REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMDIRALTY DIVISION

MISC.CIVIL APPLICATION NO. 748 OF 2003

MOHAN MEAKIN (K) LIMITED.....1ST PLAINTIFF

GALOT INTERNATIONAL LIMITED.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

JUDGEMENT

1. The Plaintiffs commenced this suit vide a Further Re-amended Plaint dated 8th March, 2010. In it, the Plaintiff seeks the following orders;

a. ***Spent***

b. ***A declaration to the effect that the 1st Plaintiff having repaid the entire overdraft facility, the Defendant is legally bound to release and discharge the 2nd Plaintiff's aforesaid property known as L.R. No. 209/8330;***

c. ***A declaration that the charge dated 4th April, 1990 is invalid, illegal, null and void ad cannot be regarded as a legal mortgage;***

d. ***An order for the Defendant to refund all the monies overpaid to it by the 1st Plaintiff being Kshs. 2,116,334.05/= as at 31.3.10;***

e. ***In the alternative the above, that accounts to be taken between the parties hereto and should any monies be properly found to be due to the Defendant for an order that the Defendant discharge the Charge and release the Title Deeds of the charged property to the 2nd Plaintiff upon payment in full within such period as this Honourable Court may deem fit of any monies found properly due and owing to the Defendant;***

f. ***The said sum of Kshs. 219,805.97/= being overpayment to the Defendant, as pleaded in paragraph 5 hereof with interest thereon at the rate of 45% p.a and the same attract current banking rate of interest of 45% p.a until full payment;***

g. ***An order for the Defendant to discharge and release the 2nd Plaintiff's aforesaid property known as L.R No. 209/8330;***

h. ***General Damages for breach of contract, the quantum thereof to be determined by the Honourable Court;***

i. ***Costs of this suit;***

j. ***Such other and/or further relief and remedy as this Honourable Court might deem fit and just to grant in the circumstances of this matter.***

2. The Plaintiff's case is that sometime in the month of April, 1990, the Defendant granted the 1st Plaintiff an overdraft facility to a maximum of Kshs. 2,000,000/= at an agreed interest rate of 15.5%. The said facility was secured vide a legal charge registered over the 2nd Plaintiff's property known as Nairobi LR. No. 29/8330. A personal guarantee was also executed by the 1st Plaintiff's directors to secure the overdraft.

3. It was the Plaintiffs' claim that on or about 25th July, 1994, the 1st Plaintiff repaid the entire overdraft facility. That in fact, due to the lack of proper and regular statements of accounts by the Defendant, the 1st Plaintiff did overpay the loan advanced. That the said overpayment as at the time of instituting the instant case, stood at Kshs. 219,805.97/=.

4. The Plaintiffs drew this conclusion from a report done by the Interest rate Advisory Centre dated 10th March, 2010. That despite the foregoing, the Defendant has refused to discharge the subject property and has even threatened to sell the same via public auction claiming that the 1st Plaintiff had failed to repay the loan facility.

5. The Plaintiffs, further pleaded that the letter of offer by the Defendant dated 22nd February, 1990 was neither addressed nor copied to the 2nd Plaintiff, the chargor in this case. That as such, the aforesaid letter of offer could not bind the 2nd Plaintiff as the contract was between the Defendant and the 1st Plaintiff. In the same breadth, the Plaintiffs claimed that the Legal charge dated 4th April, 1990 was executed only by the 2nd Plaintiff and the Defendant and therefore the Plaintiff was not bound the same as he was not a party to the charge created.

6. In the further Re-amended Plaint, it was contended that the provisions of sections 69(1) and 100A(1) of the Transfer of Property Act were never read out to the chargor as required by the certificate in the charge document thus rendering the aforesaid charge invalid.

7. The Defendant in its further amended statement of defence denied liability for the Plaintiffs' claim and contended that the Plaintiff obtained an overdraft facility totaling to Kshs.2,000,000/= from the Defendant which was secured by a charge over LR. No. 209/8330. It was further averred that the parties agreed on a provisional interest rate of 15.5% p.a that would be varied from time to time at the discretion of the Defendant without notice to the Plaintiff. The Defendant admitted that on various occasions it did actually vary the rate of interest, taking into account the prevailing lending rates.

8. It was further denied that the Plaintiff had repaid the facility or overpaid the loan facility as alleged and that on the contrary, the Plaintiff owed the Defendant a sum of Kshs. 702,079/= and in the foregoing, the Defendant's power of sale in the Plaintiff's property had accrued and the Defendant is therefore entitled to sell the suit property.

9. The Defendant contended that any loss that would be occasioned on the part of the Plaintiff as a result of the sale of the suit property is capable of being compensated in damages. With regard to the impugned charge, the Defendant contended that firstly the issues raised were time barred; that secondly, the Plaintiffs are economic arms of Mohan Galot who is the Principal shareholder and director of the two and therefore the two plaintiffs were privy to each other's dealings.

10. That the said director was involved directly with the transactions that are subject to this suit and was

the lead signatory in respect to the relevant contracts of lending and the relevant security. This included Mr. Mahon Galot being a witness to the affixing of the second Plaintiff's seal; thirdly, the Plaintiff contended that the charge herein was valid.

11. The defendant also stated that all material times, the 1st Plaintiff's Bank account was managed in a professional manner and all the interest rates levied were done strictly according to the terms and conditions of the charge instrument as well as the lending agreement. That accordingly, the order for accounts was unnecessary. The Defendant therefore urged the court to dismiss the Plaintiff's suit in its entirety.

12. In reply to the above defence, the Plaintiff filed a Reply to the Amended Statement of Defence. The Plaintiffs denied that they are privy to each other's dealings just because they share a principal shareholder and/or director. That in law, the two are distinct separate entities. It was further contended that the doctrine of estoppel did not apply in this case and therefore the Plaintiffs was entitled to challenge the validity of the charge. In addition, the Plaintiffs reiterated that the charge in connection to the case was not valid.

Evidence

13. The Plaintiffs called four witness in support of their case. PW1, PushpinderSinash Flam, described himself as the General Manager for the Plaintiff companies. He testified that he knew about the transaction that was a subject to the suit. It was his testimony that the charge dated 4th April, 1990 was prepared by the bank and the same was signed by Mr. Mohan Galot and his wife, Santesh.

14. He further told the court that Santesh executed the charge without the presence of an advocate in her house in Kiambu. In line with this, the PW1 also told the court that no advocate was present when Mohan Galot and the Company secretary Mr. Muniz executed the charge document.

15. That after the signatures of the aforesaid persons were affixed, he returned the document to the offices of the Defendant Bank. In cross examination, PW1, stated that he did not know when the allegation that the charge was not explained to the directors was first made. That his role in the transaction was to merely shift the charge documents from one office to office.

16. PW2, was Mahon Galot, who described himself as the Chairman of the 2nd Plaintiff Company. He confirmed that he had signed the charge document in his office where in the absence of an advocate. He further told the court that no advocate explained the import of section 69 (1) of the Transfer of Property Act 1882as indicated in the charge, when he signed the document.

17. On cross examination, the witness reiterated that he has a serious dispute with the Defendant Bank about the amounts owed and paid to the bank in respect to the loan facility. PW2 further told the court that when he instituted the instant claim in 1995, he did not state that he had not read the charge document. That it was only in 2005, when the same was brought up. He however, testified that he signed the document and returned it to the bank.

18. On re-examination, the witness claimed that no advocate was present when the signed the charge document and that at the time of the transaction, he did not have an advocate who acted on his behalf. He restated that he had not read the charge document at the time of signing the same.

19. John Kamau Mwangi, was PW3. He told the court that he worked with the 1st Plaintiff as the Chief Accountant since, 1995. According to him, he was aware of the subject matter of the suit. That he had read the primary documents relating to the dispute including the letters of offer and acceptance as well as the charge.

20. In his testimony, Mr. Mwangi further told the court that the Defendant had varied the rate of interest a number of times from 15.5% p.a to 40%, then to 32 % p.a. without notice to the Plaintiffs as agreed in the

letter of offer. That despite protestations from the Plaintiffs, the Defendant Bank refused to revise the interest rates according to what was agreed by the parties.

21. According to the witness, the Defendant wrote a letter to the Plaintiff to the effect that it had the discretion to vary the interest without notice. PW3 also told the court that he had recalculated the amounts paid to the bank in respect to the loan as at 30th April, 2009. According to his calculations, applying the rate of 15.5% the 1st Plaintiff had made an overpayment of Kshs. 863,345/=.

22. That he used that rate of interest as it was the one agreed by the parties. That going by the statements supplied by the bank, there would be a notable variance since the interest applied was varied from 16.5% p.a to 19% p.a to 40% p.a. That further penalty interests were also applied at a rate of 27% p.a.

23. In his assessment, the witness testified that penalty interests were inapplicable since the same was not provided for in the letter of offer. PW3 also told the court that the 1st Plaintiff had on various occasions asked the Defendant to reimburse it Kshs. 394,141.19/=. The same was calculated with the interest rate of 10% per month. The witness also testified that the statements by the bank were not reflective of the amount owed to the Plaintiff. That further the said statements contained varied interest rates that were not agreed upon.

24. He also told the court that the Interest Rate Advisory Centre also prepared a report on the recalculation of the loan and established that there was indeed overpayment.

25. On cross examination, the witness told the court that the amount advanced to the 1st Plaintiff was Kshs. 2,000,000/= which consisted of an overdraft of Kshs. 1, 200,000/= and a revolving credit of 800,000/=. That the overdraft repayment was to be done in less than a year.

26. PW3 further explained that when the facility expired, the bank wrote a letter dated 25th November, 1993 requiring the Plaintiff to liquidate the debt. That in response the Plaintiff urged the bank that it would pay Kshs. 50,000/= per month a proposal the bank did not accept.

27. With regard to the Notice, the PW3 conceded that vide a letter dated 9th November, 1993, the Bank notified the Plaintiff of the new change of interest at the rate of 40% per annum and that through a letter by the PW2, the Plaintiff rejected the substantial increase of the interest rate.

28. The PW3 also insisted the Plaintiff had not only repaid the entire loan, but had also over paid the same. PW3 told the court that the charged property was developed. With regard to the statements prepared by the Plaintiff in respect to the overpayment, the witness conceded that there were some figures that were repeated and inconsistent in the said statements.

29. Upon re-examination, the PW3 was of the opinion that when there was a conflict between the terms of the letter of offer and the charge, the charge will prevail. That the charge herein indicated that the rate of interest charged would be no greater than allowed by the law. PW3, also asserted that the Plaintiffs had prepared 4 statements with regard to the overpayment made and there was nothing sinister about the figures presented.

30. PW4 was Wilfred AbinchaOnono described as the Managing Consultant for the Interest Rates Advisory Centre. PW4 told the court that she received instructions from the Plaintiffs to recalculate the interest on the overdraft account with the Defendant. PW4 testified that a report on the same was prepared after the account statements from 31st August 1990 to 30th September, 1994 were examined.

31. The witness told the court that the Defendant had varied the interest rates above what was permissible under law. That in this case, the maximum interest rate that could be charged for the overdraft was 16.5%. That according to the report IRAC prepared on 29/7/2008, there was an overcharge of Kshs. 459,419.94%.

32. She clarified that the rate of interest the bank was supposed to charge was 16.5% p.a up to 16/4/1997 where after the bank could agree with the customer on the interest rate to be charged. However, the witness told the court that in 2001, the law changed and interest was supposed to be charged at 4%above the Central Bank of Kenya Treasury Bill Rate of Interest. The position was repealed again on 31st July, 2005.

33. On cross examination, PW4 conceded that she based her report would change if the interest variations were considered. She conceded that the Plaintiffs had defaulted on the facilities advanced. She reiterated that the interest chargeable was that permitted by law. The witness was firm that the variation of interest permitted by law under the subject transaction was 16.5%.

34. She also told the court that she excluded charges and interest rates that she considered illegal. PW4 further testified that any notice served that contained illegal interest would have no consequence as the same did not abide by the law. On re-examination, the witness averred that the calculations in the report were based on her the understanding of the law of interest rates.

35. The Defendant only called one witness. DW1 was Erick MwanzunaMwandachawho relied on his witness statement dated 21st February, 2012. It was the DW1's testimony that the 1st Plaintiff did not repay the loan facilities as required as it fell into arrears.

36. That as at 28th February, 1991, the balance of the loan was at Kshs. 1,214,115/=, and that payment of the outstanding balance is what brought about the instant case. The witness told the court that the Defendant made a demand of the immediate payment of the outstanding amount.

37. Notice of change of interest was also given. A series of correspondence followed where the Plaintiffs offered to pay installments of Kshs. 50,000/= to defray the loan balance. According to the witness the Plaintiff asserted that this was the agreement reached by itself and an employee of the bank.

38. The Bank however declined this offer. The witness further told the court that the Defendant notified the Plaintiff that the interest had changed to 32% through a letter dated 23rd June, 1994. This increase was however rejected by the 1st Plaintiff.

39. That consequently, by September 1994, the Plaintiff took the position that it had cleared the debt while the Defendant's account showed an outstanding balance of Kshs. 508, 521/=. According to DW1 the Plaintiff did not make any further payments forcing the defendant to try and realize the security held.

40. With regard to the validity of the charge, DW1 stated that this was a mere afterthought as the Plaintiffs knew the purport and contents of the charge. He further stated that the Defendant could vary the interest charges without notice as expressly set out in the charge document.

41. The claim for overpayment plus interest was also denounced by the DW1 stating that the Plaintiff terming them as exaggerated and untenable. The witness also testified that the defendant had submitted statement of accounts showing all the drawings made by the Plaintiff, the payments received by the Defendant from the Plaintiff and the interest charged plus levies

42. That the same was a true reflection of the Plaintiffs indebtedness. According to him any contradictory statements provided by the Plaintiff were meant to mislead the court and avoid a legitimate claim by the Defendant. That in the foregoing, there is no justification for grant of the Plaintiffs claim.

43. Upon cross examination, DW1 conceded that he did not see the directors of the 1st plaintiff company appearing before a lawyer when signing the charge. He however pointed out that the said directors could not feign ignorance with regard to signing the charge document as their allegations were not legitimate at all.

44. DW1 further stated that interest rate was varied from 15.5% to 40% on 9thNovember, 1993 and that

the charge document allowed for this variation. That in 1990-92, there was excess liquidity in the markets and the Treasury bill rate was paid at 70% raising the costs of interest. That it was on this basis that the interest rates went up.

45. The witness was firm that the overdraft was not turned into a term loan as alleged. Additionally, DW1 told the court that the loan fell within the period where the central bank had decontrolled the interest rates and each bank was to charge rates on its own.

46. The witness reiterated that the Mohan Galot had control of the two companies, though he was not the sole owner. Further, DW1 asserted that the 1st Plaintiff was still indebted to the Defendant to date. That further, the Plaintiffs had not at any time requested for account reconciliation.

47. The case herein was dispensed by way of written submissions. The Plaintiffs filed their written submissions and reply to the defendants submissions on 29th April, 2015 and 3rd June, 2015 respectively. The Defendant filed its submissions on 15th May, 2015. The same were orally highlighted in court on 13thOctober, 2015. Learned Counsel Mr. KibeMungai appeared for the Plaintiffs, while Learned Counsel Mr. Odhiambo appeared for the Defendant. In a nutshell, the submissions were as follows.

48. Learned Counsel Mr. Kibe argued that the Plaintiff's case is that the charge document dated 4th April, 1990 was null and void since section 69(1) and 100A (1) was not complied with. That the failure to explain the import of the aforementioned provisions to the directors of the 2nd Plaintiff before signing the same invalidated the charge.

49. Secondly, the Plaintiffs submitted that the amount sought by the defendant included the penalty and interest charges that were not provided for in the contractual documents between the parties. That furthermore the variation of interest payable was done at will and was at variance with what is provided for in law.

50. Mr. Kibe urged that the any increment as to the interest charge should have been consented to by the Plaintiff. That if the same was done unilaterally, it would go against Article 46 of the constitution. It was also the plaintiffs' case that it had fully repaid what was due and owing to the Defendant. The plaintiff therefore urged the orders as prayed for in the Plaint.

51. In rebuttal to the above submissions, leaned counsel Mr. Odhiambo submitted that the Plaintiff was seeking to re-write the contract between the parties and evade paying what was due and owing to the Defendant. According to the defendant, the interest charged were legal and contractual and that further, the defendant had the right to vary interest without notice to the 1st Plaintiff.

52. It was also urged that the contract was valid, and the attack on the same was time barred as the same ought to have been challenged before the lapse 6 years. Mr. Odhiamboadditionally told the court that there was evidence of default on the part of the 1st Plaintiff and the debt was still outstanding. That in the foregoing, the court should dismiss the Plaintiffs' case with costs.

53. I have considered the pleadings and the evidence adduced in this case as well as the submissions. I have also seen the list of agreed issues filed by the parties on 17th October, 2007. The same contain about 14 issues which can be summarized as follows;

a. ***Whether the Plaintiffs are commonly bound by the contracts of lending;***

b. ***Whether there was a valid legal charge between the parties;***

c. ***What was the interest rate chargeable on the overdraft facility and was the same variable?***

d. ***Did the agreement between the parties offer for penalty plus default charges?***

e. ***Is the 1st Plaintiff entitled to repayment for any excess payments made?***

f. ***Is the 1st claimant indebted to the Defendant?***

g. ***What orders commend themselves in this case?***

I shall now proceed to consider these issues in turn**.**

a. **Whether the Plaintiffs are commonly bound by the contracts of lending**

54. The Plaintiffs position on the matter was that the letter of offer by the Defendant dated 22nd February, 1990 through which the 1st Plaintiff agreed upon the banking services to be offered by the Defendant to the 1st Plaintiff was neither copied nor addressed to the 2nd Plaintiff.

55. The letter of contract was between the 1st Plaintiff and the Defendant. As such, the 2nd Plaintiff is not bound by the terms thereof. The Defendant seriously contested this position and argued that the 2nd Plaintiff was also bound by the terms of the lending documents in connection with the subject transaction. It dismissed the Plaintiffs objections as a mere after thought.

56. I have looked at the various documentation in connection with regard to the subject transaction. Though I agree with the Plaintiffs' contention that the letter of offer by the Defendant dated 22nd February, 1990 was not copied to the 2nd Plaintiff, I find that the 2nd Defendant cannot claim that it was not bound by the terms of the letter of offer between the 1st Plaintiff and the Defendant.

57. Firstly , it is clear through the board resolutions of the 1st Plaintiff company dated 30th March, 1990 clause 2 (ii), the 2ndPlaintiff company was to provide security for the said facilities. The said clause stated;

"(ii) That to secure the repayment of the said facilities the company and/or its associated company <u>Galot international limited do grant or secure the grant to the bank of the following securities</u> in the form and in the terms required by the Bank.

a. ***A first legal charge over LR. No. 209/8330 Nairobi for Kshs. 2 Million***

b. ***Joint and several personal guarantees of the equity directors of the company***

c. ***Joint and several personal guarantees of the Equity directors of Galot international limited."***

bf. Likewise the 2nd Plaintiff resolved on even date in the following terms;

"The chairman reported that arrangements were proposed with National Bank of Kenya Limited ("the Bank") where MOHAN MEAKIN (K) LIMITED (hereinafter called "the borrower") would be granted a loan or overdraft facility of Kenya Shillings two Million at any one time outstanding for the purpose of meeting the working capital requirements of the borrower on the terms set out in a facility letter from the bank which was tabled in the meeting. It was a term of the arrangement that the company would provide security for the liabilities of the Borrower to the Bank up to a limit on the principal sum recoverable of Kenya Shillings Two Million and charge in support of its property known as LR No. 209/8330 Nairobi."

59. From the above, it is clear that though the 2nd Plaintiff was not copied in the letter of offer dated 22nd February, 1990, it knew perfectly of the terms with regard to the lending agreement between 1st Plaintiff and the Defendant. Further to this, it is clear that the 2nd Plaintiff was willing to be part and parcel of the bargain between the 1st plaintiff and the Defendant.

60. This can be drawn from the fact that the 2nd Plaintiff at the request of the 1st Plaintiff had agreed to charge the suit property as security for repayment of the facility advanced to the 1st Plaintiff, thus the creation of a third party charge.

61. These arrangement was adequately captured by the charge document whereby the 2nd Plaintiff expressly made a covenant with the defendant in the following terms;

> ***" The Bank has at the request of the Mortgagor agreed to make advances to Mohan Meakin (K) Limited....by way of a loan or by permitting the Borrower overdraw the Borrowers' account or accounts with the Bank or granting to the Borrower other financial accommodation from time to time....."***

62. For this reason, it is clear that the 2nd Plaintiff was bound by the terms and conditions of the letter offer dated 22nd February, 1990 in so far as the provision of the security was concerned. Although the obligation to pay the aforesaid loan facility lay squarely with the 1st Plaintiff, the Plaintiffs shared common directors, a fact that all the parties agree on.

63. And while the Plaintiffs were separate legal entities, the 2nd Plaintiff had to be aware of the loan facilities being taken up by the1st Plaintiff. As such, the 2nd Plaintiff cannot feign ignorance of the terms and conditions of lending between the 1st Plaintiff and the Defendant.

64. I thus find that the 2nd Defendant was privy to the contract of lending between the 1st Plaintiff and the Defendant.

b. Whether there was a valid legal charge between the parties;

65. It was the claim of the Plaintiffs that the Directors of the 2nd Plaintiff were not informed of the impact of the provisions of section 69 (1) and 100 A (1) of the Transfer of Property Act. Indeed PW1, PW2 and PW3 testified in support of this fact.The Plaintiffs claim is that due to the procedure deficiency the mortgage/charge document that is subject to this case is null and void.

66. After considering the rival arguments by the parties, it is important to note that the repealed Section 69(1) of the Transfer of Property Act (ITPA) conferred upon a mortgagor or any person acting on his behalf statutory power to sell the mortgaged property without intervention of the court once the mortgage money has become due for payment.

67. Such money would become due for payment either the day fixed for repayment thereof by the mortgage instrument has passed or some event has occurred which according to the terms of the mortgage instrument, renders the mortgage money, or part thereof immediately due and payable.

68. The Plaintiffs' thrust of evidence was that the directors and the company secretary of the 2nd Plaintiff signed the Charge without the presence of the advocate, who would have duly advised them on the import of the aforementioned sections of the ITPA.

69. Turning to page 17 of the subject charge document, the same contains signatures of Mohan Galot (PW2), Santosh Galot, and Joe Moniz. Out of the three, it is only Mohan Galot that testified on account that he signed the document without the presence of an advocate. Santosh Galot and Joe Moniz did not appear in court to collaborate the evidence of PW3 and PW 1.

70. That being said, it is important to note that parties decry of the fact that they did not appear before the attesting advocate when they signed the document. The essential object of attestation being protection against forgery, fraud or undue influence, a party executing a mortgage-deed cannot be an attesting witness thereof.

71. In this case, no party has claimed there was fraud involved in the signing of the subject document. As regards whether the parties knew of the import of what they were signing, it has to be said that the events or actions precedent to the execution of the security instrument have not been alluded to, for an assertion by this court that there was undue influence to sign the said document.

72. In perfect circumstances, the parties to a charge are required to appear before an advocate when executing a charge. However, each case must be assessed with its own merits.In this case, the Plaintiffs did not allude to the fact that they sought independent advice with regard to execution of the charge.

73. Nothing stopped them from doing so, before signing the document. It was not on the onus of the defendant to provide that service. Further, this court has to point out that in this case the Chargor's directors were desirous of assisting the 1st Plaintiff company by offering its property as security for the facilities advanced.

74. They executed letters of offers to this effect including board resolutions. The said directors plus company secretary surely understood what it means if there was default in payment of the loan. The Bank would in exercise of its statutory power of sale, dispose of the charged property.

75. I doubt that any legal advice, independent or otherwise, would be different from what they already knew. I must therefore find and hold that the 2ndPlaintiff executed the Charge freely with full facts and was aware of the legal consequences of default. The said Charge is therefore valid and enforceable.

c. What was the interest rate chargeable on the overdraft facility and was the same variable?

76. It is the contention of the Plaintiffs that the interest rates were varied by the Defendant without notification to the Plaintiffs on occasions in contravention of what is mandated by letter of offer. The Defendant did not deny varying the interest rates, but contended that the same was perfectly legal as the charge document provided for the same.

77. I have looked at the documents incidental to the subject transaction. The letter of offer dated 22nd February, 1990, clause 6 provides as follows;

> ***" 6. Interest : To be at the rate of 15.5% per annum on monthly rests for the time being, calculated on daily balances. <u>The Bank, however reserves the right to give notice and thereafter vary the rate of interest charged as may be required</u>." (emphasis supplied)***

78. From the foregoing, it is clear that the rate of interest payable on the facility was agreed at 15.5% per annum. The Defendant had the right to vary the said rate of interest but only upon such notice to the Plaintiff. The said increased monthly payments were payable on the first day of the month next after notification.

79. The Plaintiffs contend that the Defendant wrongfully and arbitrarily varied the rate of interest on various dates to 15.5% to 40% to 32%. The Defendant's response to this was that they duly notified the Plaintiff of these changes through various letters dated 9th November, 1993, 25th November, 1993 , 3rd December, 1993, and 17th May, 1994.

80. The said letters were produced in the defendant's bundle of documents. There is no dispute that there was change of the rate of interest. The issue is whether such change was lawful and in accordance with the terms of the contract between the parties.

81. In order to discern whether the changes were in terms of the contract. is imperative to revert to the said contract for its terms and conditions. The contract between the parties is contained in two documents, the letter of offer and the Charge document, respectively.

82. I have examined the said documents and it is clear that the letter of offer did not fix the rate of interest

payable on the facility at merely 15.5% the same could be varied once notice was given to the borrower. In line with the requirement of the law that he who alleges must prove, the Defendant has produced letters to the effect that the 1stPlaintiff was notified of the said changes as required.

83. This was despite the fact that the charge document in clause 1 stated that the defendant could without reference to the Plaintiffs vary the rate of interest without notice. The 1st Plaintiff however rejected these revised rates as per its letter dated 1st November, 1994 contained in page 94 of the Defendant's document.

84. It was their argument that these rates were inordinately high and against the law. However it is important to note that the court has endeavored to analyze the documents placed before it to be able to decipher how the parties intended to deal with each other.

85. They indicated in the Charge and letter of offer that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the Defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected.

86. Clause 6 of the letter of offer dated 22nd February, 1990 must be given effect. The notices herein were given and the Defendant has proved this with the production of the said notifications. I also might add that the purpose of the notice to the 1st Plaintiff was to put it on notice of the intended increased/decreased liability; the defendant was not seeking the concurrence of the Plaintiffs to increase the interest rate.

87. As much as there was the contention that the rates of interest at the time were illegal, I find that I cannot re-write the agreement or the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them.

88. The parties executed the subject documents willingly and they are therefore bound by them. This is what the Court of Appeal seems to have said in the case of **Shah –vs- Guilders International Bank Ltd (2003) KLR 8**. It therefore find that the interests charged were perfectly legal, since the parties agreed to the said variations.

89. Accordingly, I make a determination of the rate of interest applicable to the facility until the Plaintiffs filed the current case as follows:-

i. From the date of drawdown to 31st October, 1993 - 15.5% per annum.

ii. From 1st November, 1993 to 30th April, 1994 – 40 % per annum.

iii. From 31st May, 1994 to 20th March, 1995 – 32% per annum.

d. ***Did the agreement between the parties offer for penalty plus default charges?***

90. Were the penalty interest and/or default charges levied by the defendant contrary to the terms of the Charge document and/or unlawful and did they constitute a fetter or clog on the 2nd Plaintiff's equity of redemption? The Plaintiffs' case was that these charges were not justifiable on the contract and that the same ought not to have been levied without consent of the Plaintiffs.

91. The Defendant has cited Clause 1 (a) in the contractual documents to show that it was entitled it to levy charges other than those expressly provided for. I have gone through the charge documents and I have been unable to find any provision entitling the Defendant to charge what the Defendant termed 'penalty interest', interest on arrears' or 'default charges'.

92. The defendant ought to have expressly provided for such charges in the charge documents in order to entitle it to levy the same. Without any express provision, it is my view and I so hold that any levies could only be made with the consent of the Plaintiffs.

93. Likewise the Defendant has sought to rely on clause 1(a) of the charge document as the provision which entitled it to the aforesaid charges. My reading of the said clause however does not seem to expressly provide for such charges. I agree with the decision of the Court of Appeal in **HusamuddinGulamhusseinPothiwalla Administrator, Trustee and Executor of The Estate of GulamhusseinEbrahimPothiwalla vs. KidogoBasi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** that:

> ***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***

94. However as was held in **The National Bank of Commerce Ltd vs. Nabro Ltd & Another [2008] 1 EA 432** in which **Principles of Banking Law (Oxford) [1977]** at **page 154, 155** was cited :

> ***"Therefore with regard to interest payment, while an overdraft facility attracts a compound interest, interests on a term loan only accrue on outstanding balance of the principal sum. <u>These and other terms of the lending agreement might vary from one to another, but they are all subject to the rules of construction of contracts generally, particularly, mercantile contracts. Even if clauses are found to have been incorporated in a contract, they may be construed against the bank. The "contra profentem" rule is applied in cases of ambiguity or where other rules of construction fail. If it is applicable, it results in a contract being construed against its maker. Clauses imposing bank charges, for example, must be very clear about the obligations of the customer to pay</u>." (emphasis added)***

95. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement. The charge document in clause 1(a) is not clear what "usual charges" are alluded to with regard to the payment of the loan.

96. I am thus inclined to associate myself with the position taken by **Warsame, J** (as he then was) in **GivanOkalloIngari& Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232** where the learned Judge expressed himself as follows:

> ***"The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs' indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry… There is no dispute that the defendant varied the rate of interest without the consent, knowledge and permission of the plaintiffs. There is no evidence that each time there was variation, the plaintiffs were informed. In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement. 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 plaintiffs 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. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the***

defendant made it difficult for the plaintiffs to perform their part of the bargain. The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This Court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable…When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document. In my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression… The contention of the plaintiffs which is particularly admitted by the defendant is all the charges levied to the account of the plaintiffs is contrary to the express provisions of the charge document. And in my view that is why the loan has grown to astronomical figures which can be said to be beyond the redemption powers of the plaintiffs. It would be difficult to redeem a loan which is loaded with figures at the discretion of one party. The other party interested in the redemption exercise would definitely find impossible to measure to the discretionary powers or decisions of the party interested in the beneficial result. It is in the benefit of the plaintiffs for the defendant to load figures only provided by the contractual document…Equally it is not in the interest of the defendant to milk the plaintiffs dry and drain all blood from them. The Court exists for the sole purpose of determining as who is entitled to what. In my view the defendant cannot be allowed to engage in acts or omissions, which are in contravention of the law. Equally the defendant cannot be allowed to breach the terms and conditions of the contractual document and at the same time use the statutory power of sale that emanates from the statute to defeat the rights of the plaintiffs…The charge document in its entirety does not provide for default charges that were 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 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…To my mind the equity of redemption has been clogged by the acts or omissions of the defendant by engaging in acts contrary to the terms and conditions of the charge agreement. Prima facie the loan account would become irredeemable if charges outside the contractual agreement are loaded into the account. I am therefore satisfied that there is ample and uncontroverted evidence to show that the defendant was involved in activities that would make it difficult for the applicants to honour their obligations in the charge agreement."

97. Thus from the above, it is clear that a party ought not to mutate the terms of a contract unilaterally to the detriment of the other party to the contract. Thus after considering the evidence on record, especially the evidence provided by PW4, Wilfred AbinchaOnono, I have no hesitation in coming to the conclusion that in the circumstances of this case the Defendant was not entitled to 'penalty interest', or 'default charges'.

e. Is the 1st Plaintiff entitled to repayment for any excess payments made?

98. Having held as above, I note the 1st Plaintiff's assertion that the Defendant owes it money. Several separate Statements of Accounts were relied upon. However, upon assessing the same in light of the testimony of PW4, I find that the same were highly contradictory and unsubstantiated. Further, it is unclear how the rates of interest applied arrived at without the input of the Defendant.

99. Furthermore, it was the finding of this court that the interest rates levied by the Defendant were legal as they were contractual. The Plaintiffs have thus failed to prove that the variation of interest rate was non-contractual. The Court cannot therefore rely on the said statement of accounts to ascertain if there was anything due and owing to the 1stPlaintiff.

100. On the issue whether the defendant breached any of the provisions of the law in charging interest especially section 44 of the Banking Act, I agree with the Defendant that this issue was not pursued sufficiently in order to enable the Court make a finding in favour of the 1st Plaintiff. The period of the loan was spread across different regimes where the interest rates were fluid without any real regulation.

101. I believe before the commencement of the aforementioned provisions of the banking Act. Further, the parties agreed the said rates of interest could change provided notice was supplied beforehand. The figure provided by PW4, that the maximum interest that the Defendant would charge was 16.5% is in my view not proved to the required standard.

102. As was held by **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** held that a fact is not proved if it is neither proved nor disproved. It is therefore not proved.

f. Is the 1st claimant indebted to the Defendant?

103. Bearing in mind my finding with regard to which rate of interest was applicable, it is clear that the 1st Plaintiff herein was in arrears. In its written submissions, the Defendant stated that the debt in this case had escalated to Kshs. 676,930.80 /=. However, as I have concluded any other rate such as default interest rate or penalty rate is illegal and the same should be excluded.

104. Therefore in my assessment, the question as to what is due and owing to the Defendant can only be answered by the parties after proper accounts have been taken.In the foregoing, I shall resort to Order 21 rule 17 of the Civil Procedure Rules, 2010 which provides;

> ***"The court may, either by the decree directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised."***

105. Accordingly, I direct that the parties herein agree on and appoint an independent accountant to take accounts between the parties herein. The accountant shall file his report within 45 days from the date of his appointment. Should parties utilize this option, the costs of the accountant will be shared equally by the parties.

106. In default of such agreement each party shall appoint an accountant and the two appointed accountants, will thereafter appoint an umpire and the three to go through the documents in possession of the parties and prepare a report for filing in this matter within 45 days of the appointment of the umpire.

107. Each party will bear the costs of his accountant while the costs of the umpire will be shared equally by the parties. In taking the said accounts the books of account in which the accounts in question have been kept shall, subject to this judgement, be taken as prima facie evidence of the truth of the matter therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

108. Further orders of the Court to await the filing of the said report.

109. There Liberty to apply granted.

Dated, signed and delivered in court at Nairobi this 8thday of April, 2016.

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C. KARIUKI

JUDGE