



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 6 OF 2002

SAMUEL KAMAU MACHARIA APPELLANT

AND

DAIMA BANK LIMITED RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nairobi (Onyango Otieno, J) dated 18th May, 2000

in

H.C.C.C NO. 628 OF 1998

JUDGMENT OF THE COURT

This is an appeal by the unsuccessful defendant from the judgment of the superior court (*Onyango Otieno, J. – as he then was*) in which the learned judge gave judgment in favour of the plaintiff, *Daima Bank Ltd. (the respondent in this appeal)*. This being a first appeal, it is in form of a rehearing and for that matter, it will be necessary to go back to the pleadings in the superior court. In its plaint filed in the superior court on 21st October, 1998 the plaintiff (respondent herein) stated inter alia:-

“3. That on around the 2nd January, 1996 the plaintiff herein at the defendant’s request did offer loan facilities to the defendant for K.shs.7,000,000 which loan facilities the defendant accepted and duly executed a charge in favour of the plaintiff over his land reference Galu/Kinondo/50 as a security for the said loan.

4. The defendant has failed in his obligation to repay the said loan to the plaintiff which loan stands at K.shs.23,491,007.65 as at 9th October, 1998 and continues to accrue interest at the rate of 4% per month from 9th October, 1998 until payment in full.

5. The plaintiff’s claim against the defendant therefore is for K.shs.23,491,007.65 together with interest at the rate of 4% per month the same being the amount due and owing to the plaintiff from the defendant particulars whereof are within the defendants own knowledge.

6. Despite repeated demands and notices of intention to sue in default the defendant has persistently ignored, neglected and/or refused to pay the said money or any money at all.

7. This honourable court was (sic) jurisdiction to hear and determine this matter.

REASONS WHEREFORE the plaintiff prays for judgment against the defendant for:

(a) K.shs.23,491,007.65 together with interest at the rate of 4% per month from 9th October, 1998 until payment in full being the amount due and owing.

(b) Cost of this suit and interest.”

The defence filed in response contained the following pertinent paragraphs:-

“4. The defendant in further answer to paragraph 3 of the plaint states that the said sum of Kshs.7,000,000.00 was paid by the Daima Bank Ltd to the account of M/s Ribshack Ltd. The said payment was on the understanding that it was to go towards reducing the guarantee executed by M/s Sceneries Ltd in favour of Daima Bank Ltd and on account of M/s Ribshack Ltd.

5. In further answer to paragraph 3 of the plaint and without prejudice to the foregoing the defendant states that to date and to the defendant’s knowledge M/s Sceneries Ltd have paid to Daima Bank Ltd. to the account of M/s Ribshack Ltd a sum of shillings Sixty Six (66) Million or thereabout. In the circumstances the defendant will contend at the hearing hereof or at such earlier time as the opportunity shall arise that the said account of Sceneries Ltd and/or the alleged advance of Shillings Seven Million has been fully repaid and the defendant shall ask that accounts between Daima Bank Ltd. and the Defendant be taken.

6. In further answer to paragraph 3 of the plaint the defendant states that if as alleged in the plaint the subject account is secured by a charge over land reference Galu/Kinondo/50 the proceedings herein are premature as the plaintiff is barred by the express provisions of the Registered Land Act, Cap 300 from proceeding with this suit before either realising their security over land reference Number Galu/Kinondo/50 and/or the plaintiff discharging its charge over the said property.

7. The defendant denies the contents of paragraph 4 of the plaint and puts the plaintiff to strict proof thereof of each and every allegation in the plaint.

8. In further answer to paragraph 4 of the plaint the defendant in particular denies owing the plaintiff the alleged sum of Kshs.23,491,007.65 or any sum or at all and puts the plaintiff to strict proof thereof.

9. The defendant in further answer to paragraph 4 of the plaint states that the alleged sum of Kshs.23,491,007.65 is composed of illegal charges, authorized entries, unagreed interest and/or other debit entries which have not been explained to the defendant but which the plaintiff has charged compound interest thereon thereby making the whole transaction illegal and the alleged loan irrecoverable.

10. In further answer to paragraph 4 of the plaint the defendant denies having agreed to pay to the plaintiff interest at the rate of 4% per month as stated in the plaint and states that the said rate of interest is exorbitant, unconscionable, manifestly excessive and irrecoverable.”

From the pleadings, it is clear that this was a simple and straightforward claim by the respondent to recover money advanced to the appellant. In his own evidence in the superior court the appellant admitted that he, indeed, borrowed 7,000,000/= for the purpose of the repayment of K.Shs.30,000,000/= which had been borrowed earlier. He was to use it to repay part of the K.Shs.30,000,000/=. But he denied having entered into agreement for the interest of 4% per month. According to the appellant the interest rate was 34% and this interest rate was on monthly rests.

The point for determination is therefore narrowed to the issue of interest rates charged by the respondent. This is very clear from the Amended Memorandum of Appeal which states:-

- “1. The learned Judge erred in law and in fact in holding that the respondent did not make any unauthorized charges, entries, unagreed interest and/or debit entries in the Appellant’s account.
2. The learned Judge erred in law and in fact in holding that the Respondent was at liberty to charge any rate of interest it deemed fit without any notice to the appellant.
3. The learned Judge erred in law and in fact by awarding interest at the rate of 4% per month and ignoring the appellant’s evidence that such rate of interest was unagreed and that it was not applicable in the instant case as the defendant had a term loan and not an overdraft facility.
4. The learned Judge erred in law and in fact in ignoring and failing to consider the evidence of the appellant on the rate of interest and the calculation of interest by the appellant’s accountant.
5. The learned Judge erred in fact and in law in dismissing the evidence of the appellant casually and without giving it any consideration at all in arriving at his decision.

It is proposed to ask the court for orders that:-

- (i) the appeal be allowed with costs.
- (ii) the judgment of the superior court be set aside.
- (iii) there be substituted for the decree of the superior court an order that the appellant do pay the respondent Kshs.9,045,011/=.

When this appeal came up for hearing, Dr. Kamau Kuria appeared with Mr. P.N. Gachoka for the appellant while Mr. P.C. Njuguna appeared for the respondent.

In his submission, Dr. Kuria contended that there was no clause in the charge on 4% per month as a rate of interest and that the rate of interest at 34% per annum was not pleaded as having been varied. It was further submitted that it would lead to excessive rates if the courts do not limit the discretion to vary the rates of interest.

On his part, Mr. Njuguna submitted that as there was clear admission of the claim by the appellant what was then to be dealt with was whether the rate of interest was justified. Mr. Njuguna argued that there was no legal basis for saying that the rate of interest is excessive. Mr. Njuguna reminded us that the court cannot rescue a party from a bad bargain. As regards the figure of Shs.9,000,000/= suggested in the Amended Memorandum of Appeal, it was Mr. Njuguna’s submissions that this figure presupposes that there was no interest payable on the principal amount.

On this question of interest, we are to be guided by the contractual relationship between the parties. As we have already stated this was a simple and straightforward commercial transaction in which the appellant applied for and was granted a loan of Kshs.7,000,000/= by the respondent bank. The letter of offer dated 2nd January, 1996 addressed to the appellant states at page 1 in part as follows:-

“MARGIN:

Interest at 34% p.a. floating calculated on overnight balances and payable monthly in arrears. (Please note that this rate is subject to change from time to time as will be dictated by the general cost of funds in the money market.”

That letter of offer with those instructions was signed by the appellant who stated while signing it as follows:-

“I SAMUEL KAMAU MACHARIA hereby accept the Banking Arrangements in and upon the terms of conditions herein appearing.

Signed 6th January, 1996.”

Again the charge that was executed by the appellant, makes it clear that the appellant who was referred to therein as the chargor did agree in clause 2 as follows:-

“The chargor do hereby covenant and agree with the chargee that the chargor will on the date on which the chargor receives from the chargee a written demand for payment..... pay to the chargee such sum not exceeding the principal as may then be due and owing to the chargee whether in respect of monies heretofore or hereafter advanced or paid to the chargee or chargor heretofore or hereafter incurred on the account of the charger heretofore or hereafter incurred on the account of the chargor or for any money whatsoever which may then be surety ... and also all moneys which may have been payable by the chargor to the chargee in respect of expenses properly incurred in relation to this security together with commission legal and other costs charge and expenses and together with interest at the rate of thirty six per centum per annum or at such rate as the chargee shall in its sole discretion from time to time decide such interest to be calculated on daily balances and debited monthly by way of compound interest that the chargee shall not be required to advise the chargor prior to any change in the rate of interest so payable.....”

On this issue of interest all we can say is that the appellant cannot be allowed to escape from the bargain he voluntarily entered into. In NATIONAL BANK OF KENYA LTD. V. PIPEPLASTIC SAMKOLIT (K) LTD. AND ANOTHER [2001] KLR 112 at p. 118 this Court said:-

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of FINA BANK LIMITED VS. SPARES & INDUSTRIES LIMITED (Civil Appeal No. 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

We have however not found any basis for the respondent to have charged a rate of 4% penalty interest per month from 9th October, 1998 since this was not contained in the charge instrument nor brought to the attention of the appellant beforehand.

The upshot of the foregoing is that we allow the appellant’s appeal in part to the extent that the rate of 4% per month penalty interest is set aside but dismiss the appeal in respect of the rest of the respondent’s claim. We make no orders as to the costs of this appeal.

Dated and delivered at Nairobi this 31st day of October, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR