



IN THE COURT OF APPEAL.

AT NAIROBI

(Coram: Gicheru, Omolo & Bosire, JJ.A.)

CIVIL APPEAL NO.237 OF 1997

BETWEEN

CREDIT BANK LIMITED.APPEALANT

AND

PETER NG'ANG'A MUIRURI.....RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Nairobi (Hayanga, J.) Dated 10th July 1997

In

H.C.C.C NO 3665 OF 1991)

JUDGEMENT OF THE COURT:

Pursuant to a letter dated 14th April, 1988 addressed by the appellant to and accepted by the respondent, the appellant at the request of the respondent afforded the latter financial facilities in form of a bills discounting facility to a maximum of Kshs. 2 million. Between them, it was agreed that the interest rate to be charged on this facility would be 18% per annum subject to change by the appellant at its sole discretion without notice, provided that such interest rate would not exceed the maximum rate chargeable as laid down by the Central Bank of Kenya. Subsequent thereto, the respondent's property known as L.R. NO. 7752/95 (Original No.7752/32/1) and situate at Kyuna Estate, Nairobi, hereinafter called the suit property, was on 26th April, 1988 charged to the appellant to secure the financial facility referred to above.

During the year 1989, the respondent became increasingly unable to honour the discounted bills as and when they matured and in September, 1989 he requested the appellant in writing to convert the bills discounting facility into a term loan payable over a period of 36 months vide his letter dated 25th instant. As at this date, the outstanding bills discounted on his behalf by the appellant amounted to Kshs 2.5million. the respondent's request was that each such bill be converted to a term loan as and when it fell due. he further requested that the appellant do hold the suit property as security for his facility. The appellant accepted the respondent's request and by a letter dated 17th October, 1989 the appellant informed the respondent that the converts facility into a term loan was repayable together with interest in installments of Kshs 90,000 per month commencing on the 30th November, 1989.

By 30th June, 1991 the respondent was, according to the appellant, indebted to it in the sum of Kshs

2,575, 328/75 which sum attracted interest at the rate of 19% per annum from 1st July, 1991 until the date of payment in full. This rate of interest was the maximum chargeable on the loan account by financial institutions pursuant to a legal notice published by the central bank of Kenya effective from 1st April, 1990. The respondent's loan account was from inception to 31st March, 1990 charged interest at the rate of 18% per annum and at the rate of 19% per annum from 1st April, 1990 to date of payment in full.

Following continuous default by the respondent of his obligations to repay the loan in the terms agreed between him and the appellant, the latter by a letter dated 12th July, 1990 and addressed to the respondent gave statutory notice to him under **section 69a(1) of the transfer of property act, 1882** of its intention to exercise its statutory power of sale. The respondent's inaction in regard to the notice led to instructions to M/S. Marchet Auctioneers by the appellant to advertise for sale by public auction of the suit property. This was done and the sale by public auction was scheduled for 29th August, 1990. Owing to the respondent's representation and proposals to the appellant, the sale suit property by public auction was postponed. Nevertheless the postponement of this sale notwithstanding, the respondent took no effective measures towards liquidating his mortgage indebtedness to the appellant. Consequently, by or about 4th June, 1991 the appellant instructed M/S veteran auctioneers to sell the suit property by public auction in exercise of its power of sale to realize its security. This sale was to take place on 10th July, 1991 but did not materialize and a subsequent attempt to sell the suit property was sold by Ol-loita limited in public auction by Afro-Invest Kenya limited on 26th May, 1992 was equally frustrated. Eventually, the suit property was sold by Ol-loita limited in a public auction held at their company's sales room at Chai House, Koinage Street, Nairobi on 30th December, 1994 at 11.00 a.m. the highest bid of KShs 7.2 million for the suit property which comprised of 2.503 acres of land on which was a very modern built double-storey a servant quarter, a dhobi unit, separate farm store and a three roomed guest house was by one Deepak Pandit who then made a 25% down payment of the purchase price amounting to KShs 1.8 million to the appellant. That sum of money was reflected in the respondent's loan account in an entry in that account made on 6th January 1995.

Meanwhile, the respondent had filed in the superior court civil suits numbers 3665 of 1991, 160 and 1498(o.s) both of 1995 against the appellant and other parties in connection with the suit property. These suits were consolidated on 15th May, 1996 and were to be heard together under suit NO.3665 of 1991. In a letter dated 6th December, 1996 in respect of these three consolidated suits which was addressed to the deputy registrar of the superior court and signed by counsel for respondent and for the appellant herein and also by one Deepak Pandit, all the parties to the aforesaid consolidated suits requested the superior court to record a consent judgment which was entered in the record of civil SUIT NO.3665 of 1991 on 11th December, 1996 to the effect that the consolidated suits referred to above were settled in terms of the consent letter dated 6th December, 1996. The terms of the consented letter were as follows:

“With reference to the above suits kindly record the following consent judgment as between the the plaintiff and all the defendants.

1. THAT the plaintiff be and is hereby allowed to redeem the mortgage executed in favour of the first defendant-Credit Bank Limited- over the property described, NAIROBI L.R. NO.7752/95 (Original NO. 7752/32/1) SUBJECT TO AND UPON the fulfillment of the terms following :
 - a. THAT the Defendants Advocates' fees as from time to time debited to the mortgage account be expunged from the mortgage account and the same be taxed by the Deputy Registrar **within 15 days of the date of this order** as advocate/client fees in the manner prescribed by the instrument of the charge.
 - b. THAT the **taxed fees** as in (a) above together with interest thereon at contractual rates from the respective due dates be debited into the mortgage account and the same together with the mortgage as recorded in this Honourable court together with contractual interest upto the date of payment in full and including the auctioneer's and other charges accrued thereon be **fully paid by the plaintiff to the first defendant within forty five (45) days from the date of the said taxation**
2. THAT upon full payment all moneys above set out by the plaintiff or upon receipt of an

acceptable bankers undertaking for payment of the same, the First defendant to discharge and surrender to the plaintiff or the plaintiff's bankers the title document over the suit property i.e. L.R.7752/95(ORIGINALLY 7752/32/1).

3. **THAT** credit bank limited (the first defendant), do refund to Mr. Deepak Pandit (5th defendant) the sum of **Kshs 1,800,000** advanced as down payment on the sale of the mortgage land.
4. **THAT** Mr. peter Ng'ang'a Muiruri do refund to Mr. Deepak pandit the sum of Kshs 300,000 paid as rates to the city council and Mr. Deepak Pandit do cause to be forthwith removed the caveat lodged at the land registry over the suit property.
5. **THAT** in default of the terms contained in paragraphs 1 and 2 herein the first defence be at liberty to forthwith exercise its statutory power of sale without recourse to any further orders of the this Honourable court”

From the ruling of the superior court dated 10th July, 1997 out of which this appeal arises, it would appear that some difficulty as to the interpretation of the terms of the consent judgment arose between the parties thereto who at the request of the superior court drew up one single issue for determination by that court in this regard. That issue was:

“Whether or not on a true construction of the consent order (judgment) recorded on *sic* 20-12-96 the defendant bank may charge the mortgage account interest on Kshs 1,800,000 ordered to be refunded to the 4th defendant, Mr. Deepak Pandit.”

In resolving this issue, the superior court judge, Hayanga, j appears to have been of the view that according to the consent judgment, the Kshs 1.8 million payable to Mr. Deepak Pandit was a refund of the deposit of the said sum of money by the mortgagagee. According to learned judge, the appelland could not charge the mortgage account interest on the Kshs 1.8 million as to do so would be outside the contractual arrangement between the respondent and the appelland which was the basis upon which such interest was being charged. The contractual arrangement provided for the repayment of the principle mortgage sum together with the interest thereon. The appelland's quarrel with the ruling of the learned judge in this appeal is in his resolving the issue for his determination as is set out above.

At the commencement of the hearing of this appeal on 22nd January, 1998, counsel for the respondent, Mr. Wamalwa, raised a preliminary objection in regard to the jurisdiction of this court to hear and adjudicate on this appeal as, according to him under the provisions of **sections 75(1) and 76(1) of the Civil Procedure Act**, chapter 21 of the laws of Kenya the same did not lie since it originated from an order made by the superior court in exercise of its original jurisdiction. We overruled Mr. Wamalwa's preliminary objection out rightly as we were of the view that it was frivolous since the appelland had obtained leave of the superior court to appeal against the said order bringing the same under the relevant part of the **section 75(1) supra**.

Mr. Buti who appeared with Mr. Onyambu for the appelland gallantly argued against the determination by the learned judge of the issue drawn by the parties to the consent judgment as is set out above. He, however, conceded that the applicant of **clause 1(b)** of the consent judgment would cause no problem to the appelland. Mr. Wamalwa for the respondent was, however, of the view that the entire decision of the learned judge in relation to the determination of the issue before him should be upheld.

The tenor and effect of **clause 1(b)** of the consent judgment did not extenuate in any manner the respondent's contractual obligations in the repayment of his mortgage debt together with the accrued interest thereon to the appelland. The deposit of Kshs 1.8 million in his loan account which money was in respect of the purchase of the suit property in a public auction by Mr. Deepak Pandit did not give him proprietary rights over it and the interest accruing thereon could not be a charge on his mortgage debt with the appelland. The wording of the penultimate sentence in the ruling of the learned judge may be unclear but a composed interpretation of the **clause 1(b)** of the consent judgment leaves no doubt that the Kshs 1.8 million deposited in the respondent's loan account with the appelland on the 6th January, 1995 on the account of the purchase of the said property in a public auction by Mr. Deepak Pandit together with the interest thereon is no part of his efforts to redeem the suit property. Once this money is paid by

the appellant to Mr. Deepak Pandit, the respondent will have to redeem the suit property by liquidating his mortgage debt on the basis of his contractual obligations in respect thereof. In result, we think that the appellant's appeal is without a sound foundation and the same is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 6th day of February 1998

J.E. GICHERU

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

S.E.O.BOSIRE

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JUDGE OF APPEAL