were all paid in his name. That when he took the loan facility, he gave his employer's address as P.O. Box 90334 Mombasa which was entered in the charge document while his current address is Box 145 Kaloleni.

11. That this was the address he was using. That he received the letter informing him he was in arrears of Kshs.3,001,000 and by which time the house had already been sold in the year 2003. The plaintiff admitted receiving letters informing him of change of interest rates. That when he received the letter on arrears, he went to the defendant's offices although the meeting was not recorded in writing. In re-exam, the witness said he retired in the year 2006. That he was in Voi so he would get the letters sent to Box 90334 Mombasa late. The letter of arrears found when he was still in employment. That he signed the charge document through the agent of forty properties. That he was not told the consequences of non-repayment. This marked the close of the plaintiff's case.

12. Amos Wachira Mwangi gave evidence on behalf of the Defendant as **DW1**. He testified that he is employed by the Defendant as the Mombasa Branch Manager since the year 2016 and is familiar with the details of the current case as he had in his possession the original file containing documents used in the transaction from 1987. **DW1** adopted his statement made on 30<sup>th</sup> January 2018; list of documents filed on 17<sup>th</sup> March 2010 and a supplementary list filed on 22<sup>nd</sup> November 2017 as evidence. He stated that on 26<sup>th</sup> January 1987, the plaintiff executed a charge document to secure the loan of Kshs.162,000.

13. That the charge provided *inter alia*;

a) *That the advanced sum would be repaid by monthly instalment of Kshs.2,210/= with interest or by such increased monthly instalments as the company may require as from 1<sup>st</sup> March.*

b) *That until the service of a Notice interest was at the rate of 13½% per annum.*

c) *That the Company would from time to time serve on the borrower a Demand Notice requiring payment of interest at such increased or reduced rate as shall in the decision of the Directors of the Company fairly represented the rate of interest commonly chargeable in Kenya.*

d) *That the company requiring an increase in the rate of interest would notify the borrower of the amount of the resulting increased monthly instalment payable.*

e) *That on payment in one sum or by any instalment paid in accordance with the provisions of all money secured by the Charge and all costs and expenses incurred the company would release and discharge the property to the borrower.*

f) *That if default was made by the borrower in payment of any monthly instalment or if default be made by the borrower in the observance or performance of the covenants or obligations the Company would inter alia exercise powers conferred by the Indian Transfer of Property Act 1882.*

g) *The Borrower would at any time redeem the security upon giving the Company three month Notice of such intention and upon payment of all monies due to the company at the expiry of the Notice.*

14. That as provided in the charge document, the plaintiff was advised on changes on the interest rates and the amounts that would be payable. That the plaintiff's account fell in arrears and the defendant made formal demands. That vide a letter dated 9<sup>th</sup> October 2003, addressed to the plaintiff's last known address, the defendant issued the plaintiff with a statutory notice to pay the outstanding amount of Kshs.3,053,425.80 within 3 months as mandated by ITPA. The witness said the plaintiff did not honour the demand hence the property got sold to Samuel Muriungi Kabui. He denied there was any fraud on the interest charged nor that the penalties were excessive. The witness urged the court to dismiss the case with costs.

15. On cross-examination, **DW1** stated that the Plaintiff borrowed Kshs.162,000 and repayment was to be in instalments of Kshs.2,210 per month. The same was payable by check off from the Plaintiff's employer, Kenya Railways. He continued that item 12 in the List dated 31<sup>st</sup> March 2010 was a statement of the Plaintiff's loan account. It showed credits made in every month in 1988. In 1989 all months were paid except January and April. In 1990, all monthly payments were made with November being paid twice. However, from 1991 to 1997, the Plaintiff made irregular payments. For instance, in 1992, 1993 and 1994, he settled only 1, 3 and 1 installments per annum respectively.

16. **DW1** further stated that the interest adjustments were meant to increase the loan balance thus a correct entry. At the time the loan was disbursed the interest rate was 13.5%. That in accordance with clause 4.3 of the charge document the Plaintiff was to be notified of any interest adjustments through the postal address provided. **DW1** averred that this clause was duly complied with as the Plaintiff received all notifications of interest rate changes and the bank did not receive any unclaimed letters sent to him. **DW1** however admitted that the letters to the Plaintiff dated 29<sup>th</sup> August 1992 and 20<sup>th</sup> April 1994 (Documents 6-10, Defendant's List of Documents) were sent to P.O. Box 81441 Mombasa; a different address from that indicated in the charge document. Further, the letter dated 10<sup>th</sup> May 1989 stated that there were arrears of Kshs.13,700 but did not disclose the months the arrears related to. **DW1** observed that if a customer defaults, he should be notified. He could however not confirm whether the Plaintiff had given them a change of address.

17. On the sale of the suit property, **DW1** stated that the house was sold through private treaty at the prevailing market price after the bank advertised it through the property mart but he did not have a copy of the advertisement. He contended that it was acceptable to sell the property at a lower rate than the outstanding loan. **DW1** stated further that he had not compiled the amount the Plaintiff had settled at the time of the sale. This marked the close of the defendant's case.

18. The hearing completed, parties elected to file their final submissions. Only the Defendant's submissions filed on 28<sup>th</sup> July 2019 are on record. Counsel for the Defendant submitted that the Plaintiff signed the charge documents and fully understood the terms and conditions therein. That the import of Sections 69 of ITPA had been explained to him. The Plaintiff however committed breach of the terms of the agreement by making irregular payments. That the statements produced at trial confirmed that the Plaintiffs account was constantly in arrears. For that reason, the Defendant exercised its statutory power of sale by dint of Clause 7 of the Charge document and section 69(1) of the Indian Transfer of Property Act. That the Plaintiff confirmed his postal address to which the statutory notice was sent. The sale by private treaty to Samuel Muriungi Kabui was therefore legally sound.

19. Counsel submitted further that the Plaintiff failed to prove fraud on the part of the Defendant allegedly hiking interest rates. That the Plaintiff admitted receiving letters informing him on the increase of interest rates before they were effected. They relied on the celebrated Case of *Vijay Morjoria Vs Nansingh Darbar (2000) eKLR* to the effect that fraudulent conduct must be distinctly alleged and proved. Moreover, the Plaintiff no longer had any proprietary right over the suit property after it was transferred to the 3<sup>rd</sup> party which action extinguished his right of redemption. Counsel further relied on the cases of *John Muritu Kigwe Vs EABS Bank Ltd & Others HCCC No. 665 of 2008* and *Downhill Limited Vs Harith Ali El Busaidy Civil Appeal 254 of 1999* to buttress this point.

20. On the question of a refund of the suit property value at market price, Counsel for the Defendant opined that the remedy has not accrued to the Plaintiff as he has failed to prove there was irregular exercise of the statutory power of sale. Further, no evidence such as a valuation report was tendered to substantiate the pleaded value of Kshs.2,500,000. Counsel concluded by urging the Court to dismiss the claim.

21. From the pleadings filed, evidence adduced and the submissions rendered, this court frames 3 questions for its determination;

**(a) Whether or not the defendant charged illegal interests**

**(b) Whether or not the Plaintiff was in arrears of the loan at the time of sale of the property.**

**(c) Whether or not the plaintiff was duly served with the requisite statutory notices before the sale.**

**(d) What orders should the court make in the circumstances.**

22. The plaintiff pleaded and stated that the defendant charged illegal interests in excess of the agreed amounts. In the plaintiff's list of documents, he annexed two letters from the defendant in regard to interest rate change. The first letter was dated 25<sup>th</sup> May 1990 addressed to the plaintiff at P.O. Box 81441 stated that pursuant to the gazette notice no 1617 dated 2<sup>nd</sup> April 1990, the Central Bank of Kenya had regulated the interests charged on loans to 19%. The plaintiff was notified that after effecting the change of interest, his monthly instalment was Kshs.2,686. The second letter dated 31<sup>st</sup> May 1993, the plaintiff was notified that the interest had rose to 21% thus the revised payment on the loan balance of Kshs.175,553 excluding the arrears was monthly instalment of Kshs.3,507 w.e.f 1<sup>st</sup> July 1993. On this second letter, there is a writing made in ink "Received on 21-6-93 and not."

23. The plaintiff did not inform the court how or where he got these letters from. The Plaintiff did also not tell court that he had never used address given on the letters. Since no contrary evidence has been presented how the letters came into possession of the Plaintiff, the court can

only presume that he received them. If he did, then his claim that he was charged illegal interest does not lie since he was duly informed on what basis the defendant was increasing the rate of interest. Furthermore, the witness did not lead evidence to specify the amount of interest charged that he felt was illegal. My finding on this point is that it was not proved.

24. The second issue is whether or not the plaintiff was in loan arrears. The plaintiff in his evidence in chief stated that he realized at one point his employer was not remitting the monthly instalments due to the defendant therefore he decided to be making cash payments directly to the defendant. The plaintiff did attach bank statements which clearly show he was in arrears. He was also referred to the accounts statements filed by the defendant. The defence witness during cross exam gave the months when the plaintiff fell in arrears. For instance, in the year 1992, December payment was not made, in 1993, only 3 instalments were paid, in 1994 only one instalment was paid, in 1997 there were 8 payments.

25. The evidence given by the defendant does show that the plaintiff was in arrears and to this end, he was issued with a formal demand. The first demand served on the address Box No. 90334 was made in 1987. It informed the plaintiff to bring his account upto date by 20<sup>th</sup> December 1987. By a letter dated 20<sup>th</sup> December 1999, the plaintiff was informed that besides the increment in interest rate, an additional penalty interest of 1.5% would be charged on the outstanding arrears. In the letter of 6<sup>th</sup> September 2000 and 1<sup>st</sup> August 2002, the plaintiff was informed in the reduction of interest charged. The defendant then served the plaintiff with the statutory notice on 9<sup>th</sup> October 2003. A reminder was again done on 5<sup>th</sup> February 2004. Both letters were produced in evidence and are addressed at P.O. Box 90334 which is the address contained in the charge document.

26. The plaintiff stated that he retired in the year 2006 meaning he could still access his letters through his employer's postal address. He also said he never served the defendant with any notification of change of address. The plaintiff averred that by the time the statutory notice was issued, the property had been sold to a third party. However, the search document he presented only provided the ownership of the property as at 29<sup>th</sup> June 2007. He did not present the evidence of sale or change of ownership before 5<sup>th</sup> February 2004. His allegation was thus unsubstantiated.

27. The plaintiff further argued that the contents of the charged was not explained to him particularly the clause that the property would be sold if he defaulted. He went on to state that he signed the charge before the agent forty properties. The charged document produced by the defendant does show that the plaintiff executed the charge before an advocate Keneth Marende who signed a certificate that prior to his execution, the advocate explained to the borrower the effect of 69(1) of the ITPA 1882. The plaintiff did not produce his copy of the charge he signed before the said agent. In cross-exam, the plaintiff said he understood what he signed for. In the case of *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others [2003] eKLR* where the Court of Appeal held thus;

***“I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defences I have seen in recent times for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether and no serious investors will bring their capital into a country whose courts are a haven for defaulters.”***

28. Consequently, his claim under paragraph 9 & 10 of the plaint that the sale was illegal for not following the laid down procedures nor absence of understanding of the provisions of Section 69(1) of ITPA of 1882 fails based on the evidence adduced. The plaintiff pleaded that he suffered mental pain, torture and agony by losing his only investment in life. In the Case of *Michael Gitere & another Vs Kenya Commercial Bank Limited [2018] eKLR* that cited *Kenya Commercial Bank Ltd. vs. Pamela Akinyi Ochien’g Civil Appeal No. 114 of 1991*, where the Court of Appeal held that:

***“Before a Chargee, which the bank was in this case, can exercise its statutory power of sale, certain procedures must be complied with, which, in the case of registered land, are set out in section 74(1) of the Registered Land Act Cap 300. For instance they must serve on the chargee three months’ written notice of the default and require her to comply with the conditions broken before exercising the powers of sale or taking steps to recover the sums due. These safeguards are designed to prevent oppressive behaviour by banks in realising their securities over land, which often forms the only home of the chargor. The loss thereof would in many cases cause real hardship to the borrower and his or her family...The circumstances in which a chargee exercising its statutory power of sale can be restrained from doing so have been set out. The mortgagor will not be restrained from exercising his power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action, or because the mortgagor objects to the manner in which the sale is being arranged; but will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgage claims to be due to him, unless, on the terms of the mortgage, the claim is excessive; but where he was, at the time of the mortgage, the mortgagor’s solicitor, the court will fix a sum probably sufficient to cover his claim...The Court should not grant an injunction restraining a mortgagee from exercising his statutory power of sale solely on the ground that there is a dispute as to the amount due under mortgage.”***

29. The issue of loss claimed does not lie where the exercise of statutory power of sale is done within the law. The sum total of the evidence led clearly shows that the plaintiff's case has not been proved. The order this court makes in the circumstances is to dismiss it. I however spare the plaintiff the costs of this suit thus I direct each party to meet their respective legal costs.

Dated and signed at BUSIA this 4<sup>th</sup> day of June 2020.

A. OMOLLO

JUDGE

**Judgment delivered electronically by email this 9<sup>th</sup> Day of June, 2020 due to Covid-19 pandemic.**

**A. OMOLLO**

**JUDGE**