



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL SUIT 196 OF 2006**

**FESTUS H. K. MNGAMBWA.....PLAINTIFF**

**VERSUS**

**HOUSING FINANCE CO. OF KENYA.....DEFENDANT**

**JUDGMENT**

By his plaint dated 31<sup>st</sup> October 2006 and filed on 1<sup>st</sup> November 2006, the plaintiff sought a permanent injunction restraining the defendant by itself, its servants and/or agents from selling by public auction or otherwise disposing off of the plaintiff's L.R. No. Werugha/Wundanyi 951 (hereinafter "*the suit piece of land*"). The plaintiff further sought an order compelling the defendant to discharge forthwith the suit piece of land and for any other or further order the court may deem fit to grant. Costs of the suit were also claimed.

The foundation of the plaintiff's claim was pleaded in paragraphs 4, 5, 6, 7 and 8 which are as follows:-

- 4) **On or about 1990 the plaintiff charged the suit property to the defendant in consideration of loan facilities in the sum of Kshs. 230,000/=.**
- 5) **The plaintiff states that he has fully repaid the said principal sum of Kshs. 230,000/= together with interest all totaling to Kshs. 627,150.55/=.**
- 6) **The plaintiff states that he was surprised when he was served with a statutory Notice of Sale of the suit property by public auction claiming that there was a huge outstanding interest.**
- 7) **The plaintiff states that the defendant's intended sale of the suit property is illegal, null and void and should be stopped.**
- 8) **The plaintiff further states that the interest being demanded by the defendant is oppressive, illegal and outside the contract executed between him and the defendant.**

The defendant filed its statement of defence on 8<sup>th</sup> December 2006. It denied the plaintiff's claim and further and in the alternative pleaded as follows in paragraph 4.

- 4) **Further in the alternative and purely without prejudice the**

**defendant avers that:-**

- (a) The plaint as filed is scanty and full of material non-disclosure to help the court resolve the issue in dispute.**
- (b) Whereas a loan was advanced to the plaintiff in the sum of Kshs. 230,000/=, this was only the principal excluding interest and other legal bank charges.**
- (c) In the course of repayment, the plaintiff defaulted severally and this led to charging of penalties, auctioneers' charges as well as advocates fees.**
- (d) The interest being demanded by the defendant is lawful.**
- (e) There has been another suit between the parties being HCCC No. 556 of 1995 (NBI) Housing Finance Company of Kenya Limited (Plaintiff – v – Festus H. K. Mng'ambwa (Defendant) where the defendant has a judgment against the plaintiff herein.**
- (f) All the charges levied by the defendant are lawful.**

On 1<sup>st</sup> February 2008, the defendant filed the following statement of issues:

- 1) Did the plaintiff fulfill his contractual obligations under the “Charge by Instalment” dated 3<sup>rd</sup> December 1990 to repay the principal sum and interest thereon as and when it was due under the charge?**
- 2) If yes, does he have a right of redemption of the subject property?**
- 3) If not, did he default severally as alleged by the defendant in the repayment of the principal sum and interest thereon?**
- 4) If the plaintiff did default severally, was the defendant entitled to charge penalties and auctioneers' and advocates' fees?**
- 5) If the defendant was so entitled, which ones and how much?**
- 6) If yes, is the out standing interest being demanded by the defendant lawful or is it oppressive, illegal and outside the executed contract between the plaintiff and the defendant as alleged by the plaintiff?**
- 7) Is the defendant entitled to a statutory power of sale?**
- 8) If yes, is the Statutory Notice of sale of the suit property lawful?**
- 9) If yes, is the suit therefore *Res Judicata*?**
- 10) Is the plaintiff entitled to the prayers sought?**

A summary of the plaintiff's case was as follows. In the year 1990, the plaintiff was constructing a building in Wundanyi. He applied for a loan facility from the defendant who offered him Kshs. 270,000/= for completion of the first floor of the said building. The plaintiff however, actually received only Kshs. 230,000/= and used the suit property as security. He signed exhibit P1 headed “offer to advance” which indicated the principal sum on loan as Kshs. 270,000/=. The offer indicated the loan was to be repaid in monthly instalments of Kshs. 4,169/= at 18% rate of interest per annum. The plaintiff then executed a charge over the suit property which he produced as PEX 2. Clause 6 (3) of the said charge gave the defendant the right to vary the interest rate on notice to the plaintiff which did not happen. The plaintiff paid the principal sum of Kshs. 230,000/= and an additional Kshs. 370,000/= which comprised

interest and other charges which were not provided for under the charge. The plaintiff produced PEX 3 (A), (B), (C) and (D) which were statements from the defendant.

In 2006, the plaintiff was served with an auctioneer's notification of sale dated 28<sup>th</sup> August 2006 which demanded of him Kshs. 6,594,986/60 as at 31<sup>st</sup> July 2006 which sum he did not pay. On 1<sup>st</sup> October 2006, he received another letter from the defendant indicating Kshs. 551,150.05/= as the outstanding principal sum and Kshs. 3,916,456.70 as arrears as at 30<sup>th</sup> September 2006. The plaintiff produced the said correspondence as PEX 4 and 5. The difference, according to the plaintiff was immense and made it impossible to redeem the suit property hence this suit.

On the basis of the above, the plaintiff prayed for the reliefs set out at the beginning of this judgment.

The gist of the defendant's case as stated by its witness Joseph Kamau Kania (hereinafter "*Kania*") was that the charge documents provided for variation of interest rate and the charges levied by the defendant which variations when effected, the plaintiff had notice of. Kania produced a bundle of documents which comprised several documents which according to him authorized the defendant to impose the interest and other charges it levied and how the same had arisen.

Kania also produced correspondence exchanged between the plaintiff and the defendant which showed that the plaintiff did not challenge the said interest rate and other charges but at one stage by his letter dated 21<sup>st</sup> February 2002, asked to be forgiven the entire interest. The defendant considered the plea and proposed to the plaintiff to pay Kshs. 600,000/= in full and final settlement which proposal the plaintiff accepted and proposed to pay. Kania further testified that the defendant had previously advertised the suit property for sale but had not proceeded to sale because of promises made by the plaintiff.

Finally, Kania stated that the plaintiff's suit is *res judicata* because of Nairobi (Milimani) HCCC No. 556 of 1995 a decree whereof was produced.

On conclusion of the evidence, counsel made written submissions which I have carefully considered. Having done so and further having considered the evidence, it is now convenient to answer the issues as framed by the defendant which I accept as representing a summary of the dispute between the parties.

It is common ground that the defendant actually advanced to the plaintiff Kshs. 230,000/= pursuant to the offer of advance dated 25<sup>th</sup> August 1990 and a charge dated 3<sup>rd</sup> December 1990. Although the said documents indicated that the advance was for Kshs. 270,000/= the entire loan sum was not actually disbursed. The plaintiff's explanation of the position is found in his letter dated 5<sup>th</sup> August 1993 which was produced by the defendant and appears at page 13 of its bundle of documents. In the said letter, the plaintiff requested the defendant to utilize the undisbursed sum on account of installment arrears. The said letter also acknowledged the plaintiff's default on payment of interest. The plaintiff had received a statement of his loan account from the defendant which statement indicated that the plaintiff was in arrears of Kshs. 44,228.30/= as at 2<sup>nd</sup> July 1993. The defendant also produced the plaintiff's account statement as at 30<sup>th</sup> November 1994 which indicated that the plaintiff was in arrears of Kshs. 146,440.30/=. As between 1<sup>st</sup> January 1994 and 30<sup>th</sup> November 1994, he had only paid Kshs. 4,600/= towards his indebtedness to the defendant. There are then statements dated 31<sup>st</sup> December 1996, 31<sup>st</sup> December 1997, 22<sup>nd</sup> November 1998 produced by the plaintiff as exhibits 3A, 3B and 3C. The statements indicate that for the year 1996 the arrears had grown to Kshs. 381,129.25. They further indicate that the plaintiff was more consistent in 1997 through to 1998 upto July 1998 when serious default commenced up to the institution of this suit.

What has emerged from those statements is that the plaintiff defaulted in his loan repayment and therefore did not fulfill his obligations under the charge.

The defendant has produced a letter dated 3<sup>rd</sup> April 1996 addressed to it by Hon. Darius M. Mbela, then a Minister in the Government of Kenya. The said Minister intervened on behalf of the plaintiff with regard

to a repayment programme. Further intervention from the same Minister was made by a letter dated 21<sup>st</sup> May 1996. After several failed promises and unsuccessful auction attempts, the defendant offered to accept Kshs. 600,000/= in full and final settlement in a letter dated 26<sup>th</sup> February 2002. The plaintiff by his letter dated 11<sup>th</sup> March 2002, accepted the defendant's said offer. However, he made no payment of the said sum of any part thereof.

The correspondence exchanged between the plaintiff and the defendant clearly showed that the plaintiff freely admitted his indebtedness to the defendant and at no time did he challenge the interest rate and other charges levied by the defendant. In view of my above findings, the answer to issues number 1 and 2 is in the negative and the answer to issues number 7 and 8 is in the affirmative.

I turn now to the issue of penalties, auctioneers and advocates' fees. Interest chargeable under the charge documents was governed by the offer to advance dated 25<sup>th</sup> August 1990 and the Charge by Installment dated 3<sup>rd</sup> December 1990. Under the offer to advance, interest rate was given as 18% p.a. and under the Charge by Instalment, interest rate was given as 18% p.a. (variable). The variation clause is 6 (ii), (iii) and reads as follows:-

**“6 (ii) The Chargee may from time to time serve on the chargor on demand notice requiring payment of interest at such increased or reduced rate as the chargee shall determine having regard to such circumstances as it considers to be relevant and the decision of chargee in this behalf shall not be questioned on any account whatsoever.**

**(ii) In the event of the chargee requiring a variation of the rate of interest under the provisions of sub-clause (ii) of this clause the chargee will notify the chargor of the amount of the resulting varied monthly instalments payable under the provision of clause 3 thereof and the first such varied monthly instalment shall become due and payable on the first day of the month next after notification of the amount thereof to the chargor.”**

It is clear from the above provisions that the defendant was entitled to vary the interest rate payable under the loan facility but it could only do so with prior written warning to the plaintiff. The documents exchanged between the parties show some of the said notices. Nothing much therefore turns on the rates of interest applied by the defendant.

What were the consequences of default? The relevant clause is 8 which reads as follows:-

**“8 (i) If default is made by the chargor in payment of the principal sum or of any interest or any other periodical payments or of any part thereof in the performance or observance of any agreement expressed or implied herein and continues for one month the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement as the case may be.**

**(ii) If the chargor does not comply within three months of the date of service with a notice on him under clause (i) the chargee may.....enter the property.”**

Related to the above provisions is clause 10 of the Charge by Instalment which is in the following terms:-

**“10. The chargee may from time to time make such payment as it considers expedient to any person whether the chargor or anyone acting at the chargor's request or a receiver or a subsequent chargee or to any person acting on the instructions of the chargee in connection with completing, maintaining, repairing, amending, altering or improving the said property or for outgoings in relation thereto or for any costs or expenses incurred by the chargee for the enforcement, protection or improvement of the security hereby created and all money so paid shall be deemed to be principal money hereby secured and shall carry interest at the rate for the time being payable hereunder from the date of the same being paid by the chargee and shall be repayable with such interest by the chargor on demand made by notice in writing and until repayment such interest**

shall be a charge on the said property.

**The expression “expenses” shall be deemed to include payments made or to be made by the chargee for the benefit of this security in respect of:-**

(i) .....

(ii) .....

**(iii) All costs and expenses properly incurred or paid by the chargee or any of its officers, advocates, surveyors or agents incidental to this charge or the collection of any moneys due or to become due hereunder which is not agreed shall where appropriate be taxed as between advocate and client.”**

The above provisions did not provide for payment of any penalty in the event of default by the plaintiff. In the premises, the defendant was not entitled to charge default or penalty charges. So all penalties and default charges levied by the defendant were not levied within the charge documents and were accordingly unlawful.

With regard to auctioneers’ charges and advocates’ fees, clause 10 (iii) authorized the defendant, to charge the same to the Loan account and would attract interest at the applicable rates. However, such expenses would be payable by the defendant on demand made by notice in writing to the defendant. So the said expenses would be deemed to be principal sums and would only be repayable on demand being made by notice in writing. The defendant did not exhibit any such notice. Issue number 4 is therefore answered as follows whereas the plaintiff defaulted in his loan repayment the charge documents did not empower the defendant to levy penalties. With regard to auctioneers’ and advocates’ fees, the same would be deemed to be principal but would only be repayable on demand by notice in writing. As no such notice was shown to have been served, the defendant was not entitled to levy the same. This answer determines issue number 5.

Issue number 6 is framed as follows:-

**“6. If yes is the outstanding interest being demanded by the defendant lawful or is it oppressive, illegal and outside the executed contract between the plaintiff (sic)?”**

As already stated above, the defendant was entitled to charge interest on the principal sum due and on other sums lawfully incurred by the defendant under the charge documents as long as written notice of the same had previously been served. Consequently, any interest on sums lawfully incurred by the defendant but for which no notice had been served was outside the executed contract between the plaintiff and the defendant. Such interest was therefore wrongfully charged.

For the sake of completeness of this aspect of this dispute I should mention clause 5 (iii) of the Charge by Instalment which reads as follows:-

**“5. It is hereby agreed that interest payable by the chargor to the chargee hereunder shall be calculated as follows:-**

(i)

(ii)

**(iii) In pursuance and in consideration as aforesaid interest for the whole of each succeeding**

**month shall be calculated on the amount of the principal sum (or.....) and any interest or other moneys due in accordance with the provisions herein contained and unpaid at the end of the following month after taking into account any payments made by the chargor to the chargee pursuant to clauses (i) and (ii) herein on or before such date.”**

This sub-clause empowered the defendant to charge interest on unpaid interest and other moneys due under the charge but remained unpaid. The latter was however subject to clause 10 of the same document already discussed above.

With regard to the plea of *Res Judicata*, the defendant produced a decree given on 2<sup>nd</sup> august 1996, in Nairobi HCCC No. 556 of 1995. The court therein decreed that the defendant be put in possession of the suit property. The pleadings in that suit were not produced. In the absence of the pleadings, I cannot agree with the defendant that this case is *Res Judicata* by reason of the decision in Nairobi HCCC No. 556 of 1995.

In view of the answers to the above issues, what should be the order of the court on the plaintiff's claim? The first prayer of the plaintiff is that of a permanent injunction against the defendant either by itself, its servants and/or agents not to sell by public auction or otherwise dispose off of the suit property. Having found that the plaintiff defaulted in his loan repayments and freely admitted his indebtedness to the defendant, he cannot obtain the permanent injunction claimed. My findings that the defendant applied default and penalty charges which were not provided for under the charge documents merely affect the sums due from the plaintiff to the defendant. The plaintiff himself did not particularize the sums wrongfully charged. He merely identified certain payments in his account statements which according to him were not lawfully charged. He was therefore merely disputing the amount payable. Such a dispute cannot entitle the plaintiff to the permanent injunction claimed in the plaint. That being my view of the matter I further find and hold that the plaintiff is not entitled to an order compelling the defendant to discharge forthwith the plaintiff's property.

The plaintiff has therefore not proved his case on a balance of probabilities. The same is therefore dismissed. With these findings, the defendant is most likely to commence the process of realization of its security. In doing so, it should furnish the defendant with a detailed statement of account excluding the levies herein found to be outside the contract documents. Having detected the levies wrongfully charged in the cause of this trial, it is my view that each party should bear his/its own costs of the suit.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF OCTOBER 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Kago holding brief for Wameyo for the Defendant and Abed holding brief for Mokaya for the Plaintiff.

**F. AZANGALALA**

**JUDGE**

**7<sup>TH</sup> OCTOBER 2009**

