



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI LAW COURTS

Civil Case 5400 of 1993

GEORGE T. N. KARIUKI.....PLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY..... DEFENDANT

JUDGMENT

The claim arose from a loan facility of the sum Kshs.300, 000/= offered by the defendant to the Plaintiff in 199, pursuant to a letter of offer dated 25th February, 1991 & legal charge dated the 8th of March, 1991. The terms and conditions of the loan advance were stipulated in the said documents. The offer of advance contained the initial rate of interest, the period of repayment and the monthly installments payable. The Legal charge signed between the parties described the Defendant as a building society incorporated in Kenya and registered as such under the Building Societies Act Chapter 489 of the Laws of Kenya. The amount of advance of **Kshs.300, 000/=** was initially lent at an agreed interest rate of 18%. The clause dealing with interest rates provided as follows in clause 5:-

- (1) Until seven days after service of a Notice of Intention as is hereinafter referred to interest shall be at the rate specified in the schedule herein
- (2) If at any time or times during the continuous of this society the Board of Directors of the chargee (hereinafter called 'The Board') shall in its absolute discretion consider it to be desirable in the interests of the chargee that the rate of interest payable hereunder should be varied the Board may vary the same accordingly and thereafter all references to and provisions relating to interest herein contained shall be read and have effect as referring to interest as varied by the Board and the instalments by which this balance of the money hereby secured shall be repayable shall be of such amount as will provide for payment of the said balance and the varied interest thereon within the same period as the said balance would have been paid if there had been no such variation or in such period as the Board may determined subject only to the provisions of Section 24(6) of the Buliding Societies Act”

Provided that:-

- (i) “Notice of Intention to vary the rate of interest shall be served in writing on the chargor and the varied rate of interest shall be payable as from the expiry of seven after the date of service of such notice; and

(ii) The rate of interest shall not be increased to an amount exceeding the rate normally charged by the chargee on new advances which are in the opinion of the Board of the same type as the advance hereby secured at the date of the said notice.”

Clause 10 of the charge provided as follows:-

“10 the charger will not create a second or further charge on the security of the property charged except with the written consent of the charge and on condition that any moneys at any time owing to the chargee on the security shall have priority over the moneys secured or to be secured by such second or further charge.”

The loan was given against the above provisions of the charge signed by the parties. It is the Plaintiff's case that the Defendant refused to consent to a 2nd Mortgage to Equity Building Society who had agreed to advance monies to the Plaintiff against a 2nd Mortgage on the property charged to the Defendant. That further the Defendant had been overcharging, interest had imposed interest on arrears. At the hearing the Plaintiff dropped prayers (a) where he had sought for restraining orders against the Defendant as the said property is no longer in danger of being sold. He redeemed the Mortgage and got his title. In pursuing and preparing for the case the Plaintiff engaged the services of an accountant to work out the sums due and owing and the over payment he is claiming. The Plaintiff produced the accounts as part of his evidence. In cross examination the Plaintiff confirmed that the charge document in clause 5(2) provided for variation on the rate of interest. However he also stated that he had not seen the said clause when signing the charge document. Further that he was not issued with a Notice to increase the rate of interest.

Mr. Kenneth Muiru Mwangi PW2 stated that he runs an accountancy firm by the name *Muiru Kandie & Company* situate at Agip House. He is a holder of CPA (K). He informed the court that he received instructions from the Plaintiff to analyze the Plaintiff's statements with the Defendant. He did not agree with the statements as issued by the Defendant for the following reasons:-

1. Interest rate ranged from 20-30 %
2. Late payment penalties had been charged
3. There were miscellaneous charges that were not explained.

He deferred with the Defendants. He considered interested at 18% in accordance with the agreement from the date of commencement the rate of being the 14th of March, 1991 to 30th April, 1990 as the same conformed to the Kenya Gazette Notice regularizing interest rates chargeable by lending institution. Thereafter he charged 19% up to the date the account went into credit. He confirmed that from the statements supplied that the Plaintiff did not pay his every monthly instalments and he ought to have done. That in the year 1993 only one instalment was paid, in the year 1994 no payment was done. P.W.2 further confirmed that the Defendant's name did not appear in the specified Banks and Financial Institutions referred to in the Central Bank of Kenya Act Chapter 491 of the Laws of Kenya, that his assumption was that all Financial Institutions are covered by the said Act. He also stated that he had not check at Cap 489 and confirmed that there interest chargeable. He stated that in his reconciled account he found an over payment of **Kshs.355,048/=** and he charged interest on the same.

In its defence filed on the 25th of November, 2003 the Defendant denied the claim made by the Plaintiff. The defence case is that the Plaintiff was consistently in arrears of his monthly instalments, which led to the issuance of a Statutory Notice upon him. The Plaintiff did not make good the outstanding loan by the expiry of the notice period, as a result the Defendant instructed Auctioneers to sell the property charged against the loan pursuant to the Defendant's Statutory Power of Sale.

The Defendant further states that clause 5 of the charge entitled the it to vary the rate of interest at the sole discretion of its Board of Directors. That Rule 32(a) of its rules entitle the Defendant to charge penalty where there is default on the arrears of the monthly instalment, further that clause 6 (8) of the

charge bound the Plaintiff to the Defendant's Rules.

[The Defendant also submitted that the Plaintiff repaid the loan and suffered no loss as alleged

It is the defence case that the parties are bound by 3 documents:-

- (i) The offer of advance dated 25th February, 1991
- (ii) The charge date 8th March, 1991
- (iii) The Rules of the Defendant (Society).

The defence called one witness **Mr. Joseph Mwita Natiko** an Assistant Bank Manager at its West Minster Branch in Nairobi. He informed the court that he had worked for the Defendant for 17 years and was familiar with the Plaintiff's account. He further stated that at the material time the Defendant's interest rate was not controlled by the Central Bank. That the Defendant was a Building Society at the time of the transaction and, was governed by the Building Society's Act Chapter 489 of the Laws of Kenya. That the Defendant operated as a Society up to the 30th of September, 2005. On the 1st of October, 2005 it converted into a Commercial Bank and on the 16th of June, 2008 it changed its name to Eco-Bank.

The parties each filed statement of issues. The Plaintiff statement of issues was filed on the 5th of March, 2005. He listed 9 issues. The defence filed its issues on the 16th of March, 2005 and it listed 3 issues. I do appreciate that the Plaintiff is in person and this may inform the long list of issues. I will collapse the issues into 5 as follows:-

1. Whether at the material time the Defendant as an Institution was governed by the Central bank of Kenya Act.
2. Whether the Plaintiff is entitled to a declaration that the interest on arrears charged by the Defendant was to be limited to 5% per annum.
3. Whether the Plaintiff over-paid the Defendant by the sum of *Kshs.355,048/=* and if so is the Plaintiff entitled to interest on the same and at what rate.
4. Whether the Defendant was obliged to grant an additional loan to the Plaintiff or to give consent to a second charge by Equity Building Society? Is the Defendant liable to pay the Plaintiff the sum of ***Kshs.900,000/=*** as loss for failing to consent to the 2nd mortgage.
5. Who pays the costs of the suit?

It is not a disputed fact that the Defendant at the material time was a Building Society. This is obvious from the 3 documents relied upon by the parties. The Plaintiffs case is particularly based on the Central bank Act Chapter 491 of the Laws of Kenya, more specifically the Gazette Notice L.N. 82/1983 & L.N. 243/1983 and failure by the defendant to consent to the 2nd mortgage upon request by the Plaintiff.

In the schedule to Chapter 491 of the Laws of Kenya, banks & financial institutions affected by the said legal notice are specified, the Defendant is not listed. It is clear to me that in the absence of the Defendant's name in the schedule then the Defendant did not fall under the category of those affected by the said legal notices.

On the creation of the 2nd charge, the charge herein in Clause 10 of the charge provided as follows:-

“10 the chargor will not create a second or further charge on the security of the property charged except with the written consent of the chargee and on condition that any moneys at any time owing to the chargee on the security hereof shall have priority over the moneys secured or to be secured by such second or further charge.”

The question is whether the Defendant was obliged to create a second or further charge or consent to a second charge to a third party upon request by the Plaintiff. The Plaintiff's case is that the consent was unreasonably withheld, the Defendant argues that it was not under any such obligation especially as the Plaintiff had fallen into arrears and it was not commercially prudent to allow a second mortgage. The Defendant further states that no loss had been proved by the Plaintiff as having been occasioned by the refusal to issue the consent save for mere allegation.

The defence witness denied that they were ever served with any document related to a second mortgage by Equity Building Society. In support of an earlier application for an injunction by the Plaintiff annexed a letter dated 15th April, 1993 addressed to him by Equity Building Society granting him a loan facility of **Kshs.100,000/=** which loan was to assist him with extension of residential house with 2 rooms. The Plaintiff seeks for damages for loss of profit due to the Defendant's refusal to a second mortgage or to consent to a 2nd mortgage by Equity Building Society. The letter from Equity Bank does not in any way support the assertion that the 2nd loan was to assist a business transaction, no other proof of this allegation was tabled before the court. In the case of *Ouma vs. Nairobi City Council (1976) KLR 297*. It is not adequate merely to plead or alleged it is important to place evidence before the court.

Chesoni J stated in part:-

“We are here concerned with proof and pleading and I shall make no attempt to be philosophical about these two. He it simply means that for special damages to be awarded they must be pleaded and proved.”

It is my considered opinion that the Plaintiff failed to place concrete evidence of the loss he suffered and the contract he lost in the circumstances I cannot award the prayer.

The other issue raised was whether the Defendant was bound to charge the interest rate at a term not exceeding 5%.

Having considered the evidence before the court it is clear that there were only 3 documents that regulated the transaction between the parties, the offer letter, the charge and the Defendants rules. As stated above, the Defendant was not bound by the legal notice regulating the rate of interest chargeable on loans. In the circumstances I find no basis for the Plaintiff's argument. The courts have held often times stated that parties are bound by the terms of their contract. This is ought to be the position in this case as well. I have no basis in Law or in fact to look outside the provisions of the documents signed by the parties before me.

Having stated as above it therefore follows that the Plaintiff had no basis upon which to apply rates other than those stipulated in the contract documents, or arrived at by the Defendant based on the contract as to do so would be acting outside the contract entered into by the parties. I therefore find no basis upon which the Plaintiff would apply the interest at treasury bill rates.

Findings:

Having stated as above, I find that the Plaintiff has failed to prove his case as against the defendant and I dismiss the same with costs.

Dated and delivered at Nairobi this 2nd day of November, 2009.

ALI-ARONI

JUDGE