IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 162 OF 2015

BETWEEN

JOHN MBURU.....APPELLANT

AND

CONSOLIDATED BANK OF KENYA.....RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nairobi (Fred A. Ochieng, J) dated and delivered on 19th February, 2015

in

H. C. C. C. No. 27 of 2006)

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JUDGMENT OF THE COURT

1. This appeal involves, but goes beyond, the usual bank/customer issues of interest rate charges, bank charges, accuracy of accounts, legality of statutory power of sale and such like, and includes issues of 'duress', 'unjust enrichment', 'accord and satisfaction' and 'estoppel'.

2. The genesis of the dispute goes back 25 years ago in 1983 when the appellant borrowed Sh.440,000 from Home Savings & Mortgages Ltd **(HSML),** one of the failing financial institutions that were later absorbed in the respondent Bank. The loan was repayable with interest at 16% per annum calculable on yearly rests over a period of 5 years, by monthly installments of Sh.11,358, amongst other terms. There was a clause on revision of interest rates provided the bank served a 14-day notice of such intention on the appellant, and advised on the revised monthly repayments. The loan was secured by a mortgage on LR No. 6725/22, situate in Ridgeways, Nairobi and registered in the name of the appellant.

3. Twenty years later, the loan had not been repaid and had in fact ballooned to Kshs.13,402,086.45. The bank proceeded on 29th September, 2003, to issue a statutory notice in an effort to recover the outstanding sum together with interest thereon at the rate of 20.5% p.a. from 31st August, 2003. A notification of sale followed on 23rd February, 2004 and the auctioneers published a date for auction of the security to recover Kshs.14,594,017. The auction was not successful.

4. Thereafter the appellant approached the bank for renegotiation of the sum due and offered to pay Ksh.2

million in full settlement to redeem the mortgage. On 20th April, 2004 the bank counter-offered to accept Ksh.6.5 million in full settlement if it was paid on or before 23rd April, 2004. The appellant revised his offer to Ksh.5.5 million which the bank rejected and counter-offered to accept Ksh.6 million on condition that Ksh.5 million was paid by 30th April, 2004 and the balance of Ksh.1 million 30 days thereafter, in default of which the security would be auctioned.

5. On 30th April, 2004, the appellant, through his advocates, accepted the counter-offer by the bank and agreed to pay the sum of Ksh.6 million if the bank undertook to release the security documents and execute a re-conveyance of the mortgage upon sale of the security by private treaty. By June 2004, the matter had been settled on the terms agreed by the parties.

6. But not for the appellant. He claimed subsequently that the settlement amount was paid hastily under duress as he was apprehensive that the property would be auctioned at a throw away price. He then wrote to the bank in July 2004 claiming that his loan account had not been operated in accordance with the mortgage instrument as regards interest. He specifically complained that interest was calculated on monthly rates instead of yearly rates; that notices for interest rate variations were not given since the bank took over from HSML which had notified him that they were increased to 19%; the bank was charging interest rates ranging between 19% and 37%; and failure to send bank statements since 1992, thus keeping him in the dark about the dire state of the account. He recalculated the amount due to the bank on the basis of the mortgage instrument and came up with a figure of about Ksh.3.4 million as the sum due to the bank, which meant that he had overpaid it by about Ksh.2.6 million.

7. The bank denied all those allegations and informed the appellant that a notice had been served on him by HSML in 1984 informing him that the bank would have the right to vary interest rates without reference to him. More than a year and a half went by, then the appellant, on 20th December, 2005, instructed his lawyers to pursue the overpayment based on unlawful variation of interest rates and the mode of interest calculation from annual to monthly. He also alleged fraud, misrepresentation, negligence and unjust enrichment, against the bank. He presented an audited statement of accounts showing that the amount due to the bank was Ksh.1,852,174 and demanded the overpayment of Ksh.4,147,836 at the pain of filing suit if it was not refunded. It was not, and so, the suit was filed on 30th January, 2006 seeking that amount as well as general damages and costs.

8. In its defence, the bank asserted that the loan account was operated in accordance with the terms agreed between the parties, and there was no fraud, negligence or misrepresentation. It pointed out that the appellant started defaulting on the loan as early as October 1984 and subsequently in 1986, 1991 and 2003 on which occasions the bank would advertise the security for sale but the appellant would plead for indulgence which was granted on terms he never complied with. Ultimately negotiations commenced for settlement on terms that the bank would forgo the demand for Ksh.14,594,017 and accept Ksh.6 million in full settlement whereupon it executed a re-conveyance of the mortgage. According to the bank, the settlement constituted an accord and satisfaction and the appellant was estopped from challenging the agreement.

9. The High Court, **(Fred A. Ochieng', J)** heard the appellant and his two witnesses, while the bank called one witness. It considered the submissions of counsel and the law and in the end made findings in its judgment dated 19th February, 2015 that there was no firm evidence from the bank to show that it gave a 14-day notice of variation of interest rates from the original 16% to other rates as applied in the loan account; that the bank had conceded that the interest was calculated on monthly rests instead of the agreed yearly rests; that as a result, the bank's computation of the amount due on the loan account was erroneous; that the appellant nevertheless admitted in writing that he had been notified that the rate of interest would go up to 19% after the first year; that as a result of that admission, the calculations made by the appellant's auditor were also erroneous; and that there was no agreement on what was owed on the loan account.

10. We shall let the court speak for itself on other findings:-

"But there was an agreement on one issue; the plaintiff did not service the loan in accordance with the terms of the mortgage. Therefore, he did fall into arrears. In those circumstances, the bank had a legitimate right to demand payment. The bank was also entitled to take steps to realize the security, if the plaintiff did not remedy his defaults in payment. Accordingly, I find that when the bank demanded payment, and later when the bank took steps to realize the security, it was not harassing the plaintiff. The demands made by the bank resulted in the plaintiff holding negotiations with the bank. Often times, the two parties were able to find common ground. I find that the actions of the bank cannot be described as having been calculated for purposes of 'instilling inexcusable terror in the plaintiffs to thereby wring out the monies paid, from the plaintiffs'."

11. The trial court then referred to several letters of appreciation written to the bank by the appellant, whenever the bank gave him the indulgence of withholding intended auctions of the security, and for the bank's *"understanding and a most caring attitude towards him."* One of the letters stated in part:

"I find I would be insincere not to acknowledge your great patience over this long outstanding debt and your undoubted good intentions in accommodating me all the way".

12. According to the trial court, that was the framework upon which the offers and counter-offers were made and ultimately an agreement reached. The court concluded thus:-

"The point I am making was that the defendant did not just suddenly, and without any warning, put up for sale the plaintiff's land. The defendant listened to the proposals put forward by the plaintiff and thereafter gave several chances to the plaintiff to try and pay-off the loan. During the long period of time when the parties discussed the proposals and counter-proposals, the plaintiff had every opportunity to audit the statements of his account. The plaintiff also had the benefit of independent legal advice from several lawyers. If he wished to make payment on a 'Without Prejudice' basis, there could have been nothing to prevent him from doing so. But he made a choice to tell the defendant that the sum of Kshs.6,000,000/- would constitute a full and final settlement of the money which was owed to the defendant. In exchange for that payment, the plaintiff sought from the defendant a duly executed conveyance in favour of the purchaser, together with a duly executed discharge of the charge. The defendant executed both the discharge of charge and the conveyance, which it then handed over to the plaintiff's advocates. In effect, the bank provided due consideration to the plaintiff. Indeed, the defendant did exactly what the plaintiff demanded in exchange for the payment. Having parted with the security, the defendant's legal position was altered, to its detriment. Therefore, it would be unjustifiable to now turn around and tell the defendant that although it had already altered its position on the basis of the understanding reached between the two parties, that whole understanding now counted for nought."

13. With that, the court applied the doctrine of estoppel espoused in the case of ***Moorgate Mercantile Co. Ltd vs Twitchings [1976] 1 QB. 225*** and found that the appellant led the bank to believe that when he paid Kshs.6 million and the bank discharged the security, that would result in the full and final settlement of the debt owed. The appellant was estopped from re-opening the matter and the claim was dismissed.

14. The appeal before us challenges those findings, listing 18 grounds in the memorandum. In written submissions and oral highlights, however, they were urged as four issues as follows:

(i) Whether the interest rates applied to the loan account were in accordance with the mortgage instrument.

(ii). Whether the inflated interest rate resulted in an overpayment to the bank.

(iii). Whether the appellant negotiated the settlement under duress.

(iv). Whether the appellant is entitled to the refund claimed or is estopped from seeking it.

15. On issues (i) and (ii), learned counsel for the appellant **Mr. L. L. Gachanja,** instructed by M/s Gachanja & Company Advocates, referred to the findings of the trial court as summarized in paragraph 9 above and faulted the court for turning round and citing the admission of the notice of interest rates variation as validating an unlawful process. By not serving a valid notice, it was contended, the bank lost its right to vary the interest rates which ought to have remained at 16% throughout. Instead, observed counsel, it fluctuated between 22% and from May to November 1993, 32% in May 1995, and 37% in January 1999. The court therefore fell into error in failing to make the finding that the invalid interest charges grossly overstated his indebtedness and laid an erroneous basis for the negotiations that took place.

16. On issue (iii), duress, counsel submitted that the very fact that the bank was threatening the appellant with the auction of his property on the basis of illegitimate and inflated figures put undue pressure, duress and coercion on the appellant to accept the bank's offer of settlement at Ksh.6 million, before he had worked out his true indebtedness. As for the letters unduly relied on by the trial court to show an understanding between both sides before negotiations, counsel submitted that they were written in good faith and on the assumption that the bank was acting lawfully, and not fraudulently as it turned out. The ensuing agreement was therefore not a meeting of the minds and ought to be ignored or set aside.

17. On the last issue, counsel conceded that the negotiations were not made 'without prejudice' and that the discharge of the security by the bank provided a consideration for the payment of the Ksh.6 million. He submitted, however, that there was no consideration for the sum of Ksh.4.2 million which was overpaid by the appellant on the basis of a mistake of fact that the sum due would have been over Ksh.14 million. In his view, the doctrine of estoppel should instead have been applied on the bank to stop it from reneging on its promise that the loan account would have attracted interest at 16% on yearly rests. In any case, urged counsel, the doctrine was not applicable in this case because it was just and equitable that the agreement in this matter be reopened owing to subsequent events invalidating it. The bank was the stronger party in the negotiations and arm-twisted the appellant to conclude an unjust agreement.

18. Several cases were cited in aid of those submissions, among them: ***Maskel vs Horner (1915) 3 KB 106*** for the proposition that money paid by mistake of fact or involuntarily under pressure was recoverable; ***D & C Builders vs Sidney Rees (1966) 2 QB 617*** on qualifications for the doctrine of *'accord and satisfaction'*; ***Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited [2015] eKLR*** (High Court) on alteration of interest rates contrary to express provisions of the charge document; ***Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR*** on the necessity of *'meeting of the minds'* for contracts to be valid; ***Madhupaper International Ltd & Another vs Kenya Commercial Bank Ltd & Another [2003] eKLR*** (High Court) on duress as a basis for restitution.

19. In response, learned counsel for the bank**, Mr. K. A. Fraser,** SC, instructed by M/s Hamilton, Harrison & Mathews, in written submissions and oral highlights, observed that the appellant had admitted in writing that he had been notified about the interest rate variation to 19% but he never informed his witness, the auditor, who proceeded as if the variations were unlawful. Counsel further observed the findings, correctly made by the trial court, that the auditor admitted that he did not know the terms of the letter of offer and acceptance of the loan or the extent of the defaults by the appellant for a long period and therefore, according to counsel, there was no credible evidence to support the claim for an overcharge of Ksh.4.2 million.

20. As for the submissions made that there was no consideration for the overpayment of the loan, counsel referred us to the record of the loan granted in 1983 which shows that the appellant started defaulting in the very first year 1984, stopped making monthly payments in 1991 and made no payments at all from March 1994. That is how the 5-year loan ended up taking 20 years to repay, 10 of which no payments were received by the bank. The appellant then started pleading for a negotiated settlement and the bank indulged him. All along, submitted counsel, the appellant was represented by two advocates, and ended up selling the property to one of them, and therefore he cannot be heard to plead ignorance of the details of settlement or the legal consequences thereof. Counsel further observed that the figure of Ksh.6 million was arrived at after extensive negotiations taking place 20 years after the loan was taken and 15 years after it should have been repaid. The appellant had all the time, since he had all the information and

statements of accounts, to raise the concerns now made in the suit, but did not.

21. As for the alleged duress, it was submitted that the appellant did not bring himself within the categories set by this Court in ***Ghandi & Another vs Ruda [1986] KLR 556***. Reliance by the appellant on the authority of the ***Madhupaper case (supra)*** was also attacked on the ground that it was a High Court decision which was reversed by this Court in ***Kenya Commercial Bank & Another vs Madhupaper International Ltd & Another C. A. No. 181 of 2004.***

22. Turning to the doctrine of estoppel, it was submitted that the bank had recalculated the sum due after taking into consideration the interest rate variations complained about and found the sum due in the region of Ksh.10 million part of which it was willing to give up in the interests of settlement of the long outstanding matter. In the same vein, the bank gave consideration for the settlement by releasing its security to the appellant for his use and benefit. The bank thus fell into the category of protections anticipated in ***D & C Builders (supra).*** Counsel further cited the cases of ***Kay Jay Rubber Products vs Development Finance Co (K) Ltd & Another [1991] KLR 195*** and ***Moorgate Mercantile Co Ltd vs Twitchings [1975] 3 WLR 286)*** to underscore the principles of estoppel by conduct.

23. We have considered this appeal by re-appraising the evidence on record by way of a retrial in order to arrive at our own conclusions of fact by dint of ***Rule 29 (1) (a)*** of this Court's Rules. On authority, we should respect the findings of fact made by the trial court especially when they are based on the credibility of witnesses since that court had the added advantage of seeing and hearing them testify. Not so, however, where such findings are based on no evidence or are based on a perverted appreciation of the evidence or it is clearly shown that the court was wrong in principle. See ***Mwangi vs Wambugu [1984] KLR page 453.***

24. We perceive the following to be the relevant issues for our determination:

> ***(a) Whether the bank maintained the loan account in accordance with the mortgage instrument.***
>
> ***(b) Whether the appellant was under duress or coercion when he engaged in negotiations with the bank for settlement of the matter.***
>
> ***(c) Whether the appellant is estopped from demanding the sum of Kshs.4,147,826/- in view of the settlement agreement.***

25. On the first issue, there is sufficient evidential basis for the findings made by the trial court, as contended by the appellant, that the bank did not comply with the requirement in the mortgage instrument that a 14-day notice be given to the appellant in the event of variation of interest rates; and in charging interest on monthly rests rather than yearly rests. Those are the two issues raised by the appellant, but beyond that there is no material to support any other transgression by the bank in the manner the account was run. There is also evidential material to support the contention of the appellant that the failure by the bank to comply with the mortgage instrument, resulted in an overcharge on the overall debt due. The difficulty was in establishing with exactitude what the overcharge was. Certainly the attempt by the appellant to prove that it was in the sum of Kshs.4,147,826 failed as the auditor assisting him admitted that he was not aware of the period admitted by the appellant as having been notified of interest rate variation or defaults made in repayments for a long time and consequent contractual penalties and bank charges. Similarly, the admitted infractions by the bank obviously affected the statement of accounts served on the appellant. The bank says a recalculation taking into account the erroneous interest charges came to about Ksh.10 million, but again this is in the realm of speculation. None of the figures given by the respective parties was reliable. We choose to ignore both.

26. Having so said, there was a period of 21 years of existence of the loan when the appellant received bank statements throughout and exchanged correspondence with the bank. At no time was any challenge made to the veracity of the debt or legal recourse sought. Instead, the appellant initiated a settlement process which concluded the matter amicably in the 21st year of the loan.

27. Which leads us to the second issue: was he under duress or coercion to negotiate? The definition of duress was given in the case of ***Ghandhi & Another vs Ruda (1986) KLR 556,*** as follows:

> ***"Duress at common law, or what is sometimes called legal duress, means actual violence or threats to violence to the person i.e, threats calculated to produce fear of loss of life or bodily harm. The threat must be illegal in the sense that it must be a threat to commit a crime or tort."***

A threat to sue for a civil wrong, for example, is not as a general rule, voidable for duress.

28. But there is also economic duress which was discussed by this Court in ***Kenya Commercial Bank Limited & Another vs Samuel Kamau Macharia & 2 Others [2008] eKLR.*** The court cited with approval the decision of the Privy Council in ***Pao & Others vs Lau Yiu & Another [1979] 3 ALL E.R. 65,*** stating thus:

> ***"Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree...that in a contractual situation commercial pressure is not enough. There must be present some fact on which could in law be regarded as a coercion of his will, so as to vitiate his consent.....In determining whether there was a coercion of will such that there was no true consent, it is material to inquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy, whether he was independently advised; and whether after entering the contract he took steps to avoid it".***

29. Tunoi, JA (as he then was) examined American authorities on the subject and stated:

> ***"A keen study of decisions on economic duress shows that American judges pay great attention to such evidential matters as the fact or absence of protest, the benefit received and the speed with which the victim has sought to avoid the contract."***

30. Applying those principles to the case before us, it is clear to us that the appellant did not establish a case of duress. To begin with, the letters on record written by the appellant in appreciation of the bank's indulgence persuade us that the environment was conducive to amicable negotiations. The feigned claim by the appellant that the letters were not meant to convey amity was a lame one and we reject it. The appellant was also well advised by legal counsel and has not expressed any deficiency in the legal advice he received throughout. It is conceded that the negotiations were not carried out on a *"without prejudice"* basis as a cautious party would have been advised to do. He also had an alternative remedy and if he wanted to, could have filed suit against the bank long before the negotiations.

31. As Mwera, J. (as he then was) stated in ***Housing Finance Co. of Kenya Ltd vs Njuguna, LLR No 1176 (CCK)***, referred to in ***Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR:***

> "***Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract."***

32. It is the appellant in this matter who fired the first shot in offering to settle the whole debt by payment of Ksh.2 million. Then followed other figures until an agreement was arrived at. It was a fresh agreement unrelated to the strict terms of the mortgage instrument, with its own consideration on both sides. The appellant paid Ksh.6 million and the bank gave up its statutory power of sale and its security. There was a meeting of the minds. And how long did it take the appellant to seek reversal of the agreement? More than one year and a half - hardly a lapse of time that would allow for restitution even if the agreement was annulled. As Tunoi, JA stated in the ***Kenya Commercial Bank case (supra)***, "*restitution will be denied*

where the defendant cannot be restored in his original position".

33. In view of the binding nature of the settlement agreement, the appellant was obligated to pay that which he paid under the deed of settlement. Unjust enrichment would not arise as the appellant consented to pay the said amount and voluntarily executed the agreement to pay the stated sum. All said and done, the negotiations between the parties were not vitiated by duress as claimed by the appellant and we so find. Which leads us to the last issue.

34. Should the appellant be estopped from reopening the matter? Estoppel is not easy to define in legal terminology. It is said to be a principle of justice and equity. In the case of ***748 Air Services Limited vs Theuri Munyi (2017) eKLR,*** this Court explored the history of the doctrine with Lord Denning in the case of ***McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227,*** where he stated:

> ***"..We have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying '*estoppel *is only a rule of evidence. If you go into another room you will find a different notice: '*estoppel *can give rise to a cause of action'. Each room has its own separate notice. It is a mistake to suppose that what you find in one room, you will find in the others."***

35. The Court in that case considered estoppel by conduct and estoppel by election or waiver. The latter is an intentional relinquishment or abandonment of a known right or privilege. A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. In the case of ***Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR,*** Maraga, J. (now Chief Justice) stated:

> ***"A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right."***

36. As for estoppel by conduct, both parties in this case relied on ***D & C Builders vs Sidney Rees (1966) 2 QB 617*** where **Lord Denning, M.R.** stated:-

> ***'It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.'***

37. The appellant contends that there was no true accord since he was not aware of his true indebtedness; he was not acting voluntarily but through duress; there was no consideration for the amount he paid in excess of the debt; and there was no legal justification for the payment made. In our view, as discussed earlier, these contentions have no factual or legal basis. By his words or conduct, he led the bank to believe that he was intent on settling the debt at such amount as may be agreed on terms that the bank releases the security held by it to the appellant. It would be unjust or inequitable to allow the appellant to go back on the agreement concluded in that process. We answer the question posed on this issue in the affirmative.

38. The upshot is that the High Court was right in making the findings it did. We have no reason to interfere with the decision and consequently order that the appeal be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR