REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Civil Appeal 329 of 2009

RICHARD AKWESERA ONDITI ....APPELLANT
AND
KENYA COMMERCIAL FINANCE COMPANY LIMITED............ RESPONDENT
(An appeal from the judgment and decree of the High Court of Kenya at Kakamega (Tanui, J.) dated 18th September, 2001
in
H.C.C.C. NO. 65 OF 1993)
****

JUDGMENT OF THE COURT

Introduction

1. The appellant, **Richard Akwesera Onditi**, is a gallant fighter who has joined battle with his bankers and their lawyers for the last 20 years, sometimes with the assistance of legal counsel but mainly in person. In the appeal before us, he has drawn up in person a memorandum laying out some 29 grounds of appeal with another list of 27 sub-grounds, and in the end made the following prayers: -

"i) Setting aside judgment and decree of the superior court, which are a nullity (see paragraph No 3. herein in above in this Memorandum of Appeal).

ii) Entering judgment in favour of the appellant by the discharging the charge on L.R. NOS. KAKAMEGA/CHEKALINI/780, 781 and 783 - which charge was registered on the 14th day of December 1990 - it is now 19 years thus: contravening the Limitations of Actions Act, Cap. 22 Section 19 (1), Laws of Kenya which prescribes 12 years only.

iii) Costs in exemplary damages: Kshs. 8,000,000/= (Eight million) for unlawfully withholding of the Appellant's title deeds as at sub-paragraph no. (ii) herein above quantified on the basis of the current price of land together with appurtenances in Chekalini Settlement Scheme – thus 20x400,000/= Kshs. 8,000,000/=.

iv) Costs in arrears of interest as in the judgment debt at Kshs. 1,636,264.55 (one million, six hundred and thirty six thousand two hundred and sixty four, fifty five cents) in compliance with Limitations of Actions Act, Cap. 22 Section 4(4) Laws of Kenya @ the prevailing bank rates of interest from time of filing suit on the 8th day of March, 1993 to date (see paragraph No. 5 herein above in the Memorandum of Appeal and paragraph no 19).

v) Costs in unlawfully taxed costs on March 19, 2003 in the absence of the Plaintiff/Appellant at Kshs. 407,817/= (Four hundred and seven thousand, eight hundred and seventeen) @ 14% interest

per annum from time of filing suit on the 18th day of March, 1993 to date.

vi) Cost in the breach of conditions @ Kshs. 30,000,000/= (thirty million only) see paragraph no. 7 of this Memorandum of Appeal herein above – but, the costs be in the direction of this court.

vii) Costs in fraudulently withdrawn (sic) **Kshs. 1,020,000/= from the 14th day of December 1990 with interest purported charge on LR. NO. KAKAMEGA/ CHEKALINI/780, 781 and 783 on loan account No. 205010108.**

viii) Costs in this court and the superior court from the time of filing suit @ 14% per annum of full payment to the Appellant by the Respondent to date.

ix) Incarceration as prescribed by the relevant law of Advocate WILSON KIPLAGAT KALYA for making false official documents by invocation of rule 1 3(1), (2), (3) and (4) Appellate Jurisdiction Act, Cap. 9 and the Penal Code Act, Cap. 63 Section 351 Laws of Kenya in the interest of justice.

x) Incarceration as prescribed by the relevant law of Advocate MOSES WANJALA for giving false information to the Deputy Registrar that he (Wanjala) is instructed by the Respondent in the Notice of Motion dated the 11th day of March 2009 and its Supporting Affidavit sworn on the 9th day of March, 2009 contrary to the Penal Code Act, Cap. 63 Section 129 (a) and (b) Laws of Kenya – the said Notice of Motion contradicts the Notice of Motion of Ms JANE SANG dated the 23rd day August, 2008 on record.

xi) Costs in general damages to compensate: emotional and psychological stress @ Kshs. 30,000,000/= (thirty million only).

xii) This appeal be allowed with costs as prayed herein above and,

xiii) Any other or further reliefs this court may deem just to grant.

2. Shorn of unnecessary frills, other court skirmishes and sideshows, the appeal is fairly straightforward. It arose from the judgment of the superior court (*Tanui, J.*) delivered in Kisumu on 18th September, 2001, in which the learned Judge dismissed the appellant's suit against **M/sKenya Commercial Finance Company Ltd.** (hereinafter *"the bank"*) and instead allowed a counterclaim by the Bank.

The facts

3. This is a first appeal and the appellant is entitled to expect that we shall re-examine the entire record, re-evaluate the evidence and draw our own conclusions on the facts and the law. Assessment of credibility of witnesses is, however, a different matter since the trial court is a better judge having seen and heard the witnesses testify.

4. Amongst other voluminous documents, the record before us contains a bundle of 19 letters and payment receipts which the appellant says were not part of the record in the superior court because his advocate forgot to produce them. He says, however, that he obtained an order from another judge of the superior court (*Chitembwe J.*) allowing him to include the documents in the record of appeal. The order was issued *ex parte* on *10th December 2009* and it is not clear under what provisions of the law the learned judge acted on. In essence the documents amount to additional evidence which only this court may admit under *rule 29* of the rules of this Court. On that premise, we have no hesitation in stating that *Chitembwe J*. acted in error. Nevertheless, the respondent bank has made no challenge to the said documents and we think in the interests of finality of this long drawn out dispute, we shall make reference to those documents.

5. The entire documentary evidence on record has elicited the following facts:

In November 1984, the appellant was desirous of purchasing a posho mill and a weighing machine for installation at his Chekalini farm in Kakamega but did not have the finances to do so. He therefore approached the bank for financial accommodation and the bank agreed. It would appear that the bank was

administering a USAID loan scheme meant for Rural Development.

6. It is common ground that the appellant signed a commitment letter with the bank on 12th November 1984 in which the bank was to advance to him the sum of shs.189,000 on terms, *inter alia*, that the rate of interest shall not be less than 19%, p.a. and not more than 25% p.a; that the interest shall be payable monthly on the last day of every calendar month; that unless the entire loan was repaid earlier after requisite notice, it would be repaid over a period of five years at the rate of shs.9450 per quarter; and that the loan would be secured by a legal charge over **L.R. No. Kakamega/Chekalini/416**, the appellant's 28 acre piece of land in Chekalini Settlement Scheme in Kakamega District.

7. It is also common ground that the charge was duly executed and registered on *25th January 1985* after the requisite Land Control Board's consent and other clearances were obtained by the appellant. By that charge, the appellant committed himself, *inter alia*, to:

"…repay the liability together with commissions and other usual bank charges, law and other costs, charges and expenses and together with interest at such rate, or rates (subject to a minimum of 19% p.a.) as the lender shall in its sole discretion from time to time decide with full power to the lender to charge different rates for different accounts…"

The sum of shs.189,000 was released to the appellant on 5th February 1985.

8. No sooner had the appellant installed the posho mill than he realized that the monthly repayments he had committed himself to make were onerous. Between May and September 1985, he barely made quarterly payments of shs.3000 until the bank reminded him that he was not keeping up with the scheduled payments and demanded payment.

9. The appellant tried to explain his difficulties by letter dated 29th September 1985, in relevant part, thus:

"From May, June, July, August and now there has been very little maize in the Settlement Scheme and therefore the posho mill has only been making an average of Kshs.40 (forty) per day. From last week I am beginning to realize a slight improvement in the turn out. You may send here one of your officers to come and examine the daily recording of the income.

……………………………

In the meantime, could you please re-schedule the repayment so that I could be making quarterlyinstalments plus interest; instead of paying monthly interests and quarterly instalments.

……………………………

My experience now reveals that a 5 (five) year repayment period is inadequate since this mill is situated in an area of poor peasant farmers who only get money after maize harvest i.e. from October, November, December, January, February and a part of March. The loan can only be managed if it is spread over in 8 (eight) year repayment period. With first instalment falling around October and the second at the end of January. This, I believe would be a good plan and I hope you will kindly consider this request."

10. The request to reschedule the loan requirement to quarterly payments over a period of 8 years was not acceptable by the bank and the situation did not improve. The bank therefore instructed its lawyers in May 1986 to demand the arrears of capital and interest then outstanding in the sum of shs.37,251.80. The appellant thought he was being victimised by the bank and so complained to the Chairman of the Kenya Commercial Bank Group that his plea for rescheduling the loan was being ignored. In his letter dated 2nd September 1986 he pleaded:

"I am not defeated to repay my loan and I am therefore beseeching you to kindly request KCFC to allow me repay my loan in 6 years at the rate of ksh.3,000/= per month interest plus the principal and take into account the money already paid to them. Let them, please, regularize their records and provide me with a copy together with a drawdown schedule worked out on the proposed period. The Ksh.3,000/- in the net income derived from the posho mill."

11. When the bank did not relent, the appellant instructed an advocate to plead with the bank on his behalf and on 19th January 1987, the Advocate wrote:

"Our client has intimated to yourselves verbally and in writing of the difficulty of repaying the loan as

per the commitment letter dated 12th November 1984. Details are contained in various letters exchanged between our client and yourselves and other parties. Although our client has continued to pay interests he has been unable to pay the instalments as a result of the low income from the investment.

The income from the investment (a posho mill) is approximately Shs.3000/= per month. Our client therefore requests that the repayment Schedule be varied such that he pays Shs.3000/= per month towards loan repayments and interest and a further lump sum of shs.12000/= at the end of every year. In this respect we understand that you have received a sum of shs.3000/= on 10th December, 1986 being the first payment thereof. By this arrangement our client anticipates that the total loan will have been repaid over a period of 7 to 8 years."

12. Again that proposal does not appear to have been accepted and by May, 1987, the repayment situation had become worse. The arrears stood at Shs.223,193.40 with interest thereon accruing at 19% p.a. The bank gave instructions for the security to be realised in a public auction and in June 1987 it was advertised for sale. On making further pleas through third parties, it was cancelled on condition that the appellant henceforth pays Shs.5,000 per month.

13. That arrangement did not last long before the appellant defaulted after paying only four installments and instead, in May 1988, he requested the bank for permission to subdivide the charged property into two potions of 10 acres and 18.5 acres with the intention of selling the smaller portion, in his own words: "*to reduce my indebtedness with you substantially*". Not to liquidate the loan.

14. The bank agreed to that proposal on 4th June, 1988 and informed the appellant that the loan balance as at May, 1988 was Kshs.243,077.65. He was asked to deposit the sale proceeds with the bank and avail the remaining portion for a fresh charge.

15. The appellant does not appear to have found a buyer immediately and the subdivision proposal took some time to take off. The bank felt uncomfortable waiting longer since no loan repayments were forthcoming and therefore called in the whole loan as at September, 1988 standing at Kshs.250,201.55. The statutory notice was also served.

16. The appellant made further pleas and in the end the bank agreed to give him a final chance and called off the intended sale of the security. Ultimately the appellant subdivided the charged property into four portions of 10, 6, 10 and 2 ½ acres whereupon one portion of 10 acres was sold for Khs180,000/= and the remaining three portions were charged to the bank. The three portions were **Kakamega/Chekalini/780, 781** and **783** respectively.

17. The sale transaction was not completed until 8th October, 1990 when the cheque for Kshs.180,000/= was released to the bank. Upon payment of Kshs180,000/=, the appellant felt that he had fully repaid the loan and he tabulated all payments made by him at Kshs.260,512.35 as at 11th October, 1990. He contended that this was early redemption of the account as provided for in the commitment letter and demanded the return of his three title deeds for plots **780**, **781** and **783.** The bank however rejected his contentions and demanded that he executes a charge to secure payment for the balance of the loan. On 28th November, 1990 the appellant executed a charge in favour of the bank for repayment of Kshs.340,000/= together with interest thereon and provided plots 780, 781 and 783 as security therefor. The charge was registered on 14th December, 1990 after the appellant had obtained the necessary consents.

18. In March, 1991, the appellant requested the bank to release one of the securities, Plot 783 which he intended to charge to another institution for funds to clear or make a substantial repayment of the ''l*oan*". The bank was prepared to release the title on appropriate undertakings but none were given. In the meantime the arrears situation worsened and the bank threatened to realize the securities in February 1992, and indeed went ahead and served the necessary notices and instructed auctioneers.

19. Once again, the appellant made pleas through third parties seeking cancellation of the auction but the bank was adamant in their intention to recover the debt then due as at 31st December, 1992 in the sum of Kshs.373,137.35. In those circumstances the appellant was compelled to go to court and obtain orders stopping the sale which he did.

The Suit

20. In the suit filed by plaint on 8th March, 1993 and which plaint amended on 1st April, 1993, the appellant acknowledged that he had borrowed Kshs.189,000/= for repayment within 5 years on the

security of plot No. 416. He further pleaded that the bank gave him permission to subdivide the land with a view to selling off one portion to repay the loan. He however, blamed the bank for unreasonably and maliciously delaying the process of subdivision and contended that the attendant escalation of the loan arrears was the bank's own and he ought not to be called upon to pay any more money to the bank. He denied having signed any further charge in respect of plots 780, 781 and 783 or borrowing shs.373,137.35 on security thereof. He prayed for the following orders:-

"(a) The Defendant be compelled to surrender Titles LR. Nos. KAKAMEGA/CHEKALINI/ 780, 781 & 783.

(b) The Defendant be permanently restrained from Advertising (sic) for public auction all the properties shown in No. (a) above.

(c) The demand of exorbitant interest of Kshs. 373,137.00 shown in No. 10 above be waived forthwith

(d) Any other relief this Honourable court may deem necessary."

21. As expected, the bank filed a defence, subsequently amended, contending, *inter alia*, that the repayment of the loan was governed by the charge instrument over plot 416; that the permission granted to the appellant to subdivide the plot did not affect the liability which was only reduced and was further secured by charges on plots 780, 781 and 783; that there was never a waiver of the bank's rights under **Sections 65 (2)** and **74** of the Registered Land Act; that it was the appellant who delayed the subdivision process and continued in default of regular repayments thereby attracting penalty interest and other bank charges; that the bank throughout acted in accordance with the terms of the charge and the law; that the loan outstanding as at March 1993 when the suit was filed was Shs.386,016.80 and had escalated to Shs.1,636,264.55 over a period of six years upto May, 1999 when the amended defence was filed; and that the appellant had come to court with unclean hands, hence the suit should be dismissed. In the same defence the bank pleaded a counterclaim for the payment of Shs.1,636,264.55 with further interest thereon at bank rates from 1st June, 1999.

The Evidence

22. The hearing of the main suit commenced on 22nd July, 1998 before Tanui J. but only the appellant was heard in the absence of the bank. A date for judgment was set, but before the judgment, the bank's lawyers made an application and explained their absence which was accepted by the court. The suit was relisted for hearing and the bank was allowed to cross-examine the appellant and to adduce evidence on its defence and counterclaim.

23. In cross-examination, the appellant conceded that he had not complied with the repayments as agreed with the bank and further admitted the numerous demand letters served on him by various lawyers for the bank which were put to him. He accepted that there was a delay in securing a buyer for a portion of the charged property but contended that the payment of the proceeds of that sale was sufficient to clear the loan. Cross-examined further, however, he admitted that the outstanding loan before payment of those proceeds was higher and he had agreed that the balance of the loan would be secured by the remaining plots. As for the subsequent charges registered over plots 780, 781 and 783, the appellant conceded that he executed the charges but denied that he obtained consent from the Land Control Board for the charges. He further contended that the charges were fraudulent. Shown completed application forms for the Land Control Board's Consent, the appellant conceded that he had executed them but pleaded that he did not know what the document meant and was coerced by the bank through threats of auctioning the whole property. He denied owing the bank any money and closed his case.

24. Before the bank called its evidence, it applied to amend its defence to include a counterclaim and on 22nd September, 1999 leave was granted to do so with further leave granted to the appellant to amend his plaint and to testify further. A reply to the amended defence was filed as well as a defence to the counterclaim. Ten agreed issues were then framed and filed as follows:

"1. What were the exact terms of the loan agreement herein?

2. Under what conditions was the sub-division of all that parcel of land known as L.R. NO. KAKAMEGA/ CHEKALINI/416 effected?

3. Whether or not the Defendant's action of advertising for purposes of sale the pacel in question was justified and/or legal?

4. Whether or not there is a legal or factual basis for the Plaintiff's prayer?

5. Whether or not the outstanding loan herein has ever been liquidated or paid off.

6. Was there an outstanding debit balance of Kshs.1,636,264.55 as at 31st May, 1999 in the Plaintiff's account with the Defendant?

7. Whether or not the Plaintiff owes the Defendant any money?

8. Whether or not the Defendant has a right to secure the payment of the debt owed to it, (if any) by the Plaintiff by selling the parcels KAKAMEGA/ CHEKALINI/780; KAKAMEGA/CHEKALINI/781 and KAKAMEGA/CHEKALINI/783?

9. Whether or not the Plaintiff can call upon court to vary or alter the terms of the contract between the parties in this suit or to create a new contractual relationship?

10. Whether or not the charges upon land parcel No. KAKAMEGA/CHEKALINI/780, KAKAMEGA/ CHEKALINI/781 and KAKAMEGA/CHEKALINI/783 are illegal encumbrances?

24. The matter was not heard again until July 2000 when the appellant arrived late in court and found the bank's witness giving evidence. The appellant was represented by counsel at the time. That witness was partly heard and after several adjournments for reasons on record, the witness resumed his evidence on 19th March, 2001. He produced numerous letters and other documents (over 100) now on record in support of the contentions made in the amended defence and counterclaim. Exhibiting a statement of accounts, he explained, among other issues, that the appellant had not made any payment towards the loan since the payment of Shs.180,000/= was received in October 1990 and the loan was therefore increasing exponentially. He also explained how the charges over plots 780, 781 and 783 were registered after consent of the Land Control Board was obtained. The hearing was concluded on 10th May, 2001 and the judgment was set for delivery on 18th September, 2001 after the filing of final submissions of counsel.

<u>The Superior Court's Decision:</u>

25. Upon evaluation of the evidence adduced on both sides and the submissions of counsel, the learned trial judge delivered himself, in part, as follows:

"When the payment of Kshs.180,000/= was received by the defendant, the plaintiff's indebtedness was reduced to Kshs.189,775/90 It is patently clear that the plaintiff's indebtedness was not liquidated by that payment. In fact the plaintiff's original plan in the sub-division of his land and sale of it was to enable him reduce his indebtedness to the defendant as conveyed in his letter or 10th May, 1988.

It is also clear from the statement of loan account of the plaintiff with the defendant that from 11th October, 1990 when the cheque for Kshs.180,000/= was paid to the defendant to 8th March, 1993 when the plaintiff instituted this case he never paid any other sum to either reduce or liquidate the outstanding amount which then stood as at 27th February, 1993 at Kshs.386,016/05. The amount which the plaintiff mentioned in paragraph 10 of his amended plaint as exorbitant interest which he sought to be waived was the balance then outstanding in his account as at 31st December, 1997.

I note that on 28th November, 1990 the plaintiff had executed a fresh charge in favour of the defendant over parcels Nos. Kakamega/Chekalini/780, 781 and 783 to secure a sum of Kshs.340,000/=. The plaintiff appears to have claimed that he was coerced into signing the

document but there is evidence that he made an application to the Land Control Board before it. In any case he never made any complaints about such compulsion until he was cross-examined in court. I find that the plaintiff's belated claim of compulsion to be an afterthought.

In my view the plaintiff has not discharged his onus to prove that loan he was given with interest therein has been liquidated as claimed. In the circumstances there is no basis for the plaintiff's prayers in this case".

26. The learned judge also dealt with other legal and procedural issues raised in submissions of counsel and stated:
"The plaintiff's counsel in his supplementary submission seeks to object to grant made to the defendant to amend the defence and counter-claim when the plaintiff had testified on the ground that it lacks level play. As far as I can remember the application for leave to recall the plaintiff for cross-examination and that the defendant be permitted to adduce evidence was argued before me by both counsel and I reserved a ruling. Later on I granted the defendant the prayers it had sought. The plaintiff did not appeal nor did he sought *(sic)* **a review or setting aside that ruling. Thereafter the plaintiff was cross-examined by Mr. Ruto and re-examined by Mr. Wekhulo who thereafter closed the plaintiff's case. When the matter came up for the defence case the defendant appeared through another firm of advocates who had filed a notice of change of advocates who eventually applied for leave to amend the defence case and introduce a counter-claim. That application was again inter partes and a ruling was reserved and was delivered later on in the presence of both counsel. No appeal was preferred against the ruling which granted the defence leave to amend the defence as proposed. The plaintiff was also granted leave to amend his plaint but he did not deem it necessary. He merely filed a reply to the counter-claim and he did not ask to be recalled so as to testify and deny the counter-claim. Mr. Wekhulo who has been on record until now has not thought it necessary or** *(sic)* **has he lodged an appeal against the grant of leave to amend the defence. It appears to me that this is an after-thought on Mr. Wekhulo's part.**

On the claim that the defendant's counter-claim is barred by the Limitation of Actions Act *(sic)* **cannot be true as the plaintiff filed his suit in 1993 and when the counter-claim was filed in 1999. The defendant executed the charge in favour of the defendant over the parcels of land No. Kakamega/Chekalini/780, 781 and 783 in 1990 and the counter-claim filed in 1999 cannot therefore be barred. In any case until now the arrears of interest on the principal sum are still accruing and that the right to receive money has not ceased".**

The appellant's suit was thus dismissed in its entirety and the bank's counterclaim was granted.

27. It is those findings that the appellant seeks to challenge in his lengthy and prolix memorandum of appeal.

<u>The appeal</u>

28. In his submissions made in person before us, the appellant complained about the transfer of his case from Kakamega to Kisumu asserting that it was contrary to **Section 47** of the *Evidence Act*. He further maintained that he had repaid the entire loan advanced to him despite the *posho* mill generating meager income and such repayment was in accordance with the commitment letter which allowed early redemption of the account. The appellant directed his ire at the bank's lawyers whom he accused of delaying his application for subdivision and sale of the charged property for more than 72 weeks, thus allowing the bank to load exorbitant interest and other charges to the loan account. He also contended that the Bank had introduced fake exhibits in evidence which the superior court erroneously relied on. In support of his prayer for incarceration of the bank's lawyer, the appellant contended that the lawyer had no authority to act for the bank or to swear affidavits on its behalf. Finally he submitted that the counterclaim was time barred as it was made 8 years after he had filed his suit. There was also an estoppel, he submitted, which operated against the bank for demanding extra amounts of money when it had indicated that it would accept Shs.180,000/= as final payment in 1990.

29. In response to those submissions of learned counsel for the bank Mr. Wanjala submitted that he was

lawfully on record and had been lawfully instructed by the bank to act for it and therefore ***sections 47*** of the **Evidence Act** or ***rule 22 (2)*** of this Court's Rules do not apply; that the appellant was represented by counsel when the order of transfer of the case from Kakamega to Kisumu was made and there was no complaint raised about it; that all the facts relating to the loan and the security thereof were admitted by the appellant and that the statements and other documents on record confirmed the indebtedness by the appellant; that the bank had proved that the appellant had sought the subdivision of the charged property and the charging of the plots in issue to secure the balance of Shs.340,000/= which has never been repaid in part or at all and had risen to Shs.1.6 million when the counterclaim was made; that the amendment of the defence and the counterclaim was lawful as it was unchallenged after grant by the court and the appellant was estopped under **Section 68** of the *Civil Procedure Act* from challenging them in this appeal; and that there was no time bar as the loan was still subsisting and the cause of action accrued when demand was made in 1999.

Findings

30. As stated earlier, we have gone into some length in considering the material laid at our disposal in this matter, not only because it is our duty as the first appellate court to do so, but also because the appellant was unrepresented before us and may have been inarticulate in his submissions.

We find on the peripheral issue of representation that the firm of Advocates of M/S. Kalya & Company Advocates are properly on record for the appellant and were entitled to instruct advocates within that firm to prosecute the appeal. Mr. Wilson Kiplagat Kalya and Mr. Moses Wanjala were lawful members of that firm and nothing has been shown to the contrary. The rule cited in aid of declaring those advocates as imposters is **Rule 22 (2)** of this Court's Rules which provides as follows:

"Rule 22 (2) A corporation may appear either by advocate or by a director, manager or secretary thereof appointed by resolution under the seal of the company, a sealed copy of which resolution shall be lodged with the Registrar".

It was the appellant's submission that under the rule, the advocates ought to have shown that they were appointed by resolution under seal of the bank but had filed no such resolution. It is clear to us that the submission is a misreading of the rule and as submitted by Mr. Wanjala, the requirement for a resolution under seal relates to "a director, manager or secretary" and not to the Advocates. We agree.

We also find no evidence on record for the invocation of **section 47** of the Evidence Act which relates to "*proof that judgment was incompetent or obtained by fraud or collusion"*, and provides as follows:-

"Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion."

Needless to say fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him. We find no application of that section to the case before us.

31. Four authorities were also cited by the appellant for the respective arguments: that a person is not competent to swear an affidavit on behalf of a Corporation unless he is an officer of that Company to swear the affidavit (**<u>Commerce Bank Ltd. vs. Paradiso Court Ltd.</u>** – *H.C.C.C. 173 of 2000* (UR); that a person who has no practicing certificate is not entitled to act as an advocate and cannot sign and file documents in Court (**<u>Kenya Power & Lighting Co. Ltd vs. Chris Mahinda t/a Nyeri Trading Centre</u>** (2005) 2005 KLR); that an advocate becomes personally liable for costs when he starts and conducts legal proceedings on behalf of a purported plaintiff from who he had no instructions or authority so to act (**<u>Bugerere Coffee Growers Ltd. vs. Sebadduka</u>** [1970] EA 47); and that an advocate cannot purport to act in place of another firm of advocates on record unless a notice of Change of Advocates has been filed or unless the advocate is instructed by the firm as lead counsel **<u>Kenya Commercial Bank Ltd vs John Wanyama</u> (H.C.C.A. No. 97 of 1999 (UR)**.

32. We have perused those authorities and we think, with respect, that they are irrelevant and misplaced in the context of the matter before us. There is no suggestion or proof, as suggested in those authorities

that Mr. Wanjala, who argued the appeal before us, was purporting to swear affidavits as an officer of the Bank; that he had no practicing certificate; that he had no instructions from the bank to act for it; or that he was purporting to act in place of M/s. Kalya & Company Advocates who were on record for the bank. The appellant acknowledged in his notice of appeal filed on 3rd December, 2009 that M/s. Kalya & Company Advocates were the Advocates for the bank and served them accordingly. Indeed those advocates had acted for the bank in the superior court without any objections being raised. Mr. Moses Wanjala has since appeared for the Bank severally but only as an advocate instructed by M/s. Kalya & Company Advocates and not in his own right. We find no impropriety in so appearing and reject the appellant's contention.

33. Two other issues of law were raised in respect of limitations of actions and estoppel. We are not persuaded by the appellants' arguments on those issues. As correctly pointed out by the superior court, the suit was filed in 1993 and the counterclaim was made six years later in 1999. The court also observed that the charges which secured the loan balance were executed by the appellant in 1990 and therefore claim made 9 years later would not be time barred. At any rate the secured loan subsisted until its redemption, which event had not occurred.

As for estoppels, if we understood the appellant correctly, the contention was that the bank had bound itself to accept as full and final settlement the proceeds of sale of plot 416 at shs.180,000/= which sum was paid on 8th October, 1990. Regretably we find no factual basis for such claim and cannot therefore uphold the appellant's contention.

34 What remains of the main submission by the appellant is a challenge on the findings of fact made by the superior court. The approach to that challenge has been addressed by this Court on many occasions and we take it from ***Mwanasokoni v. Kenya Bus Services Ltd*** ***[1985] KLR 931*** at page 934, 934, thus:

"Although this Court on appeal will not lightly differ from the judge at first instance on a finding of fact it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the House of Lords in Sotios Shipping v. Sauviet Sohold, The Times, March 16, 1983:

"It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate Court they should be ever mindful of the advantages enjoyed of the trial judge who saw and heard the witnesses and was in a comparably better position that the Court of Appeal to assess the significance of what was said, how it was said, and, equally important, what was not said".

Again, in Peters v Sunday Post Ltd (1958) EA 424, as decision of the Court of Appeal for Eastern Africa, Sir Kenneth O'Connor, P said at page 429:

"It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness.

But the jurisdiction (to review the evidence) should be exercised with caution: It is not enough that the appellate Court might itself have come to a different conclusion".

So that, this Court will interfere with a finding of fact where it is based on no evidence at all, or on a misapprehension of the evidence, or the Judge is shown demonstrably to have acted on wrong principles in reaching that finding.

35. We have carefully considered the record before us and in particular the proceedings and judgment of the superior court and we find no basis to interfere with the factual findings of the superior court. It is clear to us that the appellant borrowed money from the bank on the basis of a commitment letter and charge documents, the terms of which were spelt out and understood by him before execution of the loan agreement and draw down on the loan. We find no basis for the contention that the appellant paid off the whole loan after giving notice for early redemption of the account as stated in the commitment letter as there is no evidence of such notice on record. On the contrary the evidence on record is that the appellant sought permission from the bank to subdivide the charged property, sell one portion, and substantially

reduce the outstanding loan. He was aware that the sale would not liquidate the loan. Furthermore the appellant willingly executed documents of charge to secure the balance of the loan and gave out the three new titles as security. If there was any coercion by the bank he would have complained immediately as he was wont to do anytime the bank threatened to auction his property, but he did nothing for more than three years when he filed suit. In our view, that was an afterthought which cannot avail the appellant. There were terms agreed between the parties in respect of the loan and, ordinarily, it is not in the province of the Courts to re-write those terms for the parties, however onerous they may be to one of them. On the facts on record there is no reason to interfere with the findings of the superior Court.

Conclusion

36. For the reasons given above we find no merit in this appeal and we order that it be and is hereby dismissed in its entirety. As the appellant had obtained leave to file the appeal *in forma pauperis* there will be no order as to costs.

Dated and delivered at Eldoret this 12th day of November, 2010

S. E. O. BOSIRE

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JUDGE OF APPEAL

P. N. WAKI

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL

I certify that this a true copy of the original.

DEPUTY REGISTRAR