



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL DIVISION**  
**CIVIL APPEAL NO. 447 OF 2010**

**STANDARD CHARTERED**

**BANK OF KENYA LIMITED..... APPELLANT**

**VERSUS**

**DAVID HUDSON NJUGUNA.....RESPONDENT**

**MIU ELECTRIC COMPANY LTD.....RESPONDENT**

**JUDGEMENT**

The Appellant was the Defendant in the lower court while the Respondents were the Plaintiffs. The appeal is against the decree of the lower court passed on 1<sup>st</sup> October 2010. By that decree, judgment was entered for the Plaintiffs. The Plaintiffs' claim against the Defendant in the lower court arose out of a transaction of borrower (Plaintiff) and lender (Defendant) whereby the 2<sup>nd</sup> Plaintiff borrowed some money and the debt was secured by a charge over its property and guaranteed by the 1<sup>st</sup> Plaintiff. The plaintiffs' suit sought special damages amounting to Kshs. 136,367/- arising from a debit on the 2<sup>nd</sup> Plaintiff's account to secure release of title documents by the Defendant.

The grounds of appeal in the memorandum filed on 26<sup>th</sup> October 2010 are -

- i. That the Learned Magistrate erred in law in entering Judgment against the Appellant in total disregard of the issues of law and of fact raised therein.
- ii. That the Learned Magistrate misdirected himself in evidence by finding that the Appellant herein was not justified in debiting the 2<sup>nd</sup> Respondent's account with the sum of Kshs. 136,367/- to secure the release of the title documents despite the Respondent's enforceable contractual legal and collective obligations to pay all costs, charges and expenses incurred or suffered by the appellant.
- iii. That the Learned Magistrate erred in law in ruling in favour of the Respondents despite overwhelming points of law and facts tilting heavily against them.
- iv. That the Learned Magistrate erred in law and in fact as the ruling was against the weight of evidence adduced by the Defence which facts are justifiable, substantive and overwhelming as provided for in law.

- v. That the Learned Magistrate erred in law and in fact as the conclusions drawn from the facts were perverse in that the findings of facts by the Learned Magistrate were unreasonable, improper and inadequate in law.
- vi. That the Learned Magistrate erred in law and in fact by totally ignoring and not taking into consideration the submissions of the Appellant and fully upholding the Respondents' submissions which fell short of the evidence adduced by the parties at the full hearing of the suit.
- vii. The Learned Magistrate erred in law and in fact as the Judgment was against the weight of the evidence adduced by the Appellant
- viii. The Learned Magistrate erred in law and fact by failing to test all facts and evidence pleaded and adduced on a balance of probabilities.
- ix. The Learned Magistrate erred in Law in failing to take into consideration the High Court decisions cited by the Appellant which authorities are binding on the lower court.

The Appellant prayed for the appeal to be allowed and the Judgment of the lower court be set aside. The appeal was heard by way of written submissions. I have carefully read the testimonies of the witnesses who testified for both sides, as well as the judgment of the lower court. I have also considered the submissions of the learned counsels appearing.

A brief background of what led to this dispute is that, an overdraft facility was extended to the 2<sup>nd</sup> Respondent and, guaranteed by the 1<sup>st</sup> Respondent. In the year 2004 and 2005, the 1<sup>st</sup> Respondent defaulted in service of the overdraft facility and the parties changed the facility to a loan account. To secure the loan account, his property L.R. 209/719/116 was charged to the Appellant. When they defaulted, a law firm was instructed to realize the security. However, the property was redeemed before it could be auctioned. When he sought release of the security he was asked to pay the amount expended during the attempted recovery which he asserts he only paid under duress to ensure release of the security. According to the Respondents, the auctioneers and legal fees charged by the Appellant were not justifiable.

The Appellant on the other hand cited provisions (clause 5) in the 'banking arrangement' dated 30<sup>th</sup> August 2004 which entitled it to levy all its 'costs and expenses including legal and auctioneers costs connected with the recovery or attempted recovery of moneys owing under the facilities....'.

In sub-clause ii) of Clause 5, if any debiting were to cause the borrower's account to be overdrawn beyond the permitted limit, then interest and any other applicable charges was to be paid by the borrower.

This having been expressly provided for in the contract document entitled the Appellant to levy the same. The Court of Appeal in **Husamuddin Gulamhussein Pothiwalla Administrator, Trustee and Executor of The Estate of Gulamhussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003** pronounced itself thus -

**“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.”**

There was no way the Respondents could have relied on duress as the reason why they paid the disputed amount. The claim that the legal and auctioneers fees were unjustified should have been supported by evidence; the Respondents would have called to testify a lawyer and an auctioneer to quantify the amounts that should have been levied instead or to shed more light on the allegations. Without such evidence, the contentions remained mere allegations. In any case the commitment was in writing.

The learned trial Magistrate cannot be faulted in holding that the Appellant was justified in the levying of legal and auctioneers' fees. In the result I find merit in the appeal and the same is allowed with costs to the Appellant. It is so ordered.

**Dated and delivered at Nairobi this 19<sup>th</sup> Day of October, 2015.**

**A.MBOGHOLI MSAGHA**

**JUDGE**