IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & SICHALE JJ.A)

CIVIL APPEAL NO. 1 OF 2008

BETWEEN

SAMUEL MUNYAO NZIOKA.....APPELLANT

AND

HOUSING FINANCE COMPANY OF KENYA LTD.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Nairobi (Odunga, J.) dated 1st November, 2017) in **H.C. C.C. NO 671 OF 2002**

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JUDGMENT OF THE COURT

The appellant, ***Samuel Munyao Nzioka*** (the then plaintiff) was an employee of the ***Housing Finance Company of Kenya Ltd,*** the respondent herein (the then defendant) when he borrowed a sum of Ksh.595,000.00 and a further sum of Ksh.305,000.00. The two sums were secured by registration of two charges against Nairobi/Block/129/359 Komarock (the charged property). It was the appellant's averment in the plaint dated 25th November 2002 that he had overpaid the sums borrowed by Ksh.377,394.00. In the said plaint, the appellant sought the following

orders:

> "***a. An order compelling the defendant to register a discharge of the charge dated 20.12.1993 and the Further Charge dated 24.11.1994 over land title no. Nairobi/Block 129/359***
>
> ***b. An order compelling the defendant to return to the plaintiff the original title documents in respect of land title no. Nairobi/Block 129/359.***
>
> ***c. An order of injunction perpetually restraining the defendant, its servants, employees and/or agents from exercising the statutory power of sale conferred on the defendant by the Charge dated 20.12.1993 and the Further Charge dated 24.11.1994 over land title No. Nairobi/Block 129/359.***
>
> ***d) An order or restitution compelling the defendant to refund to the plaintiff Ksh.375, 394.60.***
>
> ***e) Interest on (d) above at commercial rates or at such rates as the court may deem just.***
>
> ***(f) Costs of this suit."***

In a statement of defence dated 20th December 2002, the respondent denied the averment that the appellant had overpaid the sums borrowed. According to the respondent, the appellant's mortgage account had outstanding ***"…arrears of Ksh.57,039.15 against a loan balance of Ksh. 506,092.65 as at 18th November 2002***". The dispute between the two was heard by ***Odunga, J***. who in a judgment dated 1st November 2017 dismissed the appellant's suit thus provoking this appeal. In a memorandum of appeal dated 6th November 2017, the appellant faulted the learned judge for not finding that the mortgage sum was fully repaid; in not finding that the sum of Ksh.208,363.67 being sums erroneously debited from the appellant's account on 25th February 1995 was not refunded; in failing to find that there was no mortgage arrears of Ksh.57,039.15 as at 18th November 2002; in failing to find that the payment of Kshs.1,500,000/- on 26th October 2001 fully repaid the loan owed by the appellant; in failing to find that the respondent was overpaid by the sum of Ksh.375,394.60; that illegal and erroneous penalties

were charged on the appellant's account and finally, that the learned judge failed to consider the appellant's evidence and submissions, thus occasioning a miscarriage of justice.

On 11th December 2018 the appeal came before us for plenary hearing. Learned counsel ***M/s Ogutu*** (holding brief for ***Mr. Achach***) for the appellant urged the appeal. In so doing ***M/s Ogutu*** relied on appellant's written submissions and list of authorities dated 22nd November 2018 and 23rd November 2018 respectively. In the submissions it was contended that ***B. N. Kinyumo*** who testified as PW2 was an expert witness who recalculated the charges on behalf of the appellant and it was on this basis that the appellant concluded that he had fully repaid the loan after the payment of Ksh.1,500,000/-; that the respondent debited the appellant's account with illegal interest rates and in acknowledging this, made a refund of Ksh.208,363.67 on 5th November 1998 and further, that there were other penalty charges and default charges which were non contractual and unconscionable. It was submitted that on account of the illegal charges, the appellant was entitled to a refund of Ksh.375,394.60. In conclusion, we were asked to allow the appeal with costs to the appellant.

In opposing the appeal, ***Mr. Issa*** learned counsel for the respondent relied on the respondent's submissions and list of authorities filed on 7th December 2018.

It was ***Mr. Issa's*** contention that the appellant was advanced a sum of Ksh.595,000/-secured by the charged property; that as the appellant was a member of the respondent's staff, he was given a concessionary interest rate of 5.5 % p.a.; that there was a further loan of Ksh.305,000/- which again had a special concessionary interest rate of 5.5 % p.a.; that vide a letter of 26th February 1998 the appellant was informed that the interest rate had been converted to a commercial rate of interest with effect from 24th January 1997. The respondent asserted that as at 26th October 2001 when the appellant paid Ksh.1,500,000, the outstanding sum was Ksh.1,919,763.23 thus the remaining balance thereof was reduced to Ksh.419,763.23; that the refund of Ksh.268,363.67 to the appellant was on account of misapplication of a commercial rate of interest as opposed to the concessionary interest rate; that PW2 computed the interest for the period from January 1999 to 30th October 2001 and applied, an interest rate of 18% p.a. yet the interest for this period was 18.5 % and further, that in 1998 the applicable interest rate was 26% p.a. Doubt was also cast on the expertise of ***B.N. Kinyumo*** who testified (in the lower court) on behalf of the appellant as PW2.

We have considered the record, the rival oral and written submissions, the authorities cited and the law.

This is a first appeal. In the case of ***Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR*** this Court stated as follows regarding the duty of first appellate court:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of*** *Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212* ***wherein the Court of Appeal held, inter alia, that:-***
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> ***'On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."'***

The undisputed facts of this appeal are that at one time the appellant was an employee of the respondent. Whilst at the respondent's employment, the appellant secured two loans on the security of LR No. Nairobi/Block/129/395. According to the appellant, he fully discharged his indebtedness to the respondent and that he was owed Ksh.375,394.60 by the respondent as an overpayment. In our view, the appellant's position of having cleared his indebtedness is not supported by the evidence. We note that at the time the appellant paid Ksh.1,500.000/- he wrote a letter dated 26th October 2001 to the respondent. He stated:-

> "***Today the 26.10.2001 I have cleared all my arrears and paid part of the capital amount i.e. I made payment of Ksh.1, 500, 000.00, I am now requesting whether you can consider waiving part of the penalties and capitalize the balance so as to minimize the monthly repayments. I trust and hope that my request will be met with your kind consideration."*** *(emphasis ours)*

From the above letter and contrary to the appellant's assertion, the appellant knew that the payment of Ksh, 1,500,000/- did not clear his outstanding loans with the respondent as otherwise there would be no reason to request for waiver of ***"… part of the penalties and capitalize the balance…."***. It is also not in dispute that at one time, the appellant instructed ***Ritho Properties Limited*** to sell the charged property. There is a letter on record dated 29th November 1999 from ***Ritho Properties Limited*** acknowledging the appellant's instructions. Additionally, in his letter dated 16th of May 2000 addressed to the General Manager of the respondent the appellant acknowledges financial '***strain***' that he was going through. The purpose of the letter was to inform the respondent that he had already instructed the auctioneers to sell the property. It cannot therefore be true that on payment of Ksh. 1,500,000.00 the appellant had cleared the sums owed to the respondent and that he had made an overpayment. The learned judge aptly summarized the position as follows:

> ***"Dealing with the first issue whether the Plaintiff paid to the Defendant the entire amount borrowed and secured by the charge and further charge over L.R. No. Nairobi/Block 129/359 dated 20.12.1993 and 24.11.1994 respectively, from the correspondences addressed to the Defendant by the Plaintiff it is clear that for a long time the Plaintiff believed that he was in arrears. He in fact sought waiver of some charges and at one point requested the arrears be capitalized into a loan so as to stop the accrual of interest on arrears. It was only through the recalculation of the interests by PW2 that it dawned on the plaintiff that he had in fact overpaid the loan."***

We too, are of a similar position that the appellant contrary to his assertion had not cleared the sums owed to the respondent.

The other issue raised by the appellant was that the interest charged was illegal and erroneous. To bolster his averred position, the appellant called PW2 ***B. N. Kinyumo*** who computed the figures from 1999 up to October 2001. Firstly, it is doubtful whether PW2 was possessed of the necessary expertise.

The learned judge summed up PW2's position as follows:-

> ***"In this case, PW2, Benjamin Mbithi Kinyumo, testified that he was engaged in some consultancy in bank financing and was a holder of Bachelor of Commerce (Accounting Option) degree. He was also a part time teacher at the School of Monetary Studies and had a firm. In his evidence it is clear that the witness did not base his evidence on the transactions that took place from the inception of the loan in 1993. Rather, his report covered two years from 1999 to 2001. He was not even aware how long the statements had been running.***
>
> ***Apart from that his report was only based on the bank statements and the correspondences from the bank. He admitted that he never perused the charge document and the letter of offer which he admitted were the primary documents governing a mortgage facility and constituted the contract between the borrower and the bank and that there was a need to read the charge and the letter of offer. He readily conceded that if the charge documents provided different rates of interests his opinion would have been different and that he did not consult the defendant. The witness however admitted that the plaintiff informed him he was in arrears. He however insisted that he had prepared reports for other banks without the benefit of the charge document because in his view it was not critical.***
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> ***That the terms of a mortgage are contained in the letter of offer and the charge document is not in doubt. In fact it is these documents that form the contract between the parties and apart from them, no other terms save for those implied by the law can be incorporated in the contract".***

But even assuming PW2 was an expert, he conceded that his report was prepared without reference to the charged document. There was further concession that PW2 worked on an interest rate of 18% p.a. which was not the applicable interest rate.

Further the judge stated:

> "***In this case it was contended that the contract provided for variation of the rate of interests to commercial rates. This interest, according to the Defendant was varied from the staff rate of 5 ½ % to 26%. PW2 however applied the rate of 18% without referring to the charge document or contacting the defendant. No wonder he readily conceded that had be*** (sic) ***had the benefit of reading the contractual documents, his opinion would have been different. It would seem that PW2 simply relied on the information given to him by the Plaintiff but did not conduct his own independent investigation in order to arrive at an independent opinion".***

We too are of the view that the terms of borrowing were specified in the charge document and this is what PW2 ought to have looked at before misadvising the appellant. The parties were bound by the terms of the charge. In ***Husamuddin Gulam hessein Pothiwalla administrator, Trustee and Executor of the Estate of Gulam hussein Ebrahim Pothiwalla vs. Kidogo Basi Housing Corporative Society Limited and 31 Others Civil Appeal No. 330 of 2003*** it was stated:

> ***"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."***

In our view, the judge rightly dismissed PW2's report for not being factual. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs to the appellant.

Dated and delivered at Nairobi this 5th of April, 2019.

W. KARANJA

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

JUDGE OF APPEAL

F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR