



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & M'INOTI, JJA)

CIVIL APPEAL NO. 206 OF 2010

BETWEEN

HOUSING FINANCE COMPANY OF KENYA.....APPELLANT

VERSUS

JOHN SILAS LENANA OLE PULEIY.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Lady Justice J. Khaminwa, J) Dated 16th October, 2009

in

H.C.C.C. No. 144 of 2003)

JUDGMENT OF THE COURT

This is an appeal from the Judgment of the High Court (**Khaminwa, J.**), dated 16th October 2009. The background to the appeal is that the appellant and the respondent executed two charges dated 12th March 1991 for **Kshs. 405,000** and 17th March 1993 for **Kshs. 135,000/=** over **LR No. 4480/220 (Title No. L.R. No. 44851) (the suit property)** registered in the name of the respondent. The respondent allegedly defaulted in the repayment, and on 11th June 1997 the appellant issued a three months statutory notice demanding payment of the sum due and outstanding on the respondent's mortgage account. On 6th December 1999 the appellant instructed **M/s Garam Investments** to sell the suit property by public auction, which it did on 25th January 2002. **Mr. R. H. Kimondiu**, a valuer, had on 10th November 2001 given the open market value of the suit property as **Kshs. 750,000.00** with a reserve price of **Kshs. 600,000.00**.

By a plaint dated 19th March 2003 and amended on the 19th October 2006 the respondent challenged the sale of the suit property contending, *inter alia*, that he diligently and dutifully repaid the loans leaving only a balance of **Kshs. 120,984.57** outstanding as at the 30th September 2002 and that contrary to **section 44** of the **Banking Act** as read with **section 39** of the **Central Bank of Kenya Act, 2000**, the appellant irregularly and unlawfully levied non-contractual penalty charges and interest which clogged his right of redemption, resulting in the auction of the suit property and loss and damage of **Kshs. 5,938,494/60**. He accordingly claimed that amount from the appellant together with general damages for breach of contract, interest and costs.

The appellant filed a defence and counter-claim dated 10th April 2003. It admitted a lender-borrower contractual relationship between the parties as pleaded by the respondent but contended that the respondent defaulted in the loan repayment leading to accumulation of arrears, default penalty charges, and interest by virtue of established custom and usage in the mortgage industry in Kenya. It justified the sale of the suit property as proper and lawful under its statutory power of sale. The respondent duly filed a reply to defence and defence to the counterclaim.

Khaminwa, J. heard the suit with the respondent testifying that he was not in default; that the only amount outstanding was Kshs. 120,984.57, which in his view did not justify exercise of the appellant's power of sale; and that the sale of the suit property for **Kshs 600,000** was irregular, illegal, unlawful and wrongful.

Joseph Kahonge (PW2), a professional valuer testified that the open market value of the suit property in November 2002 was **Kshs. 1,839,286/=**, less 20% discount for forced sale value, while **Wilfred Abongo Onono (PW3)**, an accountant with the **Interest Rates**

Advisory Centre (IRAC), testified that the default penalty charges and interest levied by the appellant on the respondent's mortgage account were in contravention of **sections 44 & 39** of the Banking and Central Bank Acts and without sanction by the Minister for Finance. In his view they were therefore wrongful and illegal.

The appellant's witness, **June Njoroge** (DW1) confirmed the existence of a lender/ borrower relationship between the parties but maintained that the respondent fell into arrears, prompting the appellant to rightfully and lawfully realize the security. The amount realized under the forced sale, she testified, did not clear the respondent's indebtedness to the appellant and hence its counter-claim for the shortfall. She however did not demonstrate how the amount for the shortfall was arrived at.

The trial Judge, after assessing and analyzing the evidence, made findings *inter alia* that, the default penalty charges and interest levied by the appellant were not sanctioned by the Minister for Finance and were contrary to section 44 of the Banking Act as read with section 39 of the Central Bank Act, 2000. She further found that the levies were not supported by any custom and or usage known in the mortgage industry in Kenya as averred by the appellant.

Relying on **Ingari & another v. HFCK [2007] 2KLR 232**, the learned Judge faulted the appellant for irregularly levying default penalty charges interests totaling Kshs. 3,542,505.82 which bloated the respondent's mortgage account, making it impossible to redeem. The Judge also relied on **Kenya Commercial Bank Ltd v. Osebe [1982] KLR 292**, and **Mbuthia v. Jimba Credit Finance Corporation & another [1988] KLR1**, and found the appellant to have breached its statutory duty of care for selling the suit property for Kshs. 600,000/- when it was allegedly owed Kshs. 4,775,503/20 by the respondent.

Turning to the counterclaim, the learned Judge dismissed it upon finding that neither evidence nor law supported it. In the learned judge's view, the contract of lending between the parties terminated when the appellant realized the security and it therefore had no claim against the respondent. On account of the above, the learned Judge allowed the respondent's claim to the tune of **Kshs.5, 938,494/60** with costs and interests.

The appellant was aggrieved and filed this appeal raising eight grounds of appeal, which it subsequently condensed into three. It is the appellant's complaints that the learned Judge erred and misdirected herself in law by:

- (1) granting Judgment for the respondent in the sum of Kshs.5,938,494.60 being the alleged loss suffered by the respondent without strict proof as required by law;**
- (2) relying on the evidence of a person unqualified in law as an expert witness in support of the respondent's case; and**
- (3) considering and determining issues not framed, determined or agreed upon by the parties.**

The appeal was canvassed by way of written submission, with **Ms. Muthoni Mugo**, learned counsel for the appellant, adopting her submissions without highlighting, whilst **Ms. Mary Kinyanjui**, learned counsel for the respondent elected to highlight her written submissions.

In support of the appeal the appellant relied on **Hahn v. Singh [1988] KLR 716** and submitted that the learned Judge erred by finding that the respondent's valuation was carried out on 30th September 2002 whilst the report showed that it was carried out in December 2002. Secondly, the appellant faulted the learned judge for considering the market value of the suit property without regard to the forced sale value and for relying on 20% discount as the forced sale value, without any basis or justification. Lastly the appellant faulted the learned judge for relying on the respondent's valuation report which was conducted eleven months after the public auction.

The appellant cited **Nancy Kahoya Amadiwa v. Expert Credit Ltd & another [2015] eKLR**, and submitted that it had discharged its statutory duty as a mortgagee because it had acted in good faith when it realized the security and had valued the suit property before the public auctioned. The appellant further faulted that the learned judge for awarding professional charges to PW2 and PW3 in the absence of supportive evidence in the form of receipts.

Relying on **Mbuthia v. Jumba Credit Finance Corporation & another** (supra); **Pop in Kenya Ltd & Others v. Habib Bank A.G. Zurich [2016] eKLR** and **Ashcroft v. Curtin [1971] 3 ALL ER 1208**, the appellant submitted that the learned judge further fell into error by gratuitously allowing the sum of Kshs. 3,542,505.00 tabulated by PW3 as the unlawful default penalty charges or interest allegedly levied by the appellant against the respondent's mortgage account, without any critical inquiry as to its accuracy. The learned judge was also faulted for disregarding evidence that the respondent's mortgage account was in arrears when appellant exercised its statutory power of sale; for disavowing the appellant's contractual right to sue for the recovery of the Kshs. 4,775,503.60, the subject of the counterclaim, once the realized security failed to satisfy the amounts in arrears and for holding, contrary to the law, that the contract of lending terminated when the security was realized.

On expert opinion, the appellant relied on **Gatheru s/o Njagwara v. R. [1954] EA139**; **Kenya Commercial Bank Ltd v. Rupa (K) Ltd & 2 others [2014] eKLR**; **Dhalay v. Republic [1995-1998] IEA29**; and **Elizabeth Kameme Ndolo v. George Matata Ndolo [1996] eKLR**, and faulted the learned judge for treating PW3's evidence of an expert, when it was evident that PW3 was no expert witness.

Lastly, the appellant relied on **Kukal Properties Development Ltd v. Maloo & others [1996-1994] EA 281**; **Chandaria v. Njeri [1982] KLR 65**; and **Captain Harry Gandy v. Gaspar Air Charters Ltd [1956] EA 139** and submitted that the learned judge erred by addressing and deciding on extraneous the matters.

Opposing the appeal, **Ms. Kinyanjui** relied on **Zum Zum Investments Ltd v. Habib Bank Ltd [2014] eKLR** and **Mbuthia v. Jimba Credit Finance Corporation & another** (supra) and submitted that the special claim of Kshs. 5,938,494.60 allowed by the trial Court was

not only specifically pleaded in the amended plaint but was also specially proved by the respondent and PW2 as well as PW3's uncontroverted evidence that the respondent's mortgage account was loaded with irregular, illegal and unlawful default penalty charges and interest levies. Counsel further submitted that the respondent had sufficiently pleaded in the amended plaint that the auction was irregular, unlawful, oppressive and calculated to clog his right of redemption; that the learned judge properly rejected the counter-claim because all the appellant did was simply to plead a figure without adducing evidence of how it was arrived at.

On the issues that the learned judge determined, counsel urged that the learned judge properly appreciated, condensed and identified all the crucial issues for determination and did not introduce or determine any unpleaded issues. On the evidence of PW3, it was submitted, on the authority of **Nancy Kahoya Amadiwa v. Expert Credit Ltd & another** (supra), that the trial judge properly analyzed the evidence of that witness and correctly concluded that the default penalty charges or interest levied on the respondent's mortgage account were irregular, illegal, unlawful and wrongful and not supported by any established custom or usage in the mortgage industry in Kenya. Accordingly, it was urged, the respondent was entitled to refund of such penalty charges/interest which he had paid.

This is a first appeal and our jurisdiction as set out in **Rule 29(1)** of this Court's Rules is to re-appraise the evidence and come to our own independent conclusions. (See **Selle & Another v. Associated Motor Boat Co. Ltd. & Others [1968] EA 123**).

However, we shall not interfere with the decision of the trial judge, who had the advantage of seeing and hearing the witnesses, unless we are satisfied that she misdirected herself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that she was clearly wrong and therefore occasioned injustice.

On the first ground of appeal, the existence of a lender/borrower relationship between the parties in this appeal is not contested. As stated in **National Bank of Kenya Ltd v. Pipe Plastic Samkolit (K) Ltd & another [2011] eKLR**, and **Pius Kimaiyo Langat v. Co-operative Bank of Kenya Ltd [2017] eKLR**, parties are bound by the terms of the contract willingly and voluntarily entered into. Secondly it is not the business of the courts to rewrite contracts between parties and lastly, in the absence of pleaded and proved coercions, fraud, or undue influence, parties are bound by the terms of their contracts.

The respondent agreed to meet the repayment installments as and when they fell due, inclusive of the interest accrued and lawfully levied, and in default allowed the appellant to realize the security within the terms of the charge and the law. (See of **Kenya Commercial Bank Ltd v. Osebe** (supra) and **Mbuthia v. Jimba Credit Finance Corporation & another** (supra)). The contractual rate of interest as provided for in the two charges was 18% & 19% respectively. The respondent's contention is that the appellant levied irregular, illegal, unlawful and wrongful default penalty charges/ or interest without the sanction of the Minister for Finance under **section 44** of the Banking

Act as read with **section 39** of the Central Bank Act. The appellant does not deny that the levied default penalty charges or interest were not provided for in the two charges. Neither does it dispute that these were indeed levied. The explanation it gave and which the trial judge rejected was that the default penalty charges or interest were levied pursuant to custom and usage in the mortgage industry in Kenya.

The appellant did not adduce any evidence of established custom and usage supporting the charging of default penalty charges or interest, which the respondent was charged. We seriously doubt whether such custom and usage, even if proved, could prevail over the express provisions of the law. In any case, the appellant did not contest the finding by the learned judge that the default penalty charges or interests were levied without the sanction of the Minister for Finance under section 44 of the Banking Act as read with section 39 of the Banking Central Bank Act. Accordingly, we cannot fault the learned judge for holding that the appellant irregularly, illegally, unlawfully and wrongfully levied default penalty charges or interest on the respondent's mortgage account and that the exercise of the statutory power of sale was, in the circumstances, unjustified.

It is not disputed that the respondent engaged the services of IRAC to identify the irregular, illegal unlawful and wrongful default penalty charges or interest loaded in his mortgage account, as a result of which PW3 prepared a report which was produced as an exhibit. The appellant relied on **Kenya Commercial Bank Ltd v. Rupa (K) Ltd & others** (supra), in which a report prepared by IRAC was rejected. It contends that PW3 and IRAC were not experts in the filed.

In the Kenya Commercial Bank case the IRAC report was rejected because the letter of offer allowed the bank to vary the interest chargeable from time to time. In addition IRAC admitted that it did not consult the Bank in the preparation of the report and further there was insufficient data on the basis of which the court could have made a holistic impression of what IRAC had been tasked to do. In the present appeal, there was a valid lender/borrower contract which did not allow for arbitrary variation of the interest rates or penalties and the documents upon which IRAC's opinion was based were not challenged so that the issue of lack of sufficient data for purposes of carrying out a holistic analysis did not arise. PW3 gave evidence with regard to his and IRACs' expertise, which was not controverted by either DW1 or any other expert witness called by the appellant.

The principle of law set out in **Gatheru s/o Njagwara v R** (supra) and **Dhalay v. Republic [1995-1998] 1EA 29**, among other decisions, is that expert opinion is not binding on the court and that a court of law can make its findings based on such opinion evidences if it is satisfied that it is sound and gives reasons. The learned judge accepted PW3's evidence as expert opinion and rejected the appellant's unproven assertion that the default penalty charges or interest that it had levied against the respondent were based usage and custom in the mortgage industry. There are justifiable reasons why the learned judge accepted the evidence of PW3 and we have no basis for interfering with her decision in that regard.

Turning to the complaint that the trial court determined the dispute on extraneous factors as opposed to agreed issues, the position in law as articulated in **Captain Harry Gandy v. Caspar Air Charters Ltd** (supra) and other decisions is that parties are bound by their pleadings and that a court of law cannot base its decision on unpleaded grounds. In this appeal, the learned judge identified the real issues in dispute on which the judgment turned, and did not introduce any new unpleaded issues.

As regards strict proof of the respondent's claim, we again cannot fault the learned judge because of her finding that the appellant had

illegally, irregularly and wrongfully levied default penalty charges or interest on the respondent's account which clogged his right of redemption, and entitled him to claim compensation.

Turning to the nature of the respondent's claim, it is evident that it is a claim for special damages. Such a claim must be specially pleaded and particularized and strictly proved. (See **Viran, t/a Kisumu Beach v. Phoenix of East Africa Assurance Co. Ltd [2004] 2KLR 269**). We are satisfied that in the amended plaint, the respondent pleaded his claim with sufficient particularity to put the appellant on notice as to the nature of the evidence they needed to put forth to meet the respondent's claim on each item.

On proof of the respondent's claim, while is true as stated in **Pop In Kenya Ltd Rajnikant Khetshi Shah, Hasmukh Devchand Sumaria & Ratilal Khetshi Shah v. Habid Bank A.G. Zurich** (supra) that a plaintiff cannot pluck figures from the air and throw them before the court as proof of the special damages claimed, this is not the case in this appeal. The respondent tendered in evidence a valuation report of the suit property by PW2 carried out eleven (11) months after the sale. PW2 gave the market value at the date of the auction as Kshs. 1,839,286.00 less twenty (20%) percent discount, to cater for the forced sale value which works out as Kshs. 367,857/20, leaving a balance of Kshs. 1,475,428.80 as the value of the suit propriety as at the time the appellant exercised its statutory power of sale. When challenged about the change in the value from the date of auction to the date of his valuation, PW2's evidence was that carrying out his valuation 11 months after the sale was inconsequential to the determination of the correct value of the suit property as at the time it was sold. It is not disputed that the appellant's valuation quoting a much lower figure was carried out before the auction but the appellant did not call its own valuer to establish basis for the value he had assigned the suit property.

As regards the different dates of valuation of the suit property, PW2 explained when he carried out the valuation, which the learned judge accepted. In the absence of any evidence to the contrary, the only reasonable conclusion attributable to the variance in the two dates is that, this was a typographical error, which did not go to the root of PW2's evidence.

The Judge however, failed to factor in the 20% discount for forced sale in the value of the suit property that she accepted. That is a curable error which also did not go to the root of the case. This would work out as Kshs. 1,471,248.80 less Kshs. 120,984.57, the amount found as due and owing from the respondent to the appellant as at the time the suit property was wrongfully auctioned, leaving a balance of Kshs. 1,350,264.23 as the amount due for compensation to the respondent for the loss of the suit property.

Turning to the amounts allowed by the learned judge for professional services rendered to the respondent by PW2 (Kshs. 20,000) by PW3 and IRAC (Kshs. 473,821.40), the evidence tendered both in chief and cross-examination by PW2 and PW3 supported by the respondent was that the services rendered were not *pro bono* and that the amounts claimed as the value of the services rendered to the respondent by them were within the normal range for fees usually charged for similar services. The trial judge found that testimony believable which in our view, we cannot disagree with. (See **Kampala City Council v. Nakaya [1972] EA 44**).

As for the amount allowed under the item on other charges, this figure was worked out by PW3 in IRACs report totaling Kshs. 3,542,505.82, which the trial Judge allowed. The appellant has invited us to fault the Judge for allowing this item considering that it was gratuitously allowed, contrary to the principles on special damages claim. PW3's uncontroverted testimony was that the above figure was included in the amount that the respondent paid to the appellant which he ought not to have paid had his mortgage account not been bloated with irregular, illegal, unlawful and wrongful default penalty charges or interest levies. Since the amount ought not to have formed part of what the respondent paid to the appellant in satisfaction of his indebtedness, the learned judge cannot be faulted for allowing the same.

Turning to the counterclaim, all that the trial judge was confronted with both in the appellant's pleading and evidence was a figure of Kshs. 4,775,503.20 with no explanation of how it was arrived at. It is only in the written submission in this appeal that the appellant has attempted to justify the figure. That exercise should have been undertaken before the trial court. We accordingly have no basis for interfering with the decision of the learned judge in that respect. The learned judge however, misdirected herself in holding that upon realization of the security, the lensing contract came to an end and that the appellant could not recover any shortfall from the respondent. That misdirection however does not affect the fact that the appellant did not prove its counter-claimed as required in law.

The upshot of all the above is that the appeal only succeeds to the extent that, the trial Judge should have factored the 20% discount in the amount allowed as compensation for the loss of the value of the suit property as at the time it was wrongfully realized as security by the appellant as set out above. For purposes of clarity, the respondent's claim affirmed against the appellant is as follows:

(i) Compensation for loss of the suit property Kshs. 1,350,264.23.

(ii) Professional fees in connection with reconciliation of the respondent's mortgage account payable to the interests rates Advisory Centre (IRAC) - Kshs. 473,831.40.

(iii) Professional fees for valuers Kshs. 20,000.00.

(iv) Other charges Kshs. 3,542,505.82.

Total= 5,386,601.45 with interest as awarded by the High Court.

The factoring of 20% on the value of the suit property as at the time it was wrongfully realized as security has an insignificant impact on the ultimate result of the appeal. We therefore find no reason to disturb the order on costs.

Dated and Delivered at Nairobi this 19th day of July, 2019.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR.