IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 153 OF 2017

BETWEEN

HOUSING FINANCE COMPANY OF KENYA LIMITED.....APPELLANT

AND

SCHOLARSTICA NYAGUTHII MUTURI.....1ST RESPONDENT

EVANSON KAMAU WAITIKI.....2ND RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya

at Nairobi (E.K.O. Ogola, J.) delivered on 17th February, 2017

in

H.C.C.C. No. 10 of 2010)

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JUDGMENT OF THE COURT

The relationship between the appellant, **Housing Finance Company Limited** and the 1st respondent, **Scholarstica Nyaguthi Muturi**, was that of banker and customer. In or about the year 1998 the 1st respondent approached the appellant and applied for a loan which was granted in the sum of Shs.3,000,000. She offered as security for the loan her two adjacent properties **L.R. Nos. 14667 and 14668** situate at **Muthithi Gardens** in **Kiambu**. The loan was granted repayable in 15 years. The 1st respondent was not able to meet her obligations to the appellant in repayment of the loan and in the course of time she requested the appellant to discharge one of the properties L.R. No. 14667 which was sold at Shs.3,500,000 and the proceeds thereof were applied in part payment of the loan. Because the 1st respondent did not meet her obligation in repayment of the loan after sale of that property the remaining security L.R. No. 14668 was offered for sale and was purchased at Shs.16,000,000 by the 2nd respondent, **Evanson Kamau Waitiki.**

These events led to a suit filed at the High Court of Kenya at Nairobi being H.C.C.C. No. 10 of 2010 where the matters we have referred to were stated. It was averred in the plaint that according to the charge document created for the security of the loan the expected repayment by the 1st respondent to the appellant for a period of 15 years was about Shs.7,373,704.65 based on an interest rate of 26% but that the interest rate had been varied in the course of time. The 1st respondent also averred that from 1998 to 2008 she had made payment of Shs.3,973,306 towards the loan; that she had queried interest rates employed by the appellant; that she had sought advice from an organization called Interest Rates Advisory Centre which informed her that the appellant had charged interest rates in a way not allowed in law; that the appellant had violated certain provisions of the Central Bank of Kenya Act and the Banking Act; that when she challenged the appellant in the manner it had operated her account the appellant gave her a credit of Shs.2,448,618.65 in or about March 2007 without informing her how that sum was arrived at or why the credit had been given; and without her asking for such credit; that as at the time of filing suit she had repaid the loan to the tune of Shs.8,373,306 which according to her was a sum much more than she was supposed to pay; that she had not been served with a statutory notice as required in law; that the suit property was worth Shs.32,000,000 but was sold at Shs.16,000,000 to the 2nd respondent; that a claim by the appellant for Shs.7,393,303.15 as at 6th January, 2010 was not due; that the transfer of the suit property by the appellant to the 2nd respondent was unlawful and illegal. For all that the 1st respondent prayed for injunction orders to restrain the appellant from selling or transferring L.R. No. 14668; that the appellant be ordered to discharge and release to the 1st respondent the title to the said property and an order be made directing the Chief Land Registrar to rectify the register by cancelling entries entered on L.R. No. 14668 and to cancel the transfer in favour of the 2nd respondent; that a declaration be issued to confirm that the 1st respondent had completed paying the loan and any other relief be granted by the court.

The appellant delivered a statement of defence where the 1st respondent's claim was denied. It was stated in the defence amongst other things that the 1st respondent, if she had paid the loan for the 15 year period without default, would pay to the appellant a total sum of Shs.11,951,640. The opinion of the organization called Interest Rates Advisory Centre was disputed and the appellant stated that it had not violated any law in the way it had operated the 1st respondent's account. It was further stated that the appellant had served statutory notices on the 1st respondent and that it had sold the charged property by public auction to recover sums due on the loan.

The 2nd respondent was introduced into the suit later after L.R. No. 14668 (the suit property) had been sold.

Together with the plaint were witness statements which were adopted as part of the evidence at the hearing. **Mwangi Muturi** a son of the 1st respondent stated in his witness statement that he had visited the appellant's offices in the year 2007 when he was informed by officers of the appellant that he and his family would have to be evicted from the suit premises because of arrears on the loan. He informed the officers that the 1st respondent had travelled to USA. Further, that he met the Chief Executive Officer of the appellant but his repayment proposal was not accepted.

Josephine Wangui, a sister of the 1st respondent resided in the suit property. She stated in the witness statement that the appellant officers had visited the suit premises and installed some notices to the effect that the property was on sale.

The 1st respondent in a written statement stated that in June 1978 she had borrowed Shs.3,000,000 from the appellant to purchase the suit property (L.R. No. 14668 in Kiambu) which was sold to her at Shs.6,500,000. She lost her job through retrenchment in the year 2000 and she had difficulty servicing the loan. According to her the appellant was imposing high interest rates on the loan making it difficult for her to meet her obligations. She travelled to USA and when she was away her family was harassed by officers of the appellant who placed notices on the suit property advertising the property for sale. The property was sold by the appellant which according to her was wrong because she had overpaid the loan.

The suit was heard by Ogola, J who delivered a judgment on 17th February, 2017. In the judgment it was found that the 1st respondent had proved her case and the final orders were:

> ***"(a) It is hereby declared that the plaintiff has completed repaying the loan advanced to her by the 1st defendant.***
>
> ***(b) The 1st defendant shall refund the entire purchase price of Shs.16,000,000 paid for the suit property to the plantiff with interest thereon at 26% per annum with effect from the date of auction in 2011 to the date of this Judgement,***
>
> ***(c) The sums due in (b) above shall attract interest at court rate from the date of this judgment until the decree is fully settled.***
>
> ***(d) The costs of this suit shall be paid by the 1st defendant.***
>
> ***(e) It is the finding of this court that the 2nd defendant's interest in the suit property is valid, and that the 2nd defendant is the legal and duly registered owner of the suit property.***
>
> ***(f) The 2nd defendant's costs shall be paid by the 1st defendant."***

The appellant was dissatisfied with those findings and filed this appeal.

In the Memorandum of Appeal drawn for the appellant by its advocates **Walker Kontos Advocates,** 8 grounds of appeal are set out. To paraphrase, it is said that the judge erred in law and fact in finding that the mortgage accounts of the 1st respondent were improperly kept by the appellant; that the judge erred in finding that proceeds of sale of the suit property be refunded to the 1st respondent having found that exercise of power of sale was proper and valid; that the judge failed to find that the 1st respondent had failed to collect a refundable balance of Shs.3,894,206.35; that the judge erred in condemning the appellant to pay interest on the said sum; that the judge was wrong to award the 1st respondent a refund of Shs.16,000,000 which was not prayed for; and that the judge erred in misapplication of the law.

It is our duty as a first appellate court to reevaluate and reanalyze the evidence and reach our own conclusions – this duty was well stated in the oft-cited case of **Selle & Another v Associated Motor Boat Company Limited & Others [1968] EA 123** as follows:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."***

We have perused the record of appeal and noted that the 1st respondent testified in person before the trial judge to the effect that she had charged her two parcels of land in favour of the appellant who advanced her Shs.3,000,000. She produced various documents including loan application and charge document and stated that the loan was to be repaid for a period of 16 years by monthly installments of Shs.66,398 at an interest rate of 26%. She further stated that the appellant did not serve her with any notice to vary interest but that at one time when she complained about the variation of interest she was credited a sum of Shs2,500,000 without any explanation. She further testified that with consent of the appellant which discharged one property (L.R. No. 14667) she sold the same and the purchase price was applied to repay the loan as shown in statements she produced before the trial judge. Further, that the remaining charged property comprising her home was sold to the 2nd respondent for Shs.16,000,000 in October, 2011. According to her that sale was tainted with irregularities as the same was not

advertised as required and the property was sold not by public auction but by private treaty. According to her the sale was at an undervaluation of her property which according to her was valued at Shs.32,000,000. She further testified that the appellant took from her as repayment of the loan of Kshs.3,000,000 a total of Shs.22,000,000. She admitted writing many letters to the appellant either to reschedule the loan, restructure the same or allow postponement of repayments. She denied an address to which notices were sent by the appellant claiming that it did not belong to her.

The 1st respondent called as a witness **Daniel Muriuki Kibuchi,** a valuer with **Acumen Valuers Limited**. He produced a Valuation Report which he had prepared after visiting the suit property. The report gave current market value of L.R. No. 14668 at Shs.32,000,000.

On behalf of the appellant **Evanson Njehia Karanja,** proprietor of **Crystal Valuers** gave evidence to the effect that he had valued the suit property at Shs.20,000,000 as market value with a forced sale value of Shs.15,000,000. He produced his report into the evidence.

Moses Ndungu the **Assistant Debt Manager** of the appellant testified that the 1st respondent had secured her property to the appellant for a loan of Shs.3,000,000 and that the 1st respondent had defaulted in repayment of the loan which led the suit property being sold in October 2011 for Shs.16,000,000. Further, that after the sale there was a balance of Shs.6,300,000 which the appellant was holding ready to release to the 1st respondent who had refused to collect the same. In cross examination the witness stated that the appellant had recovered a total of Shs.18,000,000 from the 1st respondent. Although it was stated in the defence that the property had been sold by public auction this witness testified that it was sold by private treaty. The witness denied that the appellant was obligated to give any other statutory notice after the first notice had been served on the 1st respondent.

The 2nd respondent testified before the trial judge to the effect that he purchased the suit premises from the appellant by private treaty. Although he paid Shs.16,000,000 for the suit property it was valued by the lands office at Shs.20,000,000 for purposes of stamp duty.

That was the totality of the evidence taken by the trial judge who reached the determinations which we have stated in this judgment.

The trial judge analysed the evidence that had been presented and identified issues for his determination. One of those issues related to the "in duplum" rule. According to this rule, which is a common law rule, it is provided that arrears interest ceases to accrue once the sum of the unpaid (accrued) interest equals the amount of capital outstanding at the time. The rule directly translates to "double the amount".

In addition to what the 1st respondent had testified relating to repayment of the loan the appellant's witness confirmed that the appellant had recovered a total of Shs.18,000,000 from the 1st respondent from the original loan of Shs.3,000,000. The judge found that the appellant had applied different regimes of interest rates ranging from 26% per annum to 34% per annum and that the respondent had not kept proper records of account and that the improper records impacted on the 1st respondent's account to the extent that the appellant without any explanation and without any request had written off sums ranging from Shs.2,478,618.65 to Shs.2,700,000 which the judge found to be a huge sum considering the loan amount of Shs.3,000,000 advanced. The judge found:

> ***"If the the 1st defandant cannot explain why it would grant such a rebate, then it is also arguable that the 1st defendant did not keep reliable accounts from which it could with certainty know what the plaintiff owed to it. It is therefore true that the amount alleged to be due by the 1st defendant is as a result of guess work. A court of law cannot determine issues of account based on guess work, and any bank which fails to keep proper records of account cannot make a calculable claim against a customer. Banks must keep proper records of account. It is on the basis of such records that a claim for or against a bank can be determined. Since between the bank and the borrower it is the bank who is obligated to keep proper records and to avail statements of account, a bank which cannot avail proper records of account will be disqualified from making any claims against a borrower and would be hard put to discharge any such claims by a borrower."***

The trial court found that unlawful regimes of interest had been charged on the 1st respondent's account and employing the provisions of **section 44A** of the **Banking Act** found that by the time the said section came into force on 1st May, 2007 the 1st respondent's loan was non-performing; that the appellant was obligated in law to give a notice to the 1st respondent of non-performance of the loan and calculate sums due to the appellant under that section. The court found that the appellant could not do that because it had not kept proper books or records in respect of the 1st respondent's account. The judge further found that from the records availed to court the court could not determine how much was owed by the 1st respondent to the appellant by 1st May, 2007 when **Section 44A** of the **Banking Act** came into force. The court also found that the 1st respondent had borrowed a sum of Shs. 3,000,000; by the time the suit property was sold in 2011 the 1st respondent had repaid a total sum of Shs.8,400,000 and that when the suit property was sold the appellant took Shs.9,600,000 from the 1st respondent's account and had been holding a sum of Shs.6,300,000 and that by the time **Section 44A** of the said Act came into force the 1st respondent had paid the loan three times over. The court therefore found that the 1st respondent had more than repaid what was due to the appellant.

On the issue of whether statutory notice as required in law had been served the court found that the appellant had served proper statutory notice before selling the suit property. Whether or not the suit property was sold at an undervalue the trial court considered the valuation by the 1st respondent's witness and that of the appellant and also considered the valuation by the Registry of lands for purposes of stamp duty and found that the property was not sold at an undervaluation. The court considered how the property was sold to the 2nd respondent and found that the sale was valid as it was allowed by the charge created as security for the loan.

This appeal came up for hearing before us on 25th June, 2019 when **Mr. Henry Omino,** learned counsel, appeared for the appellant while learned counsel **Miss W.A. Merichi** appeared for the 1st respondent. We allowed the appeal to proceed in the absence of representation for the 2nd respondent who had been served with a hearing notice on 20th of June, 2019.

Both counsel had filed written submissions which we have considered.

In a highlight of written submissions Mr. Omino submitted that the loan had not been fully repaid and that "in duplum" rule was not

applicable. Counsel pointed out that there was an admission by the 1st respondent that there was a balance payable on the loan.

Miss Merichi in opposing the appeal pointed out that the 1st respondent had made various prayers in the plaint and that the trial court had inherent power to give the orders that it did. According to counsel the sum of Shs.16,000,000 became an issue in the proceedings and that prayer could be granted. Counsel further submitted that the appellant could not be claiming any sum from the 1st respondent when it had gone ahead to give a credit to the 1st respondent which credit had not been applied for or requested.

We find that the central issue for our determination is whether the trial judge erred in applying the "in duplum" rule and whether the judge was entitled to order the appellant to refund money with interest to the 1st respondent.

We have already set out the evidence that was presented before the trial judge. It was pleaded at paragraphs 4 and 5 of the amended plaint that the loan sum of Shs.3,000,000 was advanced to the 1st respondent by the appellant on or about 9th January, 1998 on the security that we have already referred to. It was further stated that between 1998 and 2008 the 1st respondent had repaid a sum of Shs. 3,973,306 to the appellant; that in the year 2008 the property L.R. No. 14467 was discharged by the appellant and sold to a third party at Shs.3,500,000 and this sum went to off-set part of the balance of the said loan. Further, that as at the time of filing suit the 1st respondent had paid to the appellant a sum of Shs.8,373,306. Various documents including bank statements were availed to the trial court by the 1st respondent during hearing to confirm those payments. The judge analysed the evidence and found that the appellant had not kept proper books of accounts and that it was difficult to establish with any level of exactitude how much money had been paid by the 1st respondent to the appellant.

It was shown in evidence that the appellant in the course of managing the loan account had refunded to the 1st respondent's account sums of Shs.2,478,618.65 and a further sum of Shs.2,700,000. The appellant's witness **Moses Ndungu, Assistant Debt Manager**, in evidence confirmed that a sum of Shs.18,000,000 had been recovered from the 1st respondent on the original loan of Shs.3,000,000.

As we have shown **section 44A** of the **Banking Act** came into force on the 1st May, 2007. That provision of law sets up the maximum amount of money a banking institution that grants a loan to a borrower may recover on the original loan. The banking institution is limited in what it may recover from a debtor with respect to a non performing loan and the maximum recoverable amount is defined as follows in **section 44A(2)**:

> ***"The maximum amount referred in subsection (1) is the sum of the following –***
>
> ***a) The principal owing when the loan becomes non performing;***
>
> ***b) Interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non perfoming; and***
>
> ***c) Expenses incurred in the recovery of any amounts owed by the debtor."***

By that provision if a loan becomes non performing and the debtor resumes payment on the loan and then the loan becomes non performing again the limitation under the said paragraphs shall be determined with respect to the time the loan last became non performing. In addition, by **section 44A (6)** it is provided:

> ***"This seciton shall apply with respect to loans made before this section comes into operation, including loans that have become non performing before this section comes into operation."***

That is to say that the provision applies to loans and has retrospective effect.

It was alleged in the amended plaint that by the time the suit was filed in January, 2010 a sum in excess of Shs.8,300,000 had been paid by the 1st respondent to the appellant. This was not denied by the appellant and its witness actually confirmed that a sum of Shs.18,000,000 had been recovered from the 1st respondent. The rationale for the "in duplum" rule was explained by this Court in the recent case of **Mwambeja Ranching Company Limited and Another v Kenya National Capital Corporation [2019] eKLR** as follows:

> ***"The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides."***

Section 44A has retrospective effect and this was explained by this Court in the case of **James Muniu Mucheru v National Bank of Kenya Limited Civil Appeal No. 365 of 2017.**

Going by the sums of money the trial judge found to have been recovered by the appellant from the 1st respondent which we have discussed in this judgment the appellant was barred by **section 44A** of the **Banking Act** from proceeding in the manner that it did as by the time it sold the suit property to the 2nd respondent it had recovered a whooping Shs.18,000,000 as confirmed by its witness on the original loan of Shs.3,000,000. The appellant was not entitled to do that. Once the loan became non-performing, if indeed, it did, the appellant should have followed and complied with the provisions of the Banking Act. It failed to do so and by so doing, it acted contrary to law which it was not entitled to do. The grounds of appeal in respect of that issue fail and are dismissed.

The appellant takes as an issue in this appeal that the judge was wrong to grant remedies that according to the appellant were not pleaded. It

is true that a judgment should be based on the pleadings and issues as agreed by the parties. The pleadings before the trial judge and the issues that the parties proceeded on related to the operation of the loan account and the sale of the suit property by the appellant to the 2nd respondent. The trial judge analysed the issues and made the orders that we have set out. The judge found that the 1st respondent's had paid the loan in full and that the appellant was not entitled to the sum of Shs.16,000,000 being the proceeds of sale of the suit property. The judge found that the 2nd respondent had validly purchased the suit property and in the end the judge ordered that the appellant refund to the 1st respondent the proceeds of sale of the suit property which property was sold without any justification.

The issues that the parties proceeded on and which the judge made findings on all arose from the pleadings and the operation of the 1st respondent's account by the appellant. As was held by the predecessor of this Court in the case of **Odd Jobs v Mubea [1970] EA 476**, a court may base its decision on a non-pleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision. The trial court did not err in the way it reached its decision in the matter that was before it. The judge proceeded on the prayers set out in the amended plaint and the findings made were in accord with the pleadings and the issues that arose in the proceedings.

We have considered the whole appeal and cannot find any merit in any of the grounds set out. The appeal is dismissed with costs to the 1st respondent.

Dated and delivered at Nairobi this 3rd Day of April, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR