IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & GATEMBU, JJ.A)

CIVIL APPEAL NO 282 OF 2004

BETWEEN

MARGARET NJERI MUIRURI*(being the administrator of*

***the estate of the late Joseph Muiruri Gachoka* (deceased)…….....APPELLANT**

AND

BANK OF BARODA (KENYA) LIMITED…….....…..…….RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Kasango, Ag. J.) dated 13th July 2004

in

H.C.C.C. No. 1857 of 2000)

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JUDGMENT OF THE COURT

Background.

1. This appeal arises out of a bank loan facility taken out by a company known as Central Kenya Agencies Limited,(hereinafter referred to as the company) which loan was guaranteed by the late *Joseph Muiruri Gachoka* and his wife, *Margaret Njeri Muiruri* (hereinafter referred to as the appellant). The appellant is now the administrator of the estate of the deceased pursuant to a grant of letters of administration granted on the 19th June 1989 who filed suit before the High Court on her own behalf as well on behalf of the estate. The company, which was the borrower, was not a party to those proceedings and is not a party in this appeal.

2. On various dates between 1979 and 1986, the deceased and the company secured financial accommodation from the respondent. As security for the financial accommodation by the company, two properties were charged, viz LR No 4953/1028/Thika, and LR No 36/1439/111. In addition and in consideration of the Bank continuing or making advances or affording other banking facilities to the borrower, the deceased and the appellant, as directors of the borrower, executed a deed of Guarantee dated 22nd October 1986 undertaking to pay and satisfy to the Bank on demand all sums owing or to become due from the borrower "*provided that the total amount recoverable*" from the guarantors and each of them was limited to Kshs.6,000,000.00 with interest "*at the current rate of interest from time to*

time charged by the Bank to the Customer". The deceased also executed a mortgage instrument in favour of the respondent in respect of his property measuring approximately 3 acres known as LR. No. 36/IV/14 (20A), situate in Eastleigh, Nairobi, (the Eastleigh property). There also appears to be some overdrawn accounts that were held by the deceased, which continued to accrue interest even after his death.

3. Joseph Muiruri Gachoka died on the 19th January 1988, and following his death, and due to the difficulties in business, the borrower (Central Kenya Agencies Limited) was unable to repay the loans. As a result of the default, the two properties belonging to the company, that is LR. No. 4953/1028/Thika, and LR. No. 36/1439/111, were disposed of by the respondent. After her husband's death, the appellant approached the respondent to renegotiate the terms of the loan. As at the time of taking out the mortgage facility, the loan amount advanced was Kshs.6 million, and the rate of interest was agreed at 14%. The bank had raised the interest payable to 45% on the outstanding balance, and so the amount owing to the respondent continued to grow.

4. The appellant and her family attempted some fundraising efforts, and as at the time the suit in the High Court was filed, the appellant had paid about 12 million to the respondent. The respondent however took the position that since the repayments made by the appellant were so few and far between, and that since interest continued to accrue on the mortgage account, the debt owed had built up to the amount of Kshs.200 million. As a result of the failure of the appellant to repay the amount, the respondent moved to realise the Eastleigh property. This is what prompted the appellant to come to court, by way of a plaint dated 19th October 2000, where she sought orders against the respondent as follows:

a) A declaration that there has been a breach of duty by the respondent to the estate of the late Joseph Muiruri Gachoka;

b) In the alternative an order that the appellant's guarantee be limited by the court in line with the extent of the liability of the guarantor had the respondent exercised reasonable diligence;

c) An order of accounts to be taken between the appellant and the respondent, and/or the said respondent bank to furnish the appellant with a true and proper statement of accounts regarding the loan facilities;

d) An injunction restraining the bank from proceeding with the intended sale of the property LR. No. 36/IV/14 (20A)

5. In that plaint, the appellant alleged that one of the properties used as security that is LR. No. 36/1439/111 was disposed of for the amount of Kshs.8,000,000.00, and that this money went towards payment of the outstanding debt. The appellant had made some additional payments towards settlement but the respondent still continued levying a high rate of interest on the outstanding amount. The appellant further claimed that the respondent was, at the time, demanding the sum of Kshs.70,000,000.00, despite the numerous payments made to it. The appellant further claimed that the respondent, even though it had notice of her husband's death had failed to stop levying interest on the outstanding amount and to realise the security of the borrower. Because of this, the appellant considered that the respondent had breached its duty to the borrower as well as to the estate of the deceased. In particular, the appellant claimed that the respondent was in breach of its duty to comply with banking practice to stop the interest charges, and by failing to realise the security sooner.

6. The respondent on its part denied each and every claim made by the appellant. In particular, the respondent stated that it did not owe any statutory or contractual obligation to stop levying interest and other charges accruing the loan and the overdraft accounts; that it did not owe any duty to the appellant or the deceased to move sooner to realise the security; and that it was a term of the agreement between the deceased, the borrower (Central Kenya Agencies Limited) and itself that it would apply interest at its own discretion subject to the prevailing bank interests. The respondent continued to maintain that the borrower was still indebted to it and asked the court to dismiss the suit.

7. Each of the parties called one witness to advance their respective cases. The appellant in her

evidence stated that she was not aware that the respondent intended to exercise its statutory power of sale, and therefore sought an injunction to stop the same. She further disputed the rate of interest charged by the bank, stating that the amount of interest charged was very high, especially considering that she and her family had already raised Kshs.12 million towards the settlement of the debt.

8. The respondent called one witness, *David Ogega Nyaboga (DW1*) who was at the time employed by the respondent bank. He testified that up until about a year after the deceased's death, the loan facility was regularly serviced and there was no problem with the account. However, after the year 1990, the appellant begun to default in payment, and interest continued to accrue, which fact is evidenced by the numerous letters that the she wrote to the bank, seeking indulgence and admitting that she owed the money. He further testified that at some point, the appellant agreed to sell the property to another entity, by private treaty, but that sale fell through as well. On the interest component of the loan, DW1 testified that the minimum interest to be paid by the appellant was at the rate of 14%, but that there was a clause in the mortgage that the bank retained the discretion to vary the interest. When asked whether the bank had complied with the requirements of *section 44* of the *Banking Act*, the witness stated that he was not familiar with the Act, and was not aware that the bank would be required to get approval from the Minister in order to vary interest rates.

9. The High Court, after receiving the evidence, formed the opinion that there was insufficient evidence tendered before it that would entitle the plaintiff to the prayers sought. The trial court further found that the appellant had never claimed that the respondent had failed to supply the statements. Regarding the prayer for injunction, the trial court held that the bank could not be stopped from exercising its power of sale on the evidence tendered by the appellant, but nevertheless, ordered it to serve a fresh statutory notice before exercising any power of sale.

10. The trial court also considered whether the bank had complied with *Section 44* of the *Banking Act*, and held that the burden of proving that the bank had not obtained the appropriate authority to raise the interest charged lay squarely on the appellant, in line with *Section 108* of the *Evidence Act*. It further found that the appellant had placed no material before the court to show that the minister did not approve the higher interest rates, and that she did not discharge the burden on her, and this claim failed as well. The trial court therefore upheld the contract signed by the parties which specifically provided that the bank could vary the interest at its absolute discretion.

The Appeal and submissions of counsel.

11. The appellant was aggrieved by those findings, and filed a memorandum of appeal in which she raises, in brief, the following grounds of appeal:

1. The learned judge erred in law and fact in failing to find that the appellant had proved her case and was therefore entitled to the orders sought, and in particular, the order of injunction;

2. The learned judge erred in law and fact in failing to appreciate that the respondent had charged an exorbitant rate of interest which raised the principal debt from Kshs.6 million to Kshs.200 million, and failed to consider whether the respondent was entitled charge interest at the exorbitant rate of 45%;

3. The learned judge erred in fact and in law and misdirected herself in finding that while the interest charged by the bank was exorbitant, she could not interfere with the bank's statutory power of sale;

4. The learned judge failed to appreciate that the appellant had made substantial payments, amounting to over Kshs.11 million, and that the respondent owed the appellant and the estate of the deceased a duty to realise the security diligently and protect the estate from further loss;

5. The learned judge erred in failing to appreciate that the respondent had not issued a valid statutory notice of sale prior to advertising the property;

6. The learned judge erred in failing to order the respondent to supply accounts in respect of the mortgage;

7. The learned judge erred in her conclusion that evidence ought to have been given to prove compliance of section 44 of the Banking Act; and

8. The learned judge erred in law and fact in awarding costs to the respondent.

12. The grounds of appeal were canvassed before us by learned counsel Mr. Musyoki, for the appellant, and Mr. Murugara who represented the respondent. Mr. Musyoki submitted that as at the time of the hearing in the High Court, the respondent was demanding the amount of Kshs.70 million, yet the appellant had by this time already paid the sum of Kshs.11 million. He submitted further that there had been an enormous rise in the interest rate, yet there was no consent from the Minister for Finance to increase the rate of interest from the rate contained in the mortgage instrument to 45%.

13. He further submitted that because of the unclear circumstances that led to the unlawful increment of the interest rate, the amount owing shot up from Kshs.6 Million to about Kshs.200 million which comprises the principal sum and interest accrued thereon. The appellant argued that the bank had a responsibility and a legal obligation to advise the appellant on any increase in the charges that are levied on the loan accounts, and as a show of good faith, the bank ought to have proven the sum claimed by way of supplying accounts. Instead, argued counsel, the statements provided by the bank did not have any proper information, and as a result, the appellant was unable to glean information from them. Mr. Musyoki therefore contends that there was never any evidence to show how the sum of Kshs.200 million, the sum claimed in the statutory notice, was arrived at.

14. Mr. Murugara in response urged us to find that the interest charged was proper. He relied on the mortgage document, which at clause 1 (a) reads (in part) as follows:

"The mortgager hereby covenants and agrees with the bank:

(a) To pay to the Bank... such sum not exceeding Kshs. 6,000,000.00 as may then be due and owing to the Bank….and together with interest at such rates (subject to a minimum of fourteen percentum (14%) per annum or such higher rate as the Bank shall in its sole discretion from time to time decide with full power to the Bank to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission commitment charges, and other usual Bank charges law and other costs charges and expenses incurred or to be incurred by the Bank in relation to the Customer mortgagor or the mortgaged property on a full indemnity basis."

15. He submitted that the agreement was that the rate that would be charged by the bank was liable to an increase at the sole discretion of the bank, and was to be compounded. Counsel further submitted that the mortgagor and the guarantors agreed to that clause, and never once claimed that it would be wrong to charge such interest. He refuted the submission that there were no accounts given; he stated that the respondent did produce, on a monthly basis, a statement of accounts to the appellant. Counsel further submitted that in any event, the respondent was not under any duty to produce these accounts during the hearing because the appellant never laid any basis for seeking these accounts. He submitted that the appellant simply spent a lot of time seeking the indulgence of the bank for time within which she could pay her outstanding loan. Counsel concluded by saying that the amount owed was never under inquiry, so there was therefore never any need to submit accounts.

Discussion.

16. As this is a first appeal, we are cognisant of our duty to re-evaluate the evidence tendered before the trial court and reach our own conclusions – See Selle v Associated Motor Boat Company Ltd [1968] EA 123 where the Court outlined the duty of the first appellate court as follows:

"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanour of a witness is inconsistent with the evidence in the case generally."

17. We have set out the issues that came before the High Court as well as the arguments made before us in an endeavour to fulfil our duty as a first appellate court. In our view, the following issues arise for consideration:-

a) Whether the provisions of Section 44 of the Banking Act were followed.

b) Whether the interest rate charges were reasonable and in good faith.

c) Whether the Bank supplied statements of accounts to the appellant.

d) Whether the contract between the parties was conscionable.

e) Whether the variation of interest discharged the appellant from liability.

f) What is the appropriate order for costs?

18. On the first issue, it was the respondent's evidence and submission that it was unclear whether the interest increase was done in compliance with *Section 44* of the *Banking Act*. This section requires banks to notify the Minister for Finance before any change in the rate of banking is effected. It provides as follows:

"Restrictions on increase in bank charges

44. No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

19. The trial court held that the appellant, because she is the one who claimed that the bank acted without the minister's approval, was the one to adduce evidence to prove this assertion. With respect, this is not the correct position. It is generally true that he who asserts must prove. That much is contained in S*ection 108* of the *Evidence Act*. However, *Section 112* of the Evidence Act further provides that:

"In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

In the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009) this Court, differently constituted held that:

"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

20. In the appeal before us, it was the respondent bank which fell within *Section 112* and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because *Section 44* of the *Banking Act* places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from

the Minister?

21. To illustrate this point, we find persuasive authority in the High Court case of John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR (Civil Case No. 55 Of 2001) where Sergon J. found that it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with *Section 44* of the *Banking Act*. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate. To our knowledge, the principle stated in that High Court decision was not challenged on appeal.

22. This was a live issue before the trial court. When cross examined on the matter, the respondent's witness, *David Ogega Nyaboga*, conceded that he was unaware as to whether the respondent had complied with *Section 44* of the *Banking Act*. The Banking Act came into commencement on 1st November 1989. By virtue of *Section 44* of the Act, it was incumbent upon the respondent to seek approval from the Minister before it raised any interest to be charged on the outstanding amounts. There is no evidence that that approval to increase the interest charged was sought. On the face of it therefore, the interest rate increases were not in accordance with the law.

23. We are aware of the provisions of *Section 52 (1)* of the Banking Act which provides as follows:

"For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act shall affect or invalidate in any way any contractual obligation between an institution and any other person."

24. Even though under that section a failure to comply with *Section 44* of the Banking Act would not, in and of itself, render the contract between the parties void, *Section 52 (3)* of the Act prohibits financial institutions from recovering interest or other charges which exceed the maximum permitted under the provisions of the Act in the following terms:

"This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act."

25. We now turn to consider the second issue, that is, the legality of the increased rate of interest, even assuming, *arguendo*, that Section 44 was complied with. It is clear from the material placed before the court that at some point during the term of the loan facility, the interest rate shot up from a minimum of 14% that was being charged at the time the mortgage facility was taken, to the rate of 45% which was being charged by the time the appellant filed suit.

26. The respondent's view was that clause 1 (a) of the mortgage instrument, allowed it to unilaterally increase the charges on the interest rate without recourse to anyone, even the appellant who was taking steps to clear the loan. The respondent's position is that the debt would definitely have risen to the sum demanded because the interest had been accruing since the year 1990. That clause reads in part that the Bank "*shall in its sole discretion from time to time decide with full power to the Bank to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission commitment charges, and other usual bank charges law and other costs charges and expenses incurred or to be incurred by the Bank in relation to the customer mortgagor or the mortgaged property on a full indemnity basis."*

While we agree that the clause does appear to give the respondent discretion to vary the rate of interest, we do not accept that this discretion was absolute. Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest.

27. Consider the English decision of Paragon Finance plc v Staunton; Paragon Finance plc v Nash [2001] EWCA Civ 1466 [2002] All ER 248. In this case, a mortgage company (Paragon Finance) had claimed possession from the two defendants on the grounds that the defendants were in arrears with the

mortgage interest repayments. It was not in dispute that the repayments were owing. The defendants however took issue with the rate of interest charged and argued that the mortgage company had failed to adjust the interest rate chargeable in line with the prevailing market rates. The legal charges held by the mortgage company gave it the power to vary a portion of the interest rate from time to time. On appeal, among the issues that the court was to determine was whether the discretion given to the mortgage company to vary the interest rate was subject to an implied term that it was bound to *'exercise that discretion fairly, as between both parties to the contract, and not arbitrarily, capriciously or unreasonably*.' The Court then held that "the power given to the claimant by the mortgage agreements to set interest rates from time to time was not completely unfettered. A construction to the contrary would mean that the claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level."

28. We are in agreement with the sentiments of the English Court that the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self evident that at the time the interest was being changed, it was brought to the attention of the borrower.

29. We find it particularly unfortunate that in the present appeal, the respondent varied the interest and seemed not to provide this knowledge to the appellant or to the borrower. We think this was wrong. If that information was readily availed to the borrower, the borrower would make an informed decision based on his or her circumstances and the consequences that are likely to arise due to the variation undertaken. The borrower may choose to opt out of the contract through full liquidation or look at other institution that would accommodate his or her interest. Information supplied to a borrower before any adverse variation of interest rate is made affords him an opportunity to assess this relationship with his lender, and the right to terminate the contract may even be exercised.

30. In this case, the loan amount of Kshs.6 million was to be paid over a period of 8 years, and there is no indication at what point, or what time the rate of interest increased as there was no notice sent to the appellant. The explanation that the interest was loaded pursuant to the contract entered into by the deceased and the respondent simply rings hollow. It is not a term of the mortgage instrument that interest would be increased in case of default, or on what other basis the bank would have increased the interest. We do not know the circumstances that necessitated the bank's increase of the rate of interest. We are unclear as to whether it was as a result of the appellant's default, or whether there was an economic change that altered the bank's base lending rate, or whether it was due to the loss of value of money. It simply appears to be a whimsical decision by the respondent, and not supported by any relevant factors. An increase of interest rate from 14% to 45% in this matter is by any standards a substantial increase, and the respondent cannot hide behind a clause in the mortgage that allows it to vary interest. As we have stated, at the very minimum, the appellant should have been informed that it was being loaded. In this case the bank simply made a unilateral increase in the interest rate, without even informing the appellant. This was clearly not in good faith. The bank, as a public institution, had an obligation to show that it acted in good faith, and we consider the unilateral increase of interest to have been lacking in good faith. It was a radical and prejudicial change which significantly altered the mortgagor's rights to and in the property, and the least act of good faith would have been to inform the borrower. We find and hold the trial court misdirected itself on this point.

31. Which leads us to the third issue raised in the appeal; whether the bank supplied statements of accounts to the appellant. Such statements would have been crucial to answer the following questions which loudly cried out for answers: what is the amount of money that was advanced to the borrower or drawn by the borrower from the Bank on the loan and current accounts respectively? When were such advances or drawings done? What interest rate was applied by the Bank and for what periods? What is the amount that was repaid by the borrower or the guarantors and when? What is the amount outstanding on the loan and current account and how was it made up? The statements would have shown

a distinction between the loan account and the overdraft account; what charges were being levied on each of the accounts, any commissions charged, and the interest component of the outstanding balance.

32. The "statements" produced before the High Court which counsel for the Bank described as 'reconstructed' did not supply the answers to those questions. Indeed they raised more questions than they answered. They were not only "indecipherable" but also wanting. The appellant in her testimony stated that she could not understand how the amount being demanded could have risen to Kshs.200 million and characterised the bank's demand as robbery.

33. The Bank's witness, however, who would have shed light on the matter compounded the situation when he stated:

"*The current account the central agencies overdrew the following it is running account the amount drawn up to 1990. The amounts are too many I cannot now tell. I need time to add. The total amount repaid, it is only interest that we were recovering. Looking at page 4, there are credits in respect of interest payment. When at end of month we debit account if it is not paid it accrues more interest. If payment is made we credit account. There were payments made but I cannot now say I don't have total.*" (emphasis added)

34. The learned trial judge was herself disturbed when she observed that:

"The plaintiff in her evidence stated that the rate of interest charged by the defendant to be "robbery" and the court is of the view that indeed considering the amount of the facility, of Kshs.6 million and the amount now being claimed by the defendant being close to Kshs. 200 million that the rate of interest not only is it exorbitant but is …morally wrong."

This state of affairs was unacceptable. By the time the suit was filed in the High Court in the year 2000, the computer age was with us. Surely, the bank was under some obligation to provide accounts that were clear, and that were a true representation of all charges, commissions and rates that were loaded onto those accounts, as well as showing the number of times the appellant was making repayments to offset the debt. This was clearly not the case here. The appellant was not even sure at what point the interest was increased. One way of shedding light on the matter would have been to provide these accounts. The appellant's claims, on their own, provided a basis for which the court ought to have ordered the respondent to provide a statement accounts and we hold that the trial court was in error in rejecting the prayer for accounts.

35. Was the contract entered into between the parties in this matter conscionable? That is the fourth issue.

It is not for the Court to rewrite a contract for the parties. As this Court held in National Bank of Kenya Ltd vs Pipeplastic Sankolit (K) Ltd. Civil Appeal No. 95 of 1999 "a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract."

36. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability isthat which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See *Black's Law Dictionary, 9th Edition, Gardner, Ed.).*

37. In the persuasive authority of Housing Finance Co Of Kenya Ltd v Njuguna, LLR No 1176 (CCK) the High Court was dealing with a matter where the plaintiff bank had increased the interest rate up to 26% when the agreed rate was 19%. The bank brought an application for a decree of possession of the property which had been charged as security for the loan. The respondent on the other hand disputed the amount claimed because it was as a result of invalid and unknown interest rates, charges and levies

that had been levied in contravention to the rates that had been sanctioned, at the time, by the Central Bank of Kenya. The court (Mwera J.) stated that:

"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 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."

38. This Court has also weighed in on those principles in the case of Kenya Commercial Finance Company Ltd vs. Ngeny & Another [2002] 1KLR where it stated:

"The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

40. Also, in this Court's decision in Shah v Guilders International Bank Ltd [2002] 1 EA 264 (CAK) it was held that:

"…where the rate of interest [has been agreed upon by parties,] the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent."

41. So that, Contracts that have unconscionable elements will attract interference by the Court. Such was the case in Daima Bank Ltd & Others v Osmond LLR No 731 (CAK). In that case, the respondent, Osmond, had borrowed money from the applicant, Daima Bank Ltd. Osmond fell into arrears, and the Bank wrote to him demanding payment of the sum owed as well as interest thereon, which prompted Osmond to file suit in the High Court. He was granted an interlocutory injunction, and on appeal, this Court, declined to interfere with the discretion of the trial judge in part because *"the interest charged on the principal sum was not only unreasonable but also unconscionable and manifestly excessive."*

42. This is also the situation obtaining in comparative jurisdictions, which we have examined. In England, it was held in the case of Strydom v Vendside Ltd [2009] EWHC 2130 (QB) at paragraph 36 that:

"[36] In summary, therefore, before the court will consider setting a contract aside as an unconscionable bargain, one party has to have been disadvantaged in some relevant way as regards the other party, that other party must have exploited that disadvantage in some morally culpable manner, and the resulting transaction must be overreaching and oppressive. No single one of these factors is sufficient – all three elements must be proved, otherwise the enforceability of contracts is undermined…. Where all these requirements are met, the burden then passes to the other party to satisfy the court that the transaction was fair, just and reasonable."

43. *Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298* states of unconscionability:

"Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident.

It has been suggested that these various instances of protecting against weakness or vulnerability might be gathered together under a general doctrine of inequality of bargaining power: by virtue of it, English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other."

44. In Commercial Bank of Australia Ltd v Amadio [1983] 51 CLR 447 the Court in Australia stated that:

"Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogues. [Such disability includes] …"poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary". … the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other". (Quoting Blomley v. Ryan (1956) 99 CLR)"

45. As Lindy Wilmott and Bill Duncan, in their article *Clogging the Equity of Redemption: An outmoded concept? Vol. 2 No 1QUTLJJ* explain, *"the relationship of borrower and lender does not give rise, of itself, to any presumption of special disability, [but] there are certainly circumstances where a necessitous borrower may be overborne by a more powerful lender in circumstances giving rise to unconscionability on the part of the lender."*

47. A mortgage instrument whose terms constitute an unconscionable bargain will not be enforced as was stated in Multiservice Bookbinding Ltd and others v Marden [1978] 2 All ER 489 in the following terms:

"The test of the enforceability of the terms of the mortgage was not whether they were reasonable but whether they were unfair and unconscionable. The court would hold that a bargain was unfair and unconscionable only where it was shown that one of the parties to it had imposed objectionable terms in a morally reprehensible manner."

In the later case of Westfield Holdings Ltd v Australian Capital Television (1992) 32 NSWLR 194 the Court stated that:

"There does not appear to be any commercial reason why, in 1992, the court should invalidate any transaction merely because a mortgagee obtains a collateral advantage or seeks to purchase a mortgage property. Quite obviously, equity must intervene if there is unconscionable conduct. Again equity must intervene in a classic case where it can see that a necessitous borrower it not, truly speaking, a free borrower."

48. Rick Bigwood in his case note *Curbing Unconscionability: Berbatis in the High Court of Australia* which appears in *Volume 28* of the *Melbourne University Law Review,* explains the threshold of special advantage, and the attendant action as follows:

"The threshold criterion of 'special disadvantage', for instance, is concerned with the question of determining when it becomes 'unfair', 'wrong', or 'inappropriate' for the other bargaining party to play for advantage by the ordinary rules of free competitive bargaining. In this situation, the rules need to be qualified, adjusted or suspended in favour of the specially disadvantaged bargaining party."

49. In Australian Competition and Consumer Commission v Samton Holdings Pty Ltd [2002] FCAFC 4;

[2002] FCA 62 the Federal Court of Australia further developed the doctrine of special disadvantage as follows:

“65 Characterisation of disadvantage as "special" involves the recognition that it would be unconscionable knowingly to deal with the person so affected without regard to his or her disability, be it constitutional, in the sense of inherent, or situational, in the sense of arising from a particular set of circumstances. In effect this may require some special conduct or care which is not necessary in the absence of such disadvantage. If, for example, the disability relates to language, illiteracy or lack of education, conscientious dealing may ensure the bargaining deficit is compensated for by the provision of special assistance such as independent advice which will either enable a proper understanding of the transaction or overcome the disadvantage arising from want of a proper understanding.”

50. A similar case was found in Cityland and Property (Holdings) Ltd -v- Dabrah [1967] 2 All ER 639. In this matter, the Court was confronted with an issue were the defendant purchased some property on a mortgage that stipulated that should he default, the whole of the money lent as well as the premium would become due. This in effect meant that the interest chargeable on the mortgage facility amounted to about 38% on the interest. The Court was of the opinion that to load such a premium was unfair and unreasonable, and that “it was so large that it forthwith destroyed the whole equity and made it a completely deficient security. If default were made and all that had been secured was the principal and interest, it was likely that on any exercise of the plaintiff’s powers as mortgagees, there would be a surplus for the mortgagor, but this premium destroyed any possibility of that, and it also made the security which was ordered deficient.”

51. The importance of a ‘meeting of the minds’ in contracts cannot be over emphasised. In a situation between the bank and a borrower or guarantor, the latter are at a situational disadvantage, or a special disadvantage because of their position in relation to the bank. This is evident in the proceedings now before us. The correspondence between the parties shows that the appellant had lost her husband and her business, facts which were within the respondent’s knowledge. She had sold one property in Thika in order to try and offset the amount that was due to the bank. At some point during these negotiations, the respondent indicated to the appellant that the interest rate had risen to 29.5% per annum. This is shown in the respondent’s letter to Central Kenya Agency Limited which is dated 16th November 1999. At this point in time the amount owed to the respondent was Ksh.70,412,541.50. The interest surcharged was so huge that by the time the statutory notice was issued, the bank was demanding an astronomical sum of Kshs.200 million. There was absolutely no way that the appellant could exercise her equitable right to redeem the property. One may indeed surmise that the appellant was enslaved by such interest rate.

52. In the case of Chua v Timann 562 SCRA 146 (G.R. No. 170452) the Supreme Court of Philippines stated that:

*"*The stipulated interest rates of 7% and 5% per month imposed on respondents’ loans must be equitably reduced to 1% per month or 12% per annum. We need not unsettle the principle we had affirmed in a plethora of cases that stipulated interest rates of 3% per month and higher are excessive, iniquitous, unconscionable and exorbitant. Such stipulations are void for being contrary to morals, if not against the law. While C.B. Circular No. 905-82, which took effect on January 1, 1983, effectively removed the ceiling on interest rates for both secured and unsecured loans, regardless of maturity, nothing in the said circular could possibly be read as granting carte blanche authority to lenders to raise interest rates to levels which would either enslave their borrowers or lead to a hemorrhaging of their assets.”

53. The fifth issue relates to the appellant herself and the estate of the deceased whether the variation of the interest rate affected them as guarantors. It is undisputed that the variation of interest rates was done without notice to the appellant. The appellant and her late husband, as we have stated earlier in this judgment, were parties to the mortgage by virtue of being guarantors to the loan facility that was obtained back in 1988. Even we were to say that the respondent bank was within its rights to increase the rate of interest, we think that a failure to give notice of the same was a material alteration in the terms of the contract.

54. In the Canadian case of Manulife Bank of Canada v. Conlin [1996] 3 S.C.R. 415 the Supreme Court of Canada was faced with a matter in which the respondent, Conlin, guaranteed a mortgage which was to attract a yearly interest of 11.5% per annum. Before the mortgage matured, the appellant bank and the mortgagor entered into another mortgage contract, which stipulated the rate of interest as 13% per annum. It therefore fell upon the Court to determine whether under the terms of the new agreement, the respondent would be required to pay the principal sum, and any other amount guaranteed by him when the term of the mortgage was extended and the rate of interest increased, without notice to him. The Court held that:

"It is well accepted that any material variation of the terms of a contract between debtor and creditor, which is prejudicial to the guarantor and which is made without the guarantor's consent, will discharge the guarantor…. An increase in the rate of interest and an extension of the time for payment are both material changes to the loan agreement sufficient to discharge a surety."

That may well be the case in this matter.

55. Before we conclude, we must observe that at the hearing of this appeal, we were informed that the remaining property of the deceased which the appellant sought to save by seeking injunctory relief was sold by the Bank on 29th January 2008 and raised a further sum of Ksh.38 million, the whole of which the bank has retained. Learned Counsel for the bank indeed confirmed this. It is for that reason that the appellant abandoned pursuit of the ground of appeal on the injunction.

Conclusion and Disposition.

56. We have found in the above discussion that there was no evidence that the interest rate charged by the respondent was in accordance with *Section 44* of the Banking Act. We have found that it was manifestly excessive, and, in the words of the trial judge, morally wrong. We have further expressed the view that the clause relied on to charge the interest that led to this exhorbitant indebtedness was not only unconscionable and without notice to the appellant, but was bad for failure to accord with the relevant provisions of the law. In addition we have found that the bank owed a statutory and fiduciary duty of care to the appellant and the deceased's estate.

57. For all those reasons, we allow the appeal, set aside the judgment of the High Court given on 13th July 2004 and substitute the same with the following orders:-

a) An order in terms of prayer (c) of the plaint dated 19th October 2000.

To give effect thereto, we order that:-

(i) The Bank shall, within 60 days from the date of delivery of this Judgment, furnish to the appellant and to the High Court, detailed statements of account in relation to both the loan and current accounts from the inception of both accounts showing all debits and credits and interest rates charged at different times so as to arrive at the balance claimed by the Bank to be outstanding on each account.

(ii) In default of compliance by the Bank, the appellant and the estate of the deceased shall stand discharged from all claims by the Bank.

b) *Upon compliance with this order, the matter shall be remitted back to the High Court for determination of the following, and any other, issues that may arise and for disposal by any Judge excluding Kasango J:*

(i) Whether the interest charged by the Bank on the loan and current accounts of the borrower from time to time was in accordance with the terms of the agreement between the parties and the law.

(ii) Whether the appellant is indebted to the Bank, and if so, to what extent.

(iii) The liability of the appellant and the estate of the deceased if any and the extent thereof.

c) As the appellant has been successful in this appeal, the costs of the appeal shall be borne by the respondent, but otherwise, each party shall bear its own costs of the proceedings before the High Court.

Orders accordingly.

Dated and delivered at Nairobi this 10th day of October, 2014

P. WAKI

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JUDGE OF APPEAL

M. WARSAME

……..……

JUDGE OF APPEAL

S. GATEMBU KAIRU

……..……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR