REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 63 OF 2013

RICHARD CHEPTIRGE.....1ST PLAINTIFF

RUSI CHEPKEMOI CHEPTIRGE.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 25th September 2013 the Plaintiffs instituted a suit against the Defendant seeking the following reliefs:

> *a) A declaration that the defendant cannot recover any amount from the plaintiffs because of limitation and that any attempted recovery is egregious and that the Defendant should release the three title deeds to the Plaintiffs forthwith and in default the District Land Registrar Kericho to re-issue the same to the plaintiffs after 30 days of this judgment, and that the defendant be temporarily and permanently restrained from dealing with, selling interfering with or in any way dealing with the 3 parcels of land in question*
>
> *b) Costs of this suit.*

2. Simultaneously with the Plaint, the Plaintiffs filed an application for injunction to restrain the defendant by its agents, servants and employees, and or proxies from dealing with, alienating, selling, or in any way interfering with parcels of land known as Kericho/Cheborge/117 and 358 and Kericho/Chermaner/1131 pending the hearing and determination of the suit herein. The said application was granted by Justice Sergon in November 2013.

Background of the case

3. The 1st and 2nd Plaintiffs are husband and wife. On or about the 7th December 1984 ,the 1st Plaintiff approached the Defendant's Kericho branch for a loan facility. The Plaintiffs state that the loan facility that was granted to the 1st Plaintiff was for the sum of Kshs. 120,000/- although the amount registered against the title was Kshs 155,000/-. The said loan was secured by a charge over two parcels of land known as title No. Kericho/Cheborge/358 and Kericho/Cheborge/117. The said parcels of land are registered in the name of the 1st Plaintiff.

4. Subsequently, the 1st Plaintiff took up another loan facility of Kshs. 70,000 from the Defendant's Sotik branch. The said loan was secured by a charge over land title number Kericho/Chemaner/1131 in November 1989. All the land titles used to secure the loans constitute the plaintiffs' matrimonial home and are registered in the name of the 1st plaintiff.

5. The Plaintiffs allege that out of the total amount borrowed from the Defendant amounting to Kshs. 190,000/-, the 1st Plaintiff has repaid a total sum of 779,362 through the Defendant's Kericho, Nairobi and Sotik branches. The Plaintiff alleges that the bank is demanding a further sum of Kshs 1,300,000/-. Sometime in 1994, the defendant consolidated the plaintiffs two accounts and filed suit against the plaintiff vide Nairobi CMCC No.11368 of 1994. He obtained judgment against the 1st Plaintiff on 25th April 1994. The said judgment has not been executed todate.

6. The Plaintiffs further allege that since it is more than 18 years since judgment was entered against them, the defendant cannot execute the same against them as it is statute barred. They further allege that the amount claimed by the defendant as the outstanding balance is immoral, unconscionable and illegal as the 1st plaintiff has paid Kshs. 779, 362 for a loan of Kshs. 190,000 thus the principle sum and interest have been paid.

7. In its Defence filed on 10th June 2014, the Defendant states that the first loan facility was in the sum of Kshs. 155,000 as indicated in the official search and not Kshs. 120,000 as alleged by the plaintiffs. It is further alleged that despite the fact that the 1st Plaintiff has made some payments, he is not yet discharged from his obligations as he reneged on his contractual obligations of repaying the loan.

8. The defendant denies that it has exaggerated the amount owed by the 1st plaintiff and states that what it is demanding is what is rightfully owing. In response to the allegation that it cannot execute the judgment entered against the plaintiff in 1994, the defendant states that the account between the 1st plaintiff and the defendant is an on-going concern with the defendant making continuous demands and the plaintiff making proposals and counter-proposals upto as late as 2012/2013 and the claim is therefore not statute barred.

9. The defendant states that even if the plaintiffs 3 parcels of land constitute the plaintiffs' matrimonial home, they were given out as security for the loans with full knowledge of the conditions attached thereto.

10. When the matter came up for hearing on the 22nd June 2017 only the plaintiffs testified.

11. The 1st plaintiff testified that on 7th December 1984 he obtained a loan of Kshs 120,000 from the defendant's Kericho branch although the amount registered on the charge was Kshs. 155,000. The said loan was secured by a charge over his two parcels of land; Kericho/Cheborge/117 and 358.

12. He subsequently applied for an additional loan of Kshs. 70,000 on 28th November 1989 through the defendant's Sotik branch. The same was secured by a charge over land parcel number Kericho/Chemaner/1131. He produced certificates of official search in respect of the 3 parcels of land as exhibits P 1a and b and exhibit 2. The total loan was therefore Kshs. 225,000. He testified that he had made payments to the bank amounting to Kshs. 779, 362. He produced a bundle of receipts for the same as exhibit P.4. He stated that despite having made substantial payments, the defendant had sued him for recovery of the outstanding loan in Nairobi CMCC No. 11,368 of 1994. He produced a copy of the proceedings as exhibit. 6.

13. From the said proceedings, it is clear that judgment was entered against the 1st plaintiff in default of appearance on 25th April 1994. The defendant subsequently took out a Notice to Show Cause why the 1st plaintiff should not be committed to civil jail for failure to pay the decretal sum, on 3rd April 2001. The court ruled that the plaintiff had repaid the principal sum and what remained was interest. The Magistrate therefore declined to commit the 1st plaintiff to civil jail.

14. The 1st Plaintiff further testified that he wrote to the defendant on 17th July 2013 requesting the bank to release his title deeds. The defendant responded by its letter dated 13th September 2013 demanding a sum of Kshs. 3,224,977. They then sent him a bank statement showing that he owed Kshs. 4, 402,129.

15. In cross-examination the 1st plaintiff stated that he signed the charge which stated that he had borrowed Kshs. 155,00 and he understood that he would be bound by the conditions therein. He stated that he made payments from time to time and there were times when he was unable to make the monthly payments.

16. He stated that after he received the defendant's letter dated 1st November 2012 demanding a sum of Kshs. 3,224, 977, he visited the bank and complained. The amount was then readjusted to Kshs. 1,300,000. He subsequently made an offer to pay Kshs. 75,000 per month but the defendant declined the offer. He maintained that in his opinion, he had repaid the principal sum in full.

17. With regard to the interest applied to the loans, the plaintiff stated that the agreed interest rate for the first loan was 14.5% while the second loan was to attract interest at the rate of 18.5%. Even though the 1st plaintiff admits that he was informed that the loans would attract penalties for late payments, he does not know how the penalties were calculated. The 1st plaintiff testified that the defendant made six attempts to sell the charged parcels of land in vain.

18. The 2nd Plaintiff Rusi Chepkemoi Cheptirge testified that she had been married to the 1st plaintiff since 1972 and they were blessed with eight children. She testified that she had accompanied her husband to the bank when he went to apply for the loans and she saw him sign some documents but she did not understand what was contained in the said documents nor did she sign any consent. In cross –examination she admitted that she knew that her husband had charged their 3 parcels of land to the bank as security for the loans. She testified that the said parcels of land comprised their matrimonial home where she stayed with her husband all their eight children.

19. The defendant did not call any witness as no witness statement had been recorded by the time the case came up for hearing. The defendant's counsel made a belated application to record their witness statement after the plaintiffs had testified. His application was strenuously opposed by the Plaintiff's counsel, on the grounds that it would prejudice the Plaintiff's case. The court rejected the application and counsel for the defendant had no choice but to close the defendant's case.

20. Both parties filed written submissions.

Plaintiff's Submissions

21. In their written submissions filed in court on the 4th August 2017, Mr. Kipkoech learned counsel for the plaintiffs does not dispute that the 1st plaintiff took out loan facilities from the defendant in 1984 and 198 respectively. What is in dispute is the amount owed as at the time of filing suit. The plaintiff testified that he had paid Kshs. 779,362 which in his opinion constituted the principal sum together with interest. Counsel submitted that the amount of Kshs. 1,300,000 that the defendant expected the plaintiff to pay was colossal, astronomical and oppressive. He submitted that the said amount had accumulated due to the fact that the bank had increased the interest rate beyond 18.5% contrary to what had been agreed at the time of taking the loan. He submitted that this had the effect of negating the intention of the parties hence rendering the contract void.

22. He cited the case of **James Njuguna Wainaina & Rosemary Njeri Wainaina V East African Building Society (2014) eKLR** where Gikonyo J held as follows:

> ***"The defendant is in default of the provision of the charge. The law is that no one should benefit from one's fault. You will be stopped.."***

23. He faulted the bank for contravening section 44 of the Banking Act which provides that no institution

shall increase its rate of banking or other charges except with the prior approval of the Minister. He submitted that there was no evidence that the consolidation of the two accounts and the upward variation of interest was consented by the plaintiff or approved by the Minister.

24. Learned counsel urged the court to apply the *in duplum* rule provided for in section 44A (1) of the Banking Act which provides as follows:

> "*An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection 2.*
>
> *Subsection 2 of the same section provides as follows:*
>
> *The maximum amount referred to in (1) is the sum of the following-*
>
> *The principal owing when the loan becomes non-performing;*
>
> *Interest in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and*
>
> *Expenses incurred in the recovery of any amounts owed by the debtor"*

25. He urged that since the lower court in Nairobi had found that the plaintiff had paid the principal sum, what was pending was interest and the same could not run into millions for a maximum principal sum of Kshs. 225,000.

26. The second limb of the plaintiff's submission was that the recovery of the loan against the plaintiff was statute barred. Learned counsel submitted that 23 years had elapsed since the defendant obtained judgment against the plaintiff in Nairobi CMCC No 11368 of 1994. Any attempt to execute the said judgment was contrary to the provisions of section 4(4) of the Limitation of Actions Act which provides as follows:

> *4(4)" An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered , or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due".*

27. He submitted that since the interest on the plaintiff's loan has been due since 1994, which is 23 years ago, the same is no longer recoverable as 12 years (after judgment) and six years (after the interest became due) have elapsed. He submitted that both the judgment and interest have suffered death through operation of the law.

28. He cited the case of **National Bank Kenya Limited V Felix ole Nkaru (2008) eKLR** which held that where the debtor acknowledges indebtedness after the limitation period has expired, such an acknowledgment constitutes a fresh cause of action"

29. He was however quick to point out that in the instant case even though the 1st plaintiff admitted having taken the loans, he disputed the interest loaded on him and testified that he went to court to challenge the colossal amounts that had no basis.

30. Learned counsel further submitted that the charged property was matrimonial property and the defendant could not purport to sell it to recover the loan without informing the 2nd plaintiff.

31. He referred to section 93 of the Land Registration Act, 2012 which provides thatany property acquired during the subsistence of a marriage is matrimonial property which should be dealt with in

accordance with the Matrimonial Property Act.

32. Section 12(3) of the said Act provides that a spouse shall not be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court. The Plaintiff adds that no consent has been given by the 2nd Plaintiff to dispose of the property and that her interests in the property cannot be overridden.

Defendant's submissions

33. Mr Otara learned counsel for the defendant filed written submissions dated 13th October 2017. In the his submissions, he summarized the plaintiffs' case and stated that the total loan advanced to the 1st Plaintiff was Kshs 225,000.

34. The Defendant submitted that the Plaintiff defaulted in the repayment plan. He further stated that the Plaintiff engaged the Defendant in repayment plans which were not adhered to thereby leading to accrual of interest as per the contractual agreement.

35. The Defendants also argue that ignorance of the law is no defence. He negates the 1st plaintiff's the argument that he never read the charge as he signed the same in the presence of an advocate. The Defendant relies on the maxim of equity which states that he who comes to court must come with clean hands to make the point that the Plaintiff has approached the court with unclean hands as he has failed to disclose to the court that he defaulted in repaying the loan. He relied on the case of **Cheni Plains Company Limited and 2 others V Eco bank Kenya Ltd 2017 eKLR** where the court allowed the Defendant to sell the Plaintiff's property as the Plaintiff had admitted that he was indebted to the Defendant.

Issues for determination

36. The following issues emerge for determination:

i. Whether the amount claimed is justifiable

ii. Whether the in diplum rule ought to be applied

iii. Whether the defendant's attempt to sell the plaintiff's property or recover the loan pursuant to the judgment in Nrb CMCC no. 11368 of 1994 is statute barred

iv. Whether the charged property is matrimonial property

v. Whether the plaintiffs are entitled to the reliefs sought

37. With regard to the first issue, it is not in dispute that the 1st plaintiff took two loans totaling upto to Kshs. 225,000 from the defendant. What is in dispute is whether the defendant is justified in what it is demanding from the plaintiff. The defendants expect the 1st plaintiff to pay a whooping Ksh1.3 million over and above what he has already paid. The defendant has not been very forthcoming with information on the exact amount payable as the figures keeping fluctuating. The fact that the defendant consolidated the two loan accounts is also questionable since the interest rate applicable to the two accounts was different. This clearly negates the terms of the contract.

38. It is trite law that generally courts shy off from intervening where a contract exists between parties. However, there are circumstances where a court may intervene. The court in the case of **Kenya Commercial Finance Company Limited vs Ngeny & Another [2002]1KLR** quoted with approval by the Court of Appeal in the case of **Margaret Njeri Muiruri v Bank of Baroda (Kenya Limited [2014] eKLR** stated as follows: -

"The court will not intervene where parties have contracted on arms –length basis. However, by its equitable jurisdiction, the court will set aside any bargain which is harsh, unconscionable and oppressive or where one having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve the party of such conditions."

39. In **Commercial Bank of Australia Ltd v Amadio [1983] 51 CLR 447** the court defined unconscionable conduct as follows:-

"Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit, of a dealing with a person under a special disability in the circumstances where it is not consistent with equity or good conscience that he should do so."

40. In the instant case the figures have kept varying from Kshs. 1.300,000 to as high as Kshs. 5,401,372.86. The Plaintiff states that the amount being claimed by the Defendant is unconscionable and illegal. It is evident that in the instant case, the bank unilaterally varied the interest rate without informing or seeking the consent of the chargor as required under the charge instrument dated 24th November 1989. In the circumstances, it is my finding that the amount claimed by the defendant is unconscionable, oppressive, unjustifiable and illegal. This is a proper case for the court to intervene and relieve the Plaintiff from the same.

41. The second issue is whether in the court ought to apply the *in duplum* rule contained is section 44 A of the Banking Act. As stated above, the effect of the above rule is that in the case of a non-performing loan, the lender cannot recover an amount that is more than double the outstanding principal amount.

42. In the case of **Rajnikantkhetshi Shah V Habib Bank A.G Zurich (2016) eKLR** the court stated as follows:

" ***The decision to keep this account open for as long as they wish was an act comparable to illegal foreclosure.. It defeated prudence and reasonableness. I do not think prudence would call such an account a performing one. The bank kept a dark ominous cloud hovering over the chargor. This is not only a source of anxiety and uncertainty as to when the property will be redeemed but it is contrived, malicious, stealth and oppressive, a complete negation of the law on equity of redemption. In such cases courts will not hesitate to strike down anything or conduct that threatens the integrity of the equity of redemption. …The charge deliberately restrained itself from asserting its right to realize the security yet on the other hand the debt was swelling to satisfying digits of over Kshs. 150,000,000. That conduct is loathed by the courts. The in duplum rule was designed by the Common Law and now in Kenya to obviate such circumstances"***

43. In the instant case, it is clear that the bank has kept loading interest on the plaintiff's account over the years. Although it may be argued that the *in diplum* rule does not apply because there is a judgment against the 1st plaintiff, considering the circumstances of the case, particularly the length of time it has taken and the fact that the defendant has made six attempts to sell the charged property in vain, it is just and equitable for the court to intervene.

44. The third issue is whether the defendant's attempt to execute the judgment entered on 25th April 1994 is statute barred. In the case of **Willis Onditi Odhiambo V Gateway Insurance [2014] eKLR** the court of appeal considered the applicability of section 4(4) of the Limitation of Actions Act and stated as follows:-

"In other words, the appellant wanted to execute the said decree against the Respondent out of time. Execution of judgments and/or decrees is governed by section 4(4) of the Limitation of Actions Act in the following terms:

> ***4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered.***

> ***"The judgment which the appellant sought to execute was passed on 26th August 1996. The judgment should therefore have been executed on or before 27th August 2008."***

45. Similarly, in the case of **Danson Muriithi Ayub v Evanson Mithamo Muroko [2015] eKLR** the learned Justice Limo stated as follows:

> ***"...It is clear that a judgment must be executed within 12 years from the date of its delivery otherwise it becomes legally stale and of no benefit to the decree holder."***

46. In this case, it has been 23 years since judgment was entered against the 1st plaintiff. The defendant last tried to execute the judgment in 2001 when it took out a Notice to Show cause why the 1st plaintiff should not be committed to civil jail for failure to pay the decretal sum. The court ruled that he had paid the principal sum and what remained was interest and declined to commit the 1st plaintiff to civil jail. I agree with learned counsel for the plaintiffs that the judgment and interest have suffered death by operation of the law.

47. Regarding the fourth issue as to whether the charged property is matrimonial property. My finding is that the plaintiff's property was charged long before the new regime of land laws and the Matrimonial Property Act came into force and it is therefore not applicable to the instant case.

48. The fifth and final question I must determine is whether the plaintiffs are entitled to the reliefs sought.

49. I have considered the pleadings, documentary and oral evidence as well as the rival submissions herein and in my final analysis the plaintiffs have proved their case on a balance of probabilities.

50. Accordingly, I enter judgment for the plaintiffs as prayed in the plaint and make the following orders:

> **i. The defendant shall not make any further attempts to recover any amount from the 1st Plaintiff pursuant to the judgment in Nairobi CMCC No 11368 as such action is statute barred.**
>
> **ii. The defendant shall forthwith and not later than 30 days from the date hereof execute and hand over to the 1st Plaintiff an appropriate instrument of discharge of charge in respect of land parcels No. KERICHO/CHEBORGE/117, KERICHO/CHEBORGE/358 and KERICHO/CHEMANER/1131.**
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> **iii. In default of execution of the instruments in (b) above, the District Land Registrar Kericho shall reissue the same to the 1st Plaintiff within 30 days.**
>
> **iv. A permanent injunction do, and is hereby issued restraining the defendants by themselves their servants, employees or agents from selling, alienating, dealing with or in any way interfering with the land parcels known as KERICHO/CHEBORGE/117, KERICHO/CHEBORGE/358 and KERICHO/CHEMANER/1131.**
>
> **v. The costs of this suit shall be borne by the defendant.**

Dated, signed and delivered at Kericho this 24th day of November 2017.

J.M ONYANGO

JUDGE

In the presence of:-

Mr. Kemboi for Mr. Kipkoech for the Plaintiffs

Mr. Kamande for Mr. Otara for the Defendant

Court Assistant: Rotich