IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 31 OF 2016

BETWEEN

HOUSING FINANCE COMPANY OF KENYA.....APPELLANT

AND

SHAROK KHER MOHAMED ALI HIRJI.....1ST RESPONDENT

WATTS ENTERPRISES LIMITED.....2ND RESPONDENT

(An Appeal against the Judgment and Decree of the High Court of Kenya at

Nairobi (Khaminwa, J.) dated 29th November, 2010 in HCCC No. 223 of 2006)

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As consolidated with

CIVIL APPEAL NO. 32 OF 2016

BETWEEN

HOUSING FINANCE COMPANY OF KENYA.....APPELLANT

AND

SHAROK KHER MOHAMED ALI HIRJI.....1ST RESPONDENT

WATTS ENTERPRISES LIMITED.....2ND RESPONDENT

(An Appeal against the Ruling and Decree of the High Court of Kenya

at Nairobi (Gikonyo, J.) dated 3rd June, 2015 in HCCC No. 223 of 2006)

JUDGMENT OF KANTAI, JA

There are two appeals, Civil Appeal No. 31 of 2016 and Civil Appeal No. 32 of 2016 which we ordered consolidated because they both arise from the judgment and orders of the High Court given in HCCC No. 223 of 2006. Civil Appeal No. 31 of 2016 is by Housing Finance Company of Kenya as appellant against Sharok Kher Mohamed Ali Hirji as 1st respondent and Watts Enterprises Limited as 2nd respondent. This is an appeal from the judgment of High Court delivered on 29th November, 2010. Housing Finance Company of Kenya is also the appellant in Civil Appeal No. 32 of 2016. The appeal is against the same respondents and arises from the ruling of the High Court delivered on 3rd June, 2015 in the same suit.

The relationship between the appellant, Housing Finance Company of Kenya and the 1st respondent's husband, **Firoz Nurali Hirji** was that of banker and customer. The 2nd respondent Watts Enterprises Limited was a peripheral party in the suit at the High Court and also in this

appeal being the agent appointed by the appellant to sell a property charged to secure a loan. The property **L.R. No. 7785/310 (“the suit property”)** situated within Runda Estate in Nairobi was registered in the name of the 1st respondent’s husband Firoz Nurali Hirji who donated a Special Power of Attorney to the 1st respondent dated 24th February, 2003 registered on 17th March, 2003 at the Land Titles Registry as **P/A No. 37723/1**. The power donated allowed the 1st respondent to, amongst other things, commence any action or any other proceeding in any court in relation to the suit property and to do all things in relation to the suit property.

The said Firoz Nurali Hirji (hereafter **“the chargor”**) approached the appellant in or about May, 1997 and applied for a loan which was granted in the sum of Kshs. 600,000 and was secured through a charge created against the said suit property. Certain installment payments were made by the chargor on the loan but it appears that there were outstanding arrears which disturbed the relationship of banker - customer of the appellant and the chargor/1st respondent. A statutory notice to exercise statutory power of sale was served on the chargor but negotiations then followed and the suit property was not sold as per the statutory notice or the first advertisement.

In the plaint filed by the 1st respondent at the High Court of Kenya at Nairobi, those facts I have related were stated and it was further alleged that on about 15th December, 1999 the appellant called for a fresh repayment proposal from the said chargor but that the appellant did not act on or respond to the proposal made. It was further stated that on 19th January, 2000 the appellant instructed the 2nd respondent to advertise the suit property for sale by public auction on 17th January, 2000. It was further stated that the loan advanced by the said appellant was for 15 years and that as at 17th January, 2000 the chargor had paid in excess of the amount advanced and was ready and willing to complete paying any amount found to be due or owing. Further, that despite this, the 2nd respondent sold the suit property on 17th January, 2000 for Kshs. 6,050,000 when according to the 1st respondent the property was worth in excess of Kshs. 20,000,000. It was further stated that after service of the first statutory notice of sale the appellant had continued to accept repayments on the loan and that the chargor was made to believe that the appellant was always ready and willing to accept payment. It was therefore said that the sale of the suit property was unlawful null and void because the appellant did not serve a proper statutory notice of its intention to exercise its statutory power of sale; that the appellant by reason of accepting repayments and requesting for proposals on the repayment of the loan after the issue of statutory notice was estopped by conduct from exercising its statutory power of sale without issuing a fresh statutory notice to the chargor; that the advertisement of sale of the property on 17th January, 2000 and the sale by the 2nd respondent on 17th or 19th January, 2000 was an apparent fraud on the part of the appellant and the 2nd respondent; that the advertisement notice was incurably defective; that the appellant and the 2nd respondent did not comply with requirements of law in the conduct of the sale thus rendering the sale illegal and unlawful; that the sale at an undervalue was in bad faith and in breach of the duty owed to the 1st respondent by the appellant and the 2nd respondent and finally, that the exercise of the appellant’s statutory power of sale was capricious, dishonest and was not executed in good faith as the law required.

It was further averred in the plaint (which was twice amended) that the exercise of the appellant’s purported statutory power of sale constituted an improper conduct amounting to fraud in law; that no valid statutory notice was served; that the advertisement of the sale of the suit property was for the 19th January, 2000 yet the 2nd respondent sold the suit property by public auction on 17th January, 2000; that the property was sold at an undervaluation of Kshs.6,050,00 when according to the 1st respondent, the property was worth Kshs. 20,000,000 and the appellant and the 2nd respondent had failed and/or refused to render accurate up to date accounts on the loan.

The 1st respondent further stated in the plaint that the interest charged by the appellant on the loan amount was unconscionable and prejudicial and contrary to the terms of the agreement between the appellant and the chargor. It was further alleged that an amount of Kshs.434,226.54 being interest due to the 1st respondent was wrongfully and unlawfully retained by the appellant on 13th May, 2003 and the 1st respondent claimed that sum with interest. It was therefore stated in conclusion that the chargor had suffered loss and damages due to the irregular and illegal sale of his property and for all that the chargor claimed special and general damages and interest thereon.

The prayers in the Re-Amended Plaint were: a declaration that the sale of land parcel known as L. R. No. 7785/310 by public auction was unlawful and thus null and void; General damages, Special damages in the sum of Kshs. 20,000; Kshs.434,266.54: In the alternative a valuation of the property to ascertain its value at the material time. There was a prayer for interest on monetary claims at 26% per annum from 17th January, 2000 or such a date as the court may determine till payment in full.

The appellant and the 2nd respondent filed defences which were amended as the plaint was. The defences took similar positions; it was denied that the 1st respondent had any standing to bring the suit as the power of attorney was challenged; that it was a term of the charge contract that the borrower could repay the agreed advance with interest thereon and that notwithstanding that interest or installments may have been paid the remainder on the principal continued to be due for all purposes for the exercise of statutory power of sale. It was further said in the defence that even if money was paid by the chargor it was received without prejudice to the appellant’s rights. It was averred that a statutory notice served was valid; that estopell could not override express provisions of the law; that the indulgence granted was without prejudice to the statutory power of sale; that the sale conducted was lawful and was reasonable considering that it was a forced sale; that the sale was conducted with all *bona fides* and in good faith and that the sale was above board.

It was averred that the appellant had charged a further sum on the chargor’s mortgage account and that it had done so due to an omission on the part of the 1st respondent in failing to pay or service the loan as agreed and the appellant charged extra charges in order to mitigate its position in light of the 1st respondent’s breach of the contract; that it was a term of the contract that the appellant could charge an extra sum in order to mitigate the situation brought about by the 1st respondent’s omission; that it was a term of the contract that in order to give business efficacy, the appellant could charge an extra sum once the 1st respondent defaulted in repaying the monthly installments; that it was part of a well established and old trade custom and usage of the mortgage industry in Kenya that once a chargor defaults in the repayment of the monthly installments, the chargee is at liberty to charge an extra sum in addition to the terms expressly provided for in the contract and that it was implied in law that the appellant could charge an extra sum as it did once the chargor had defaulted in monthly installments. The appellant and the 2nd respondent stated in the defences that a cheque for Kshs.5,079,149.45 dated 21st May, 2003 was forwarded to the 1st respondent as excess of the proceeds of the sale after deduction of the incidental costs and redemption of the debt. It was also said that the suit as framed was defective and should be struck out.

The suit was heard by Khaminwa, J., who took evidence of witnesses. The 1st respondent testified in person to the effect that the owner of the suit property was her former husband who had donated the Power of Attorney to her. She testified that the suit premises comprised the matrimonial home and that her husband had taken a loan of Kshs.600,000 from the appellant on the security of the suit property. She

produced into evidence various documents including bank statements issued to the chargor by the appellant. She came to know that the suit property had been sold on 17th January, 2000 and that at the time of sale there was rent receivable through a tenant occupying the suit property who was the Director General of Amref. When she learnt of the sale of the suit property she and her husband were shocked and surprised and this led to husband suffering a stroke. She visited the appellant's offices and followed up the matter through her lawyer and established that indeed the suit property had been sold. She also produced correspondence between her husband and the appellant showing proposals made on repaying the loan. There was correspondence produced to the effect that the tenant who occupied the premises had offered to buy the suit property at Kshs 12,000,000. She produced an advertisement in The Standard Newspaper showing that the property would be sold on 19th January, 2000 but that the sale took place on 17th January, 2000. She wondered why there was no reserve price indicated on the sale and, according to her, the suit property was worth Kshs. 20,000,000 while it was sold for Kshs. 6,050,000. She and her husband used to collect monthly rent at Kshs. 150,000. According to her, the charge document mandated the appellant to appoint a manager to collect the income from the suit property in case of default but the appellant had not appointed such a manager but had sold the suit property instead. She testified further that the appellant retained a sum of Kshs.434,226.54 which the appellant was not entitled to retain and the sum had not been returned to them. The witness appointed a valuer in the year 2003 who inspected and valued the suit property at Kshs. 20,000,000. The suit property was at the auction sold to and later transferred to Benson Ochieng Obolla on 4th May, 2000 for Kshs. 6,050,000 but it was transferred 5 months later to the tenant who occupied the suit property and who used to pay rent to the 1st respondent. The witness asked for the sale by public auction to be declared unlawful; damages at Kshs. 20,000,000 and a refund of the retained sum of Kshs.434,226.54. She also asked for costs and interest at 26%. In cross-examination the 1st respondent denied an address shown to her to which statutory notice was said to have been sent. She denied receiving any statutory notice served on her or her husband, the chargor.

Gordon Odhiambo Nyabande, a consultant valuer with Vineyard Valuers M. Limited was called as a witness for the 1st respondent and as he testified that upon instructions from the 1st respondent he carried out a valuation of the suit property and prepared a valuation report dated 23rd May, 2003. The market value of the suit property according to that valuation was Kshs. 20,000,000. He stated that the value would have been the same up to the last quarter of the year 2002. In cross-examination the witness testified that he had visited City Hall and perused Approved Plans of the suit property which enabled him to compile his report.

Wilfred Amulanda Onono was also called by the 1strespondent and said that he was a consultant with Interest Rates Centre. He had been engaged by the 1st respondent to carry out an audit of the loan advanced to the appellant to the chargor and the payments made in respect of the loan. He gave various figures for the duration of the loan period.

The appellant called Mr. Kamau Kania, an Advocate of the High Court of Kenya and Manager in-Charge of Legal Services of the appellant. He stated amongst other things that monthly payments were Kshs.7,938; that interest was at 13½% per month which could be altered by the appellant after giving a notice to the chargor to change interest payable. Further, that under the Registration of Titles Act (now repealed), if there was 3 months default in payment of principal or interest, a statutory notice could be served; that the chargor was given indulgence by the appellant to service the loan; that there was default; that there were unpaid cheques, and that interest payable had increased to 26%. According to the witness, a statutory notice had been served on the chargor when the loan balance was Kshs. 231,738.45 and interest at Kshs. 683,387.90. According to him there were various statutory notices served upon the charger and a 45 days' notice as required had been served through registered post. He admitted that the address to which notices were served upon the chargor differed from the address on record. He testified that the public auction took place on 17th January, 2000 when the suit property was sold to the highest bidder who paid 25% of bid price as required and the balance was paid later. According to him the appellant was entitled to recover all costs and disbursements and expenses incurred including auctioneers' charges and advocates' fees. According to him there were 3 valuations giving the open market value of the suit property at Kshs. 8,000,000. He denied that the sale was unlawful and testified that the property was eventually transferred to a person who was a tenant of the suit property when it was owned by the charger. The transaction was financed by the appellant. According to him the sum of Kshs. 434.266.54 was retained as possible costs of a suit that was then pending between the parties. He denied the evidence of the witness called by the 1st respondent stating that interest charged by the appellant was regulated in law.

On cross-examination Mr. Kania admitted that he had not produced any Certificate of Posting to confirm that notices had property been served on the chargor and further admitted that at the time of sale, the balance in the appellant's books was Kshs. 609,521 on the loan and arrears of Kshs. 372,558.28 while the rent collectable was Kshs. 150,000 per month.

The appellant also called Mr. Macharia, an auctioneer, who conducted the sale by public auction. According to him the suit property was advertised for sale on 5th January, 2000 and again on 17th January, 2000. There was a reserve price of Kshs. 6million and the suit property was sold on 19th January, 2000. In cross examination the witness was not able to produce a Certificate of Posting to confirm service of auctioneers' notice as required in law. He admitted that there was some confusion on the proper address of the chargor. Shown a letter by his firm Watts Enterprises Limited (the 2nd respondent) addressed to a law firm acting for the 1st respondent where it was stated that the sale of the suit property by public auction took place on 17thJanuary, 2000, the witness denied that date stating that the sale took place on 19th January, 2000.

Peter Kitaka Kimeu was also called by the appellant as a witness. He was a valuer then working for the appellant. He had not prepared any valuation report but according to him the suit property was valued at Kshs. 8,000,000 not Kshs. 20,000,000 as stated by the 1st respondent's witness valuation report.

Michael Munyele, the Mortgage Manager of the appellant, denied that the suit property was worth 20,000,000. He admitted that he had not prepared any report to contradict the report prepared by the valuer appointed by the 1st respondent.

Mr. Kimeu who had testified earlier was recalled and he gave the value of the suit property at Kshs. 8,000,000 without producing any report to support this evidence. He said that there had not been a reserve price and the property had been offered to the open market on a willing buyer willing seller basis.

That was the totality of the evidence that was called by the two principal parties before the trial judge.

In the judgment delivered by Khaminwa, J., on 29th November, 2010 the Judge found for the 1st respondent and entered judgment as follows:

"1. Declaration that the sale of land parcel known as L.R. No. 7785/310 by public auction was unlawful and thus invalid, null and void.

2. Damages Shs. 20,000,000.

3. Shs. 434,226.54.

4. Costs are awarded to the Plaintiff payable by the Defendant.

5. All awards of money shall carry interest at the rate of 26% per annum from 19/1/2000 until the day the amount shall be fully paid".

Those are the orders that provoked Civil Appeal No. 31 of 2016 where in the memorandum of appeal drawn by M/s Muriu Mungai Advocates for the appellant, 14 grounds of appeal are set out. It is stated in the first ground of appeal that the learned Judge erred in law and fact by first proceeding to nullify the sale of the suit property to a party not enjoined to the suit and consequently proceeding to award the respondent damages of Kshs. 20,000,000 for loss of the suit property. In other grounds the judge is faulted for failing to appreciate that the appellant had upon sale of the suit property credited the 1st respondent's account with over Kshs. 5,000,000 being the excess of the proceeds. The Judge is faulted for failing to appreciate that the power of attorney had not been registered against the suit property; for failing to appreciate that the extra charges imposed on the respondent's account constituted implied terms which are customary in the mortgage industry and which took effect immediately the express terms of the mortgage were breached; that the chargor had been in constant default in servicing the mortgage account and had been accommodated by the appellant on several occasions after acknowledging indebtness; that the Judge failed to appreciate that the 1st respondent had failed to specifically prove special damages though pleaded in the plaint; that the Judge erred in relying on a valuation report to award damages; that the Judge erred in law and fact by failing to appreciate that the suit property had been sold to a third party who should have been enjoined into the suit as a necessary party; that the Judge erred in law and fact in holding that the appellant's exercise of its statutory right of sale was unlawful when in fact the 1st respondent was in constant arrears; that in the event of improper exercise of power of sale the Judge should have found that the aggrieved party's redress lay in damages. In the penultimate ground it is said that the Judge erred in law and fact in failing to deliver judgment within the period required in law and, finally, that the Judge erred in law and fact by totally failing to appreciate the appellant's respective contentions and arguments. It is therefore proposed that we allow the appeal and set aside the judgment of the High Court and award costs of the appeal to the appellant.

For good continuity let me examine the case in Civil Appeal No. 32 of 2016. As we have seen the learned Judge of the High Court gave judgment for the 1st respondent on 29th November, 2010. Various applications followed entry of that judgment. I shall not visit those applications but shall confine myself to the matters leading to a ruling of Gikonyo, J., made on 3rd June, 2015. The applications leading to that ruling are not on record but the substance of them can be discerned from the ruling itself. There was an application dated 15th October, 2014 filed by the appellant where orders sought were to stay execution of orders of Gikonyo, J. made on 13th October, 2014; that those orders be reviewed and set aside and costs be provided for. Gikonyo, J. considered that application and in a ruling delivered on 30th January, 2015 the Judge found no merit in the application and dismissed it, stating further:

"…for the avoidance of doubt, the respondent is at liberty to execute the decree herein which is drawn in accordance with the law. The registry is accordingly directed. It is so ordered…"

It would appear that the Judge was then moved to declare whether the sums awarded by Khaminwa, J., in the judgment of 29th November, 2010 should attract simple interest or compound interest. The judge considered various applications made before him and held in favour of the 1st respondent as follows in the ruling delivered on 3rd June, 2015:

"The plaintiff has shown that the circumstances at hand warrant for the award of interest herein to be computed on the basis of compound interest. I hereby order that the interest on the principal sum shall be calculated at 26% per annum on the basis of compound interest from 19th January 2000 until the day the amount shall be fully paid. It is so ordered".

Those orders provoked the said appeal drawn by the law firm M/S Muriu Mungai & Company Advocates for the appellants where 9 grounds of appeal are set out. The judge is faulted for what the appellant thinks is a re-opening of the judgment of Khaminwa, J., without any formal application for review; the Judge is faulted for failing to appreciate that after the judgment was delivered by Khaminwa, J., the court became *functus officio* and had no jurisdiction to re-open the matter; it is also said that there were no sufficient grounds for review; that the issue of compound interest was decided without being pleaded or being raised at the hearing; that the Judge erred in law and fact by failing to appreciate that in the pleadings the 1st respondent had sought for 26% interest which was construed to be simple interest; that the Judge erred in law and fact by awarding the 1st respondent compound interest yet there was no evidence that the 1st respondent would trade with the said amount; that the Judge erred in awarding compound interest which amounted to unjust enrichment to the 1st respondent; that the Judge erred in law and fact for failing to appreciate that the essence for an award of damages is compensation not punishment to the other side, and, finally, that the Judge erred in law and fact in conferring itself jurisdiction.

As I have already stated, when the appeal came up for hearing we noted that there was an order made earlier for consolidation of the two appeals.

Mr. D. K. Musyoka, advocate, appeared for the appellant in both appeals while Mr. Taib Ali Taib appeared for the 1st respondent in both appeals. There was no appearance for the 2nd respondent who as I have observed was not a primary party to the dispute between the two principal parties. Both the appellant and the 1strespondent in the appeals had filed written submissions which I have perused. In a highlight, Mr. Musyoka informed us that he would urge ground 2 only and abandon all the other grounds in Civil Appeal No. 31 of 2016 and that, in respect of Civil Appeal No. 32 of 2016 he was only urging the ground on award of compound interest.

What is the essence of ground 2 in the memorandum of appeal in Civil Appeal No. 31 of 2016? It is said:

"The learned Judge erred in law and fact to appreciate that the Appellant upon the sale of the house had credited the Respondent's account with over 5 million being the excess of the proceeds".

According to Mr. Musyoka, after the subject property was sold, the appellant made a credit to the 1st respondent's account which the Judge had failed to notice or take account of in awarding damages. Counsel referred to the Re-Amended Plaint at page 33 of the record where the value of the suit property was given at Kshs. 20,000,000 by the 1st respondent which value counsel informed us the appellant was not contesting. According to counsel the suit property was sold at Kshs.6,050,000 and a sum of Kshs 5,097,147 credited to the account of the 1st respondent. According to counsel judgment should have been entered for the 1st respondent for Kshs. 14,920,850 being the value of the suit property less that credit.

In urging Civil Appeal No. 32 of 2016 and in further submissions, it was Mr. Musyoka's case that the judgment was contrary to law because the Judge awarded 26% interest from the date the property was sold. The suit was filed in 2003 while the property was sold in the year 2000. According to counsel there was no pleading of interest prior to the filing of the suit and there was no justification for interest to be awarded prior to the suit. Counsel submitted that interest should have been awarded at 12% from the date the suit was filed. Counsel explained that after judgment had been delivered an issue arose in extracting the decree as it was not known whether interest awarded at 26% was simple interest or compound interest. That is how the matter reached Gikonyo, J., who ruled that interest be compounded. According to counsel no review application was made before Gikonyo, J.; there was no error on the face of the record; the 1st respondent had not prayed for compound interest; Khaminwa, J. did not award compound interest and, finally, counsel submitted that after judgment of Khaminwa, J. the court became *functus officio* and could not reopen the case. In conclusion Mr. Muysoka submitted that it was unjust to award compound interest whose effect was to enrich the plaintiff way beyond the value of the suit property.

In opposing the appeal Mr. Taib referred to the two sets of written submissions and in a highlight submitted that interest withheld being Kshs. 434,226.54 was unlawfully retained by the appellant. According to counsel the suit property was unlawfully sold as no proper procedures required in law were followed before the sale. The 1st respondent was therefore entitled to special and general damages and interest on the same. On the issue of whether simple or compound interest was applicable, it was Mr. Taib's submission that an award of compound interest was not wrong in the circumstances where the sale of the suit property had been found to be wrongful. In further submissions, Mr. Taib reminded us that the appellant did not raise or oppose the issue of award of interest at 26% at the High Court, and further, that had never been an issue of the proceedings. In the event, it was his submission that the issue could not be raised in this appeal. Counsel on the issue of *functus officio* submitted that the parties had proceeded at the High Court on the judgment and sought the interpretation on the issue of interest and *functus officio* could not be an issue in the proceedings. It was therefore his view that the appellant was estopped from raising this issue in this appeal. Counsel supported award of interest as compounded submitting that banks like the appellant compound interest against their customers and should be treated the same when found to have acted wrongly against their customers.

Let me address the first issue raised – whether the appellant had credited the 1st respondent's account with money as alleged by the appellant, and if it had, whether the Judge erred in not recognizing such credit in the judgment.

There is on record (page 121) what appears to be a statement of account prepared by the appellant on the chargor's account. It shows two credits (for purposes of this appeal): a credit made on 29th December, 2000 for Kshs.4,929,149.45 and another credit made on 17th January, 2001 for Kshs.150,000. This must be contrasted with other documents on record as the witness called by the appellant, Mr. Kania, did not explain those credit entries as seen from other correspondence or documents produced as part of the evidence before the trial court.

By a letter dated 4th January, 2001 (at page 130 of the record) addressed to the chargor, the appellant addressed the issue as follows:

"4th January, 2001

Our Ref.: JWN/jn/096033

Firoz Hirji

P O Box 14502

NAIROBI

RE: MORTGAGE ACCOUNT NO. 096033 L.R. NO. 7785/310 NAIROBI

The company is holding some excess funds on your behalf from the auction proceeds of the above property held on 19th January, 2000. You are therefore requested to get in touch with the company with a view to collecting the said funds the soonest possible.

Yours faithfully

J. N. WAMBUA (MRS.)

DEPUTY MANAGER (LEGAL)".

There is also of significance another letter dated 13th May, 2003 by the appellant to the chargor's advocates to the following effect:

"13th May, 2003

Our Ref: JM/Hirji F98115970

M/s Ali & Associates Flat No. A.6, Chemusian Flats NAIROBI

Dear Sirs,

RE: MORTGAGE ACCOUNT NO. HIRJI F98115970

L.R. NO. 7785/310

FIROZ NURAJI HIRJI

We refer to the above matter and to our letter of 11th April, 2003 herein where we advised you that the amount payable to yourselves for onward transmission to the borrower was Kshs.4,929,149.46.

We advise that there was an additional sum of Kshs.150,000.00 paid into the account at a later date being the rent refund collected by the purchaser from the property and thus the sum payable is Kshs.5,079,149.46.

We enclose herein the statements of account showing that in totality what we hold in the account is Kshs. 5.513,376.00 (the sum has accrued interest) out of which we are retaining the sum of Kshs.434,226.54 as per the previous agreement. We are preparing the cheque and shall forward it to you shortly.

Yours faithfully,

J. MWALUMA

ASSISTANT MANAGER LEGAL SERVICES.

M/s Ahmednasir Abdikadir & Co. Advocates – we enclose herein Prudential assurance House, copies of the relevant NAIROBI correspondence

for your perusal".

As can be seen there is total confusion in the documents presented to the trial court; was any credit made to the chargor's account after the suit property was sold? The two credits which we have set out were allegedly made in December 2000 and January, 2001 while the appellant over two years later (13th May 2003) was writing to the chargor to the effect that it was holding the chargor's excess money which it would forward to the chargor later. The oral evidence given before the trial Judge and the documents presented were of no assistance to the appellant to show that any credit had been made. If, indeed, credits had been made on 29th December, 2000 and 17th January, 2001 why was the appellant writing to the chargor over two years later to state that it was holding credit in favour of the chargor which it would forward later? The trial Judge did not take account of any credits made to the chargor and I observe here that there is no credible evidence on record to show that any credit was made. The Judge did not err in finding that no credit had been made by the appellant to the chargor and that is my answer to the first issue raised by the appellant in the consolidated appeals.

The 2nd issue taken by the appellant which is the main issue in Civil Appeal No. 32 of 2016 is whether the High Court was *functus officio* after the judgment of Khaminwa, J. secondly, whether it could deal with the matters that came later after judgment, and, tied to that issue, whether Gikonyo, J., was right to award compound interest on the sums that had been awarded in the judgment of Khaminwa, J.

Functus officio is defined in Black' Law Dictionary Ninth edition Edited by Bryan A. Garner as follows:

> ***"functus officio (Latin "having performed his or her office"); of an officer or official body without further authority or legal competence because the duties and functions of the original commission have been fully accomplished".***

It is the appellant's case that after the judgment delivered on 29th November, 2010, the High Court became *functus officio* and could not deal with the matter any further. The record does not however support this position. For instance there is on record evidence that after that judgment, the appellant moved the High Court for orders for stay of execution of the judgment. The appellant further filed an application for review of the judgment and also an application by the appellant for an interpretation of the judgment of Khaminwa, J., on whether the award made on the monetary sum was to attract simple interest or compound interest. It is the appellant who was moving the court with those applications and filed written submissions and also presented oral submissions way after judgment had been delivered. The appellant cannot turn back to attack the High Court and say that it was *functus officio*. After judgment had been delivered the court could properly be asked for review, stay of execution, approval of decree arising from judgment, the issue of costs if taxed and thereafter a disagreement arising thereof; amongst other issues that could procedurally be raised after judgment. Gikonyo, J. was right to assume jurisdiction after judgment and proceed to deal with the issues that were raised before him by the appellant. That is my answer to that part of that issue where I see no merit in the complaint raised. The issue of functus officio is not, in my respectful opinion, of any moment in this appeal.

What about the interpretation by the Judge that monetary sums awarded in the judgment carry compound interest? The Judge considered

submissions made and reached the conclusion that interest awarded in the judgment at 26% per annum be compounded from 19th January, 2000, the date when the suit property was sold.

I have set out the relevant part of the judgment of Khaminwa J., in this judgment. The Judge awarded certain sums of money to the 1st respondent and ordered that those sums of money carry interest at the rate of 26% per annum from 19th January, 2000 until the amounts were fully paid.

Where a decree is for payment of money **Section 26** of the **Civil Procedure Act** allows a court in the decree, to order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on that principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or such earlier date as the court thinks fit that was before him.

Mr. Musyoka for the appellant faults Gikonyo, J., for awarding interest from the date of auction and further for ordering that the same be paid in a compounded manner instead of simple interest. Counsel has cited to us various cases in support of the preposition that interest should be from the date of judgment until full payment, interest being awarded at court rates.

Mr. Taib on the other hand has cited various persuasive case laws particularly from America and Canada where the courts appear to be attracted to awarding interest as compound interest particularly in suits by or against banks and in other commercial institutions.

We note that the 1st respondent pleaded in the re-amended plaint interest at 26% per annum from 17th January, 2000. The significance of this date (17th January, 2000) is important because that was the date that the suit property was sold. Khaminwa J., awarded interest from 19th January, 2000 and this arises from some confusion whether the property was sold on 17th January, 2000 or 19th January, 2000.

There is no dispute that at the date the suit property was sold, interest payable to the appellant by the chargor was 26%. As we have seen **Section 26** of **Civil Procedure Act** permits the court in a decree for money to award interest from the date of the suit or for a prior period as the court may find reasonable to award. Gikonyo, J., considered various cases and came to the conclusion that compound interest was deserved by the 1st respondent in the premises of the case.

This Court had the occasion to interpret **Section 26** of the **Civil Procedure Act** in the case of **Ajay Indravadan Shah v Guilders International Bank Limited [2003] eKLR** where it was held:

> ***"This section, in our understanding, confers upon the Court the discretion to award and fix the rate of interest to cover three stages, namely:***
>
> > ***(1) the period before the suit is filed;***
> >
> > ***(2) the period from the date the suit is filed to the date when the Court gives its judgment, and***
> >
> > ***(3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.***
>
> ***We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent."***

The trial court is thus entitled to award interest for a period before the suit; the period from the date of the suit and from the date of judgment. It has been held in various cases by this Court that the question of when interest will apply and whether the same be simple interest or compound interest is a question at the discretion of the trial court. In **Omega Enterprises Limited v Eldoret Sirikwa Hotel Limited & Others C.A. No. 235 of 2001 (ur)** this Court stated on those issues:

> ***"The question of interest as regards the date from which it should be paid, the rates thereof as well as whether the same should be on compound or simple basis, is essentially a matter for the discretion of the court and unless the discretion is exercised wrongly an appellate court would not interfere with the (decision of the trial court)."***

In the **Ajay Shah** (supra) case this Court stated its reluctance to interfere with an award of interest by the High Court. In that case an award of 35% interest per annum had been given by the High Court. The parties had not agreed on that rate of interest. In dismissing the appeal against award of interest this Court stated:

> ***"The only law on the point is section 26 (1) of the CPA, and that section as we pointed out at the beginning leaves the question of the rate of interest to the discretion of the Court. In fixing the rate at 35% per annum, Mr. Commissioner Ransley was clearly exercising his discretion. To be able to interfere with his exercise of discretion, the appellant was bound to demonstrate to us that in coming to his decision, the Commissioner took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account, or that he misapprehended the law applicable, or that he did not correctly appreciate the bearing of some evidence or that the decision itself was plainly wrong. The appellant did not demonstrate to us any of these matters. His complaint appeared to us to be on the issue of how the Commissioner arrived at the figure of 35% per annum. The Commissioner was bound to come up with a figure and***

even if we ourselves had thought that it was a high figure and would not have awarded it, that alone would not entitle us to substitute the Commissioner's discretion with our own. Some error in principle such as those we have already set out herein had to be shown before we could ever think of interfering with the exercise of discretion."

WAKI, JA refused to disturb an award of interest at 25% per annum in the case of **Kenindia Assurance Company Limited v Alpha Knits Limited & Another C.A. No. 330 of 2001 (ur)** and had this to say:

"Lastly, Mr. Frazer argued that there was a triable issue on the interest awarded at 25% per annum. In his submissions no interest was payable at all. The question of interest of course lies in the discretion of the Court under section 26(1) of the Civil Procedure Act, Chapter 21. With the finding that Alpha Knits was unlawfully deprived of the sum of money which was converted to the use of another person, I see no unreasonableness in awarding interest as pleaded at the rate of 25% per annum. I would not disturb the award by the learned judge of the superior court."

On the issue of whether interest be simple or compound it was held in the case of **Sempra Metals Limited v Inland Revenue Commissioners [2007] UKHL 34** by the English House of Lords cited with approval by this Court in the **Ajay Shah** (supra) case that a court has the jurisdiction to award compound interest in its exercise of equitable jurisdiction. In **National Bank of Greece SA v Pinios Shipping Company No. 1 [1990] 1 AC 637** it was noted that custom and trade usage with regards to calculation of compound interest as part of a bank's practice may be applicable.

In the persuasive case of **Pacific Playground Holdings Limited v Endeavour Developments Limited (2002), 28 C.P.C. (5th) 85, 2002 BCSC 1491,** Wilson, J in quoting with approval the ruling of Major, J in **Bank of America Canada v Mutual Trust Company [2002] 2 SCR 601** held:

"There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also."

Major, J, of the Supreme Court of Canada argued in that case that equitable principles allow for interest to be calculated on a compound basis where fairness concerns dictate it. He therefore held:

"Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal. Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and financial systems in Canada and the Western world and is the standard practice of both the appellant and the respondent …. Where the parties have earlier agreed on a compound rate of interest, or there are circumstances warranting it, it seems fair that a court has the power to award compound post judgment interest as damages to enable the plaintiff to be fully compensated when the award is finally paid."

Khaminwa, J in the judgment delivered on 29th November, 2000 found that the sale of the suit property was illegal; that the appellant had proceeded, after selling the suit property at the auction to advance a loan to the chargor's previous tenant who purchased the suit property 5 months after the auction at Kshs.12,500,000 and the Judge found that a person damnified by unlawful sale or improper or irregular exercise of power of sale has a remedy against the person exercising that power unlawfully.

Gikonyo, J. found after being moved by the parties who made substantive submissions, that the circumstances of the sale of the suit property warranted an award of interest on compound basis. The judge considered all relevant facts and, in his discretion, made that order. It has not been shown to me or demonstrated that the judge either exercised his discretion wrongly or failed to consider any relevant factors in making that award. As held in **Mbogo v Shah [1968] EA 93** we should not interfere with the discretion of the judge of the High Court unless he has failed to consider relevant factors, or has considered irrelevant factors or it can be shown that he is demonstrably wrong in the way he has exercised that discretion. That has not been shown here at all.

The consolidated appeals have no merit and are accordingly dismissed with costs to the 1st respondent who will also have costs of the suit at the High Court.

JUDGMENT OF OKWENGU, JA.

[1] I have read the judgment of Kantai, JA in draft and entirely concur with the judgment. On the issue of compound interest I note that the record of appeal reflects that on 30th January, 2015, Gikonyo, J. delivered a ruling in which he dismissed a motion for stay of execution and review of the order that he had made on 13th October, 2014.In the ruling Gikonyo, J. granted the 1st respondent "liberty to execute the decree herein which is drawn in accordance with the law."

[2] Mr. Taib counsel for the 1st respondent then informed the court that there was an issue in the registry concerning interest. Counsel sought the courts authority to file written submissions on the issue. Mr. Ayisi counsel for the appellant agreed with Mr. Taib that the parties should file written submissions. The court therefore recorded a consent as follows:

"(i) By consent the issue of interest be canvassed by way of written submissions.

(ii) The plaintiff to file and serve submissions thereof within fourteen days of today. On service thereof, the defendant to file submissions within 14 days thereof.

(iii) Mention on 5th March, 2015."

[3] In accordance with the consent the parties duly filed and exchanged written submissions in which the 1st respondent urged the court that a compounded interest rate should be adopted in applying the 26% interest to the principal sum. The appellant on the other hand urged that a simple calculation rate should be applied. Gikonyo, J. proceeded to make a ruling in which he ordered that the interest on the principal sum should be calculated at 26% per annum on the basis of compound interest from 19th January, 2000 until the entire debt was satisfied. It is evident that the order made by Gikonyo, J. was an order arising out of an issue concerning the decree as the original judgment of Khaminwa, J. which was subject of the execution did not indicate whether the interest awarded should be applied using a compounded interest rate or a simple interest rate.

[4] Order 21 Rule 8(3) of the Civil Procedure Rules provides that where there is a disagreement on a draft decree any party may file the draft decree and the registrar shall list the same in chambers "before the judge who heard the case or if he is not available before any other judge."

[5] Although there is no evidence that a draft decree was filed, it is clear that the attention of Gikonyo. J. who was handling a matter concerning the execution of the decree was drawn to the fact that there was a problem in the decree regarding the issue of interest. As the trial judge who originally dealt with the matter did not specify whether the interest should be calculated on simple or compounded rate, it could not be assumed that the learned judge intended that the interest should be calculated on a simple rate.

[6] Both parties agreed to address the court and the record shows that each party urged the court to adopt their position, the appellant maintaining that the interest should be calculated at simple rate, with the 1st respondent advocating for calculation at a compounded rate. In my view the matter was properly before Gikonyo, J. as an issue concerning the preparation of a decree.

[7] I agree with Kantai, JA that the learned judge considered all the facts and the law before directing that the interest on the principal decretal sum should be calculated at the compounded rate. In the circumstances I concur that the two appeals have no merit and should be dismissed with costs to the 1st respondent.

JUDGMENT OF KOOME, JA

[1] I have read the judgment of Kantai, JA in draft, I agree with most of the conclusions except one aspect on compound interest that was awarded in the Ruling of Gikonyo J., on 3rd June 2015 which is the subject of **Civil Appeal No 32 of 2016.** A very detailed factual background of this matter is very well set out in the judgment of Kantai, JA, but I will briefly recap to place this judgment in perspective. Two appeals were consolidated being **Civil Appeal No. 31 of 2016** and **Civil Appeal No.**

32 of 2016.

[2] ***Firoz Nurali Hirji*** was the registered proprietor of **LR. No. 7785/310** (suit property). It is said that he suffered a stroke due to the sad events that led to the sale of the suit property. The said **Hirji** donated a Special Power of Attorney to his wife ***Sharok Kher Mohammed Ali Hirji*** (1st respondent). The said **Hirji** had borrowed a loan of Kshs.600,000 from the **Housing Finance Company of Kenya** (appellant) in May 1997. As security for the said loan, his title for the suit property being a residential house in Runda estate in Nairobi was charged as security. It is common ground that sometimes in 1999, the 1st respondent fell into some arrears in paying the monthly instalments and the appellant issued a statutory notice threatening to call in the loan or else it would exercise its statutory power of sale. It is also common ground that this was followed by some negotiations and the suit property was not sold as per the statutory notice.

[3] Matters deteriorated sometimes in December 1999 when the appellant called for a fresh repayment proposal, which the 1st respondent gave but apparently was not considered by the appellant as they proceeded to sell the suit property on 17th January, 2000 at a sum of Kshs.6,050,000 when the value of the property according to the 1st respondent stood at Kenya Shillings twenty five million (Kshs.25,000,000). The 1st respondent therefore filed suit in the High Court which was later amended challenging the sale on many grounds; to wit failure to issue a lawful statutory notice; selling the property at an undervaluation; failing to indicate a reserve price and charging the 1st respondent unconscionable interest at the rate of 26% p.a. when the agreed rate was 13.5%.

[4] The suit was resisted by the appellant, in its amended defence, the appellant, denied the claim and challenged the 1st respondent's *locus standi* to bring the suit. The appellant was categorical that the exercise of the chargees power to sell the 1st respondent's property was lawful and done according to the charge document after the 1st respondent had defaulted in the loan repayment. The appellant justified the charging of interest above what was provided for in the charge which was implied in the contract. The appellant also contended that a cheque of Kshs.5,079,149.45 being the excess recovered from the sale was forwarded to the 1st respondent on 21st May, 2003.

[5] The suit was heard by Khaminwa, J; with the 1st respondent and two expert witnesses giving evidence in support of the claim. The 1st respondent testified how she was shocked to learn that the suit property was sold on the 17th January, 2000; that as at the time it was sold there was receivable rent of Kshs.150,000 per month from a tenant who was the director general of Amref. The rent alone would have cleared the outstanding loan in about 4 months as the charge document mandated the appellant to appoint a manager to collect the income. There was also correspondence to show that the tenant who occupied the suit premises had offered to buy it at Kshs.12,000,000 and wondered why there was no reserve price indicated on the sale. Strangely the suit property was sold to one ***Benson Ochieng Obolla*** on

4th May, 2000 and five months later it was transferred to the said tenant According to the 1st respondent the suit property was worth Kshs.20,000,000. The 1st respondent also called two witnesses who gave evidence on property valuation and interest rate audit that was done on the loan account and established that the appellants had charged illegal interest.

[6] On the part of the appellant, ***Mr. Kamau Kania*** an advocate who said that he was the manager in – charge of the legal services of the appellant, he stated inter alia that the monthly loan repayment by the 1st respondent was Kshs.7,938 and the interest rate chargeable per month was 13.5 % which was altered to 26% after the 1st respondent defaulted in the loan repayment. He contended that the sale was lawful as a statutory notice had been issued when the loan balance was Kshs.231,738.45 and interest stood at Kshs.683, 387.90. ***Mr. Macharia*** an auctioneer testified on how he executed the sale after he advertised it twice on 5th and 17th January, 2000 he apparently sold the suit property on the same date it was advertised on the 17th January, 2000. Both **Mr. *Peter Kitaka Kimeu*** and **Michael Munyele** who are property valuers also testified. What was notable from the two valuers was that they said they valued the suit property for Kshs.8,000,000 but they did not produce any valuation report to support their evidence.

[7] Upon hearing the parties the learned trial Judge was satisfied that the 1st respondent had proved her case and made the following orders:-

> ***"1. Declaration that the sale of land parcel known as LR No.***
>
> ***7785/310 by public auction was unlawful and it was null and void.***
>
> ***2. Damages Kshs.20,000,000.***
>
> ***3. Kshs.434,226.54.***
>
> ***4. Costs are awarded to the plaintiff payable by the defendant.***
>
> ***5. All awards of money shall carry interest at the rate of 26% per annum from 19.1.2000 until the day the amount shall be full paid."***

[8] This is the judgment that provoked C.A. No. 31 of 2016 while C.A. No. 32 of 2016 relates to a subsequent ruling and order made by Gikonyo, J. on 3rd June 2015 where it was stated:-

> ***"The plaintiff has shown that the circumstances at hand warrant for the award of interest herein to be computed on the basis of compound interest. I hereby order that the interest on the principal sum shall be calculated at 26% per annum on the basis of compound interest from 19th January 2000 until the day the amount shall be full paid. It is so ordered."***

This is the order that provoked C.A. No. 32 of 2016.

[9] Just to repeat what is stated in the opening paragraph, for reasons enumerated in the judgment of Kantai, JA, I am in agreement that there was breach of what was markedly a fiduciary duty on the part of the appellant when they purported to sell the suit property in the manner they did; that is the learned trial Judge did not err in making the orders as she did as the suit property was not only undersold for a song but even the procedures set out in the charge were not followed. It is no wonder counsel for the appellant did not contest the award of damages of Ksh 20 million. I also find no fault with the Judges finding that the appellant did not offer any credible evidence to support their claim that a credit of a sum of Kshs.434,226.54 was made to the 1st respondent's account because they failed to show at the time of the hearing, that they had credited the 1st respondent's account with the same.

[10] I differ with the majority judgment in regard to the order of Gikonyo, J. directing the interest at the rate of 26% p.a. be calculated on the basis of compound interest. According to **Black's Law Dictionary, 10th Edition**, compound and simple interests are defined as follows:-

> "**Compound interest**. Interest paid on both the principal and the previously accumulated interest.
>
> **Simple interest.** Interest paid on the principal only and not on accumulated interest. This interest accrues only on the principal balance regardless of how often interest is paid. – Also termed straight-line interest".

In my humble view, it was within the discretion of Khaminwa, J. who tried the case to make an order of payment of interest which was awarded at 26% per annum and if the intention of the Judge was to award compound interest, she should have done it because all the aggravating circumstances were present when the decree was issued. This is because the 1st respondent prayed for interest without specifying whether it was simple or compound and if indeed the Judge intended to award compound interest nothing would have prevented her from doing so.

[11] I therefore find there was no error that was apparent on the record to justify the amendment of the decree by a subsequent ruling to include compound interest. It is the trial Judge who had the jurisdiction to award interest and she did so by awarding at 26% p.a. which in my view was justifiable looking at the circumstances of this case where the 1st respondent's property was sold in blatant disregard of the principles of the law. As if that was not enough the appellant withheld even what would have been due to the 1st respondent. All this information was available to the trial Judge and in my respectful view it was a misdirection for **Gikonyo, J**. to make an order altering the decree to include compound interest.

[12] As Okwengu, JA agrees with Kantai, JA, the orders made in the judgment of Kantai, JA will carry the day. On my part, I dismiss C.A. No. 31 of 2016 and partially allow C.A. No. 32 of 2016 and set aside the orders of Gikonyo, J. of 3rd June, 2015 relating to compound interest.

Dated and delivered at Nairobi this 22nd day of November, 2019.

S. ole KANTAI

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

M. K. KOOME

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR