REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO.205 OF 1999

KESHAVJI JIVRAJ SHAH.....PLAINTIFF

VERSUS

KANWAL SARJIT SINGH DHIMAN.....DEFENDANT

JUDGMENT

Introduction

1. The plaintiff through a plaint dated 25th February 1999 sued the defendant seeking the following prayers:-

a) Kshs.13,813,132/25 together with interest at 36% per annum from 1st February, 1999 until payment or realization in full;

b) An order for sale of the aforesaid property by public auction and in the event of there being a deficit on sale a personal decree against the Defendant for the balance of the amount unrealized;

c) Costs of the suit and interest thereon at Court rates from the date of filing the suit until payment or realization in full;

d) Interest on the decretal amount at the rate of 36% per annum from the date of judgment until payment or realization in full; and,

e) Such other or further relief as to this Honorable Court may deem just.

2. The defendant on his part filed a statement of defence and counterclaim dated 6th August 2015 praying for the following:-

a) There be a declaration that the purported agreement between the plaintiff and the defendant was null and void and unenforceable in law.

b) The Honourable court be pleased to order revocation of plaintiff's title and rectification of the register in favour of the defendant.

c) Costs of this suit and counterclaim with interest at courts rates.

3. The plaintiff filed amended Reply to defence and defence to counterclaim by leave of the court dated 26th April 2017 praying that judgment be entered against the defendant as prayed in the plaint and that the defendant's counterclaim be dismissed with costs.

4. I have noted that this suit had gone all the way to the Court of Appeal which ordered retrial of this suit.

Plaintiff's Case

5. The plaintiff's case is that at all material times the defendant was and is still registered as proprietor of all parcel of land known as L.R. No.209/8192/8 Lavington, Nairobi together with an executive residential house situated thereupon also with other erections and improvements. That pursuant to a memorandum of agreement in writing made at Nairobi. On 17th December 1996 between the plaintiff and the defendant at the request of the defendant the plaintiff agreed to lend the defendant and the defendant agreed to borrow sum not exceeding Kshs.30, 000,000 with interest.

6. Pursuant to the Agreement the plaintiff lent and advanced to the defendant a sum of Kshs.7, 000,000 with agreed interest at a rate of 36% per annum payable quarterly in arrears and quarterly interest rate paid at the end of the year to carry further interest at a rate of 36% per year until interest is paid in full, which interest the defendant failed to pay.

7. The plaintiff avers that the defendant is indebted to the plaintiff in the sum of Kshs.13, 813,132/25 including interest declared upto 31/1/1999 as per statement marked "A" annexed thereto.

8. The plaintiff gave evidence in this matter as PW1 and relied on his witnesses statement dated 14th March 2016 **(Exhibit P(1)(a);** further statement dated 12th April 2017 **(Exhibit P(1)(b);** sequence of events filed on 12th April 2017 **(Exhibit P(1)(c);** and list of documents **(Exhibit P(1)(d).**

9. The plaintiff called **PW2,** Edward Mwani Njehia, who relied on his witness statement dated 16/8/2018 **(exhibit P-2),** the document **EMW-2,** and a Memorandum of Agreement.

Defendant's Case

10. The defendant contends that the plaintiff has since transferred the **L.R.No.209/8192/8,** Lavington, Nairobi to himself albeit irregularly and without the defendant's knowledge or consent. On the execution of the Memorandum of Agreement dated 17th December 1996, the defendant avers he was in dire need of financial assistance and the plaintiff offered the money upon introduction to the defendant by defendant's friend but took undue advantage of the defendant desperate need for money and unlawfully loaded unconscionable interest thereon and impelled on the defendant to sign the agreement under duress failure of which the plaintiff was to decline the assistance and as such for all intention and purpose the said agreement was tainted with coercion, irregularity and was a contract of adhesion and not enforceable in law.

11. It is contended by the defendant the advances were not in accordance with the purported agreement as there were variations which went to the root of the purported agreement thereby hindering the purported contract substantially, compromised and incapable of being enforced in its original form it at all. It is further contended the agreement was illegal in law to the extent that it was not witnessed and it provided for charging of interest which were unconscionable and is highly oppressive as to cause hardship to the defendant and as such the interest are not recoverable in law and that rendered the whole contract illegal and unenforceable in law.

12. The defendant contend at the time of bringing up this suit the parties were in talking terms and negotiating settlement out of court and the defendant in good faith paid Kshs.3,000,000 leaving a balance of Kshs.4,000,000/- which he was ready and willing to pay at the time but the plaintiff declined as the plaintiff had other intentions as a consequence of which the defendant is now not obligated to pay the balance given the whole contract was tainted with illegality and is not enforceable in law. The defendant further contend the plaintiff's real intention/motive was to illegally acquire the defendant's property under duress and the acts are unlawful and was without the defendant knowledge or consent and has caused the defendant great loss, damage and prejudice. The defendant contend as parties were negotiating before the plaintiff made unconscionable demands that the defendant pays the illegal interest and refusing to accept the defendant's offer, the suit was prematurely instituted.

13. The defendant contends further that the plaintiff has irregularly transferred the suit premises into his own name. The defendant further avers that the agreement between the parties was under duress, illegal, a nullity in law and unenforceable and in his counterclaim seeks a declaration to that effect and an order of revocation of plaintiff's title and rectification of the register in favour of the defendant.

14. The defendant gave evidence as **DW1.** He relied on his written witness statement **(Exhibit D-1);** list of documents **(Exhibit D-2),** the Agreement between the plaintiff and the defendant **(Exhibit D-3).**

Plaintiff's Case in Reply to defence and counterclaim

15. The plaintiff contend that the property **L.R. No.209/8192/8** was regularly transferred pursuant to court orders, to wit attachment of the property, the permission by the plaintiff to bid at the auction and the vesting of the property in the name of the plaintiff in respect whereof the defendant never appealed.

16. The plaintiff in response to the defendant's averments contend the defendant freely and voluntary signed the memorandum of agreement in presence of a senior counsel Satish Gartama Esq, without any coercion of any sort as the existing interest rate at the material time were high and the defendant willingly agreed to pay 36% interest rate and that the defendant being a businessman was not one to be coerced due to his many years standing.

17. The plaintiff contend that the defendant's claim as set out in his counterclaim, *(filed on 6/08/2015)* is barred under and by virtue of the Limitation of Actions Act in that the counterclaim was made more than 6 years from the date when the cause of action arose.

Analysis and Determination

18. I have taken time to peruse the pleadings herein, the parties written and oral evidence, counsel rival submissions and from aforesaid the issues that arises for court's consideration, as counsel have not agreed on the issues, can be summed up as follows:-

a) Whether the suit was prematurely instituted"

b) Whether the defendant complied with the court's order as regards filing of the Defence"

c) Whether the defendant's defence and counterclaim are time barred"

d) Whether the memorandum of agreement is inadmissible for lack of stamp duty under the Stamp Duty Act"

e) Whether the Memorandum of Agreement is illegal, null and void"

f) Whether in absence of defence and counterclaim whether a claim for rectification of Land Register can ensure"

g) Whether the suit claim is competent as drawn and filed"

A) Whether the suit was prematurely instituted"

19. The defendant contend that as per clause 6 of the Memorandum of Agreement dated 17th December 1996 it is provided that the defendant upon electing to draw the final instalment of Kshs. 8 million on 2nd April 1997 he was to repay the loan within a period of 3 years from the date of advancement.

20. The defendant contend that plaintiff advanced only Kshs.2 million of the said money on 5th August 1997 and that according to the contract, he had 3 years to pay the loan from 5th August 1997. That this suit was commenced on 25th February 1999 before the expiry of the three (3) years and as such the defendant contends it was prematurely filed denying the defendant the opportunity to repay the loan within the said period.

21. Clause 6 of the Memorandum of Agreement was a provision for repayment of the amount lent together with interest, which such interest was payable every quarterly in arrears with the proviso that in the event of the borrower defaulting payment of two successive quarterly instalments on their due dates the lender shall be entitled to enforce the security and to realize the loan and interest payable thereon.

22. The plaintiff in his evidence testified that he brought up the suit by invoking the proviso in the Memorandum of Agreement when the defendant failed to pay the interest quarterly. The defendant did not controvert the plaintiff's evidence that he had defaulted in paying the interest. He did not aver that he had cleared the interest in terms of clause 6 of the Memorandum of Agreement dated 17th December 1996. In view of the aforesaid I find that the plaintiff was justified to institute the present suit. In terms of the Memorandum of Agreement the suit as instituted is not premature.

B) Whether the defendant complied with the court's order as regards filing of the Defence"

23. In this matter following the defendant's appeal to the Court of Appeal in allowing the defendant's appeal the court pronounced itself as follows:-

"The appellant does not deny borrowing the 7,000,000.00. His defence however is that the interest charged is unconscionable as the sum due and owing now stands at over 45,000,000.00. He insists that he has a good defence as he thinks that the rate was unconscionable. Be that as it may, it is important for us to point out that the courts exist for the purpose of dispensing justice, and that the sword of justice cuts both ways. As a court, we have to balance the two divergent interests. Further it has been said that a technical judgment is not the best judgment. … We think that it is only fair, in the circumstances of this matter, that the appellant is given a chance to ventilate his case. … Accordingly we allow the appeal. We set aside the judgment entered on the 16th September, 1999. The draft defence is deemed as duly filed upon payment of the requisite fees within 7 days from today's date. The costs of the appeal shall be borne by the appellant."

24. The Court of Appeal in its judgment extended the time limited by the summons to enter appearance and filing of defence subject to the defendant paying filing fees on or before 7th August 2015. The plaintiff contend the Court of Appeal did not give the defendant carte blanche order allowing any defence to be filed. The plaintiff urge the defendant on 6th August 2015 filed a defence contrary to the draft defence, which the Court of Appeal had allowed to be deemed as duly filed upon payment of the requisite fees within 7 days and without the leave of the court. The defendant by filing a fresh defence contrary to the draft defence, it is urged by the plaintiff he did not only breach the orders issued by the Court of Appeal and terms of setting aside the judgment but also effectively filed an amended defence without leave. Thus the plaintiff urges is a new defence that was filed more than 16 years out of time. The plaintiff contend that there is no valid defence on record which the defendant can validly ventilate his case.

25. It is plaintiff's contention, that Rules are handmaids of justice and that Article 159(2) (d) of the constitution ought not to be read as having overturned all procedure for respectable conduct of court proceedings. In **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 others [2015] eKLR** the Court of Appeal (Justices Waki, Mwera and Kiage) observed and held:-

"While fully cognizant of the court's primary duty to do justice untrammeled by procedural technicalities, we are also aware that litigation is a game with clear rules of engagement. It is not open for parties to pursue, and for the court to allow, a path of circumventing the rules that are imposed to aid in the attainment of justice. The oxygen principle cannot save applications that are incompetent."

26. In arriving at that decision the Judge were guided by the decision in **City Chemist & another vs Oriental Commercial Bank (Civil Application No.302 of 2008),** where it was stated:-

"…… that, however, is not to say that the new thinking (the oxygen principle) uproots well-established principles or precedents in the exercise of discretion of the court, which is a judicial process devoid of whim and caprice. On the contrary, the amendments enrich those principles and embolden the court to be guided by a broad sense of justice and fairness as it applies those principles. The application of clear and unambiguous principles and precedents assists litigants and legal practitioners alike in determining with some measure of certainty the validity of claims long before they are instituted in court. It also guides the lower courts and maintains stability in the law and its application."

27. The defendant urges in response that the plaintiff is splitting hairs in raising the issue and is bound to deny the defendant his pound of fresh in the suit. He urges the plaintiff in his submissions has strongly argued that parties are bound by their pleadings pointing out that nowhere in the plaintiff's plaint or amended reply to defence and counterclaim has the issues and the prayer or valid defence has been raised. He urges that the plaintiffs counterclaim should not be entertained as it is an afterthought and should not be entertained as it amounts to departure from his pleadings and is untenable and lastly it is defendant's counterclaim that was not one of the issues for determination during the hearing of the main issue. The defendant contend the plaintiff is relying on technicalities to deny the defendant his day in court albeit on a wrong footing as he has replied to the defence and counterclaim

thereby confirming that it is properly on record.

28. From the plaintiff's submissions, there is no dispute that the Court of Appeal in allowing the defendants draft defence it made clear that the same had to be filed within 7 days, however the defendant instead filed a fresh defence within the period given by the Court of Appeal. The defence was duly filed together with counterclaim to which the plaintiff filed a reply to the defence and counterclaim. The fact that the defendant did not draft word for word as per draft defecne does not amount to breach of the order and terms of setting aside the judgment. The defendant was required to file defence and I believe parties are free within the time as given by court to file and serve their pleadings as they deem fit and just, as it is the parties who know the kind of defence or case one has. The change of the draft defence and filing a fresh defence do not in my view prejudice any party. By insisting that a party should stick to a draft defece, in my view is being too technical and amounts to micro-managing party's pleadings.

29. The plaintiff responded to the fresh defence, the case proceeded to hearing and each party understood each other's case. The purpose of filing pleadings and serving them is to ensure the party knows what case to expect and what response to give. Striking a defence on grounds raised by the plaintiff would result in injustice to the defendant, who has conducted his case on the basis of his defence and which the plaintiff had responded. The parties came to court to have their grievances fairly determined but not to be denied fair hearing on a technicality. Parties came to court to seek substantive justice. In view of the above I am satisfied the defendant complied with court's orders as regards filing a defence. The fresh defence was filed within timelines given by the Appellate Court and the defendant was not bound to replicate the draft defence. The defence on record should remain and be considered on merit

C) Whether the defendant's defence and counterclaim are time barred"

30. The plaintiff in his reply to defence to counterclaim has contended that the counterclaim is time barred by virtue of the provisions of the Limitation of Actions Act. The defendant contended that the Memorandum of Agreement, thus the contract subject of this suit dated 17th December 1996 was illegal, a nullity and not enforcement in law and that the agreement was tainted from the 1st day with coercion, was a contract of adhesion and not capable of being enforced.

31. The defendant on the other hand avers the claim is not time barred as it is not founded on monetary contract but recovery of land which time frame is 12 years; that the defendant had been participating in the proceedings before High Court to challenge the impugned judgment; and that the time did not run during the litigation.

32. The defendant's counterclaim was filed on 6th August 2015 and under the counterclaim, the defendant contend that agreement between the parties here was under duress, was illegal, a nullity and not enforceable. The defendant is praying for a declaration that the purported agreement between the plaintiff and the defendant was null and void and unenforceable and an order for revocation of plaintiff's title and rectification of register in favour of the defendant.

33. Section 4 of the Limitation of Actions Act (Cap 22) Laws of Kenya, provides that an actin founded on contract may not be brought after the end of 6 years from the date on which the cause of actin occurred. According to the pleadings by the defendant if then the contract was tainted with illegality and coercion and was drawn as a contract of adhesion that it follows the cause of action occurred on 7th December 1996. The defendant had upto 17th December 2012 to lodge his counterclaim and seek declarations and orders he has sought but not to wait and lodge his counterclaim on 6th April 2015 when he filed his first defence and counterclaim, thus after a period of 19 years.

34. In the case of **Kenya Bus Service Ltd vs Minister for Transport and 2 others (2012) eKLR** Hon. Justice David Majaja at paragraph 40, noted that the purpose of the law of limitation is to strike a balance between the contentions to enforce an action and the other not to be vexed by an action that is stale. The balance is struck by the legislature which provides specific limitation depending on the subject matter taking into account various policy considerations. This was also the view earlier on stated by Bosire J *(as he then was)* in **Rawal vs Rawal [1990] KLR 275.**

35. Unlike in the **Rawal vs Rawal [1990] KLR 275** situation where a defendant did not raise the issue of limitation in limine, the Plaintiff as defendant to the counterclaim in this suit has raised limitation in his Amended Reply to Defence and Defence to Counterclaim. The Plaintiff has not waived his right to raise limitation in these proceedings.

36. The Defendant at paragraph 13 of his witness statement and in his viva voce evidence tried to suggest that the Plaintiff was

dealing with matters secretly in these proceedings. When challenged in cross-examination whether for instance he was party to the 2004 proceedings that led to the vesting order and registration of the plaintiff as proprietor of **L.R. No.209/8192/8,** he readily conceded that he was party to the proceedings and knew what was going on. When confronted with Hon. Mutungi J's Ruling of 13th February 2004 *(pleaded at paragraph 7 of the Plaintiff's Amended Reply to Defence and Defence to Counterclaim)* where the Judge lambasted him as a man economical on truth, he had no answer and was not asked to say anything about it in re-examination. He wishes in his Defence to blame Miller & Company Advocates and seeks the Court's indulgence to not let the alleged mistakes of his lawyers be visited upon him. He has also claimed that proceedings were ex-parte and he was not involved or notified.

37. The Sequence of Events shows at page 7 thereof that at every instance in the proceedings when the law required the Defendant to be served he was duly served. Nine (9) instances of service are outlined. Lady Justice Kasango could not find any irregularity with the entry of the regular judgment in the matter against the Defendant either on 16th June, 1999 or in September, 1999. The High Court and the Court of Appeal did not find any sufficient reason or error on record to justify review and set aside of the proceedings on record where the Defendant had been lawfully involved. I find in this matter I have considered defendants defence and counterclaim and find that the Defendant's defence and counterclaim are out of time and barred by law. The defendant interest is only to have court admit his defence and counterclaim by not disclosing the truth.

38. I further refer to plaintiff pleadings at paragraph 10 of his Amended Reply to Defence and Defence to Counterclaim where the Defendant's **"averment that the agreement in question was made under duress up, is false and a figment of the defendant's imagination. If the contract was illegal and not enforceable the Court of Appeal in two** a**pplications before it by the defendant would have ruled so."** As to the averment that the agreement was a contract of adhesion and upon considering the same I find that it was no standard form contract imposed by the Plaintiff on several money borrowers on a take-it-or-leave-it basis as is characteristic of contracts of adhesion. When the Defendant was confronted with the evidence of Mr. Edward Mwangi Njihia, Mr. Satish Gautama's, stenographer who sat in at the negotiations and drawing of the 1996 agreement, the Defendant did not cross-examine the witness. His advocate pointed out to the court that they were not challenging the agreement. He accepted the evidence that the agreement was freely negotiated and freely entered into. The Court of Appeal in its judgment found that the Defendant does not deny borrowing money under the agreement.

39. On the Invalidation of Contracts of Adhesion by Andrew Tutt 30 Yale Journal on Regulations (2013). The author point out (page 445) **… "But in substance contracts of adhesion are nothing liked negotiated contracts. Because they are meant to be employed across potentially thousands of consumers, both firms and consumers prefer that consumers not hire attorneys to pore over the boilerplate in every contract that they sign and try to get terms changed."**

40. In the instant suit I find no evidence that was adduced pointing out that the plaintiff is involved in lending money to thousands of businesses and uses the form of contract that he used with the defendant in such lending. I therefore find no basis of the defendant's claim that this was a contract of adhesion and even if that was the case, which has not been established, the law of Limitations bars the action against it. I find the counterclaim in this matter should have been presented to this court by or before 17th December 2002. The parties are bound by their pleadings and a party without proper pleading has no case that he can advance before court.

41. In **Raila Amolo Odinga & another vs IEBC & 2 others (2017) eKLR,** the Supreme Court of Kenya stated as follows:-

"In absence of pleadings, evidence if any, produced by party, cannot be considered....."

42. In view of the aforesaid and having considered the counsel rival submissions and authorities relied upon I am satisfied the defendant's counterclaim is time barred. I further find the counterclaim having been filed out of time there is no pleading which can be relied upon in support of the counter-claim. The evidence adduced being not supported by the pleadings is of no probative value and cannot be considered in advancement of the defendants counterclaim.

D) Whether the memorandum of agreement is inadmissible for lack of stamp duty under the Stamp Duty Act"

43. At the start of the hearing on 15th January 2019 the Defendant raised objection dated 15th February, 2017 to the production of the Memorandum of Agreement dated 17th December, 1996. He reasoned that the agreement was not registered and was not stamped under **Stamp Duty Act, Cap 490.** After hearing brief arguments on the point this court ruled:-

"I have heard the objection raised by the Defendant on the production of the Agreement. I have also considered the Plaintiff's response. I have also considered the age of this case and the injustice that may be caused. I therefore direct that this hearing proceeds and the objection dealt with at submissions on whether the exhibit should be produced."

44. The defendant's position on this issue is that the court should take judicial notice of the fact that the agreement was for Kshs.13, 000,000 and there must therefore be stamp duty. It is further urged that under the Stamp Duty Act (Cap 480) Laws of Kenya, the said agreement was a registrable document given the nature of the suit involved. **Section 19(2) and (3)** of the Stamp Duty Act provides:-

"(2) No instrument chargeable with stamp duty shall be filed, enrolled, registered or acted upon by any person unless it is duly stamped.

(3) Upon the production to any court (other than a criminal court), arbitrator, referee, company or other corporation, or to any officer or servant of any public body, of any instrument which is chargeable with stamp duty and which is not duly stamped, the court, arbitrator, referee, company or other corporation, or officer or servant, shall take notice of the omission or insufficiency of the stamp on the instrument and thereupon take action in accordance with the following provisions—

(a) if the period of time within or before which the instrument should have been stamped has expired and the instrument is one in respect of which a person is specified in the Schedule to this Act as being liable for the stamping thereof, the instrument shall be impounded and, unless the instrument has been produced to a collector, shall forthwith be forwarded to a collector;

(b) In any such case, before the exclusion or rejection of the instrument, the person tendering it shall, if he desires, be given a reasonable opportunity of applying to a collector for leave under section 20 or of obtaining a certificate under section 21;

(c) In all other cases, unless otherwise expressly provided in this Act, the instrument shall, saving all just exceptions on other grounds, be received in evidence upon payment to the court, arbitrator or referee of the amount of the unpaid duty and of the penalty specified in subsection (5), and the duty and penalty, if any, shall forthwith be remitted to a collector with the instrument to be stamped after the instrument has been admitted in evidence."

45. The defendant therefore contend the memorandum of agreement forming the basis of this suit is not admissible in evidence in the circumstances, which then renders, the suit a non-starter as it is founded on the said contract unless and until it in full compliance with the provision of the law.

46. The Court of Appeal in **Abok James Odera t/a A.L. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)** in a judgment delivered on the 11th October, 2013 considered the effect of sections 19(3) (a), (b) and (c), 20 and 21 on stamping of agreements in the Stamp Duty Act. The Court ordered that the *"respondent be and is hereby directed to submit the agreement of 4th March, 1996 to the stamp duty collector for assessment of the duty payable, which should be paid in the normal manner."* At page 9 of the **eKLR** report the Court said –

"…We are in agreement that the agreement of 4th March, 1996 though subject to the Stamp Duty Act (supra) and that duty is payable on it, it does not fully comply with the above provision, but such non-compliance is not however fatal to the enforcement of the agreement. ……the court is enjoined under section 19(3) (a) (b) and (c) not to reject such an agreement in totality, but to receive it and either assess the stamp duty itself and direct that it be paid. Or alternatively the court can impound such an agreement and direct that it be delivered to the stamp duty collector for him to assess the stamp duty payable and demand its payment. There is also provision for payment or waiver of penalties on late payment of duty as the stamp duty collector may direct at his discretion. The stamp duty collector also has a discretion to extend time within which the stamp duty assessed should be paid where he is satisfied that the omission or neglect to pay stamp duty was not from intention to evade payment of stamp duty or otherwise to defraud the Authority concerned. The stamp duty collector also has a discretion to charge additional stamp duty on top of what may have been assessed as stamp duty payable on the such agreement. There is also a safety valve vide which the defaulter has a right of appeal to the relevant minister against the collection directive on the payment of the stamp duty assessed additional stamp duty assessed and penalties imposed. … What the learned trial judge should have done and which we are also mandated to do as a first appellate court, is simply to impound the said agreement, either assess duty ourselves, collect it, and then forward the duty collected to the stamp duty collector for purposes of assessment and payment of the resulting duty payable."

47. In **Mwanahamisi Omar Mzee Also Known as Fatuma Mohamed Ali Omar v Chengo Kahindi Birya & another [2018] eKLR (Mombasa High Court Civil Appeal No. 107 of 2016)** Honourable Mr Justice Majanja confronted with an objection to receiving an agreement in evidence because it was not stamped. At paragraphs 19 and 20 and 21 of his judgment he said:-

"19… The purpose of the Stamp Duty Act is to ensure collection of revenue and not necessarily to deprive the party of a cause of action. I hold that such an objection should be raised at the earliest opportunity to enable the party relying on the document comply with the provisions.

*20. This same issue was dealt with by the Court of Appeal in **Stallion Insurance Company Limited v Ignazzio Messina & C S.P.A [2007] e KLR** where the Court approved its previous decision in **Diamond Trust Bank Kenya Limited v Jaswinder Singh Enterprises NRB CA Civil Appeal No. 285 of 1998 [1999]eKLR** where Owuor JA, with whom Gicheru and Tunoi JJA, agreed, stated as follows:-*

*The learned judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap. 480). In view of my above finding, it suffices to state that section 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of **Suderji Nanji Ltd v Bhaloo (1958) EA 762** at page 763 where Law J., (as he then was) quoted with approval the holding in **Bagahat Ram –vs-** Raven Chond (2) 1930 A.I.R Lah 854 that :*

"before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ……"

The appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in his support of his claim against the 2nd defendant/respondent and he must be given the opportunity".

Although it was the respondent that was relying on the unstamped agreements, there was the offer by the appellant's counsel to be given a chance to have the agreements stamped. This in my view was the correct step in terms of section 19(3) of the Stamp Duty Act.

*21. The decision I have cited accords with the provisions of **Article 159(2d)** of the Constitution which requires the court to do substantive justice without undue regard to technicalities. The Constitution underpins the overriding objective in **sections 1A** and **1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which imposes on the parties and their advocates to assist the court in ensuring substantive justice is achieved. The respondents ought not be permitted to defend their case by ambush where full discovery has been made and opportunity given to the parties, at the pre-trial conference, to raise all objections concerning admissibility of documents and other evidence in advance of the hearing. At the end of the day, the appellant proved that she incurred expenses for treatment following her admission at Mewa and Tenwek Hospitals. These documents were admitted without objection. …"*

48. In **James Maina Muriithi v My Beauty Transporters Limited & 2 others [2018] eKLR (Nairobi Milimani High Court Civil Suit No. 262 of 2014)** Honourable Mr Justice Richard Mwongo was faced with an objection to some receipts that were not stamped under the Stamp Duty Act in final written submissions. The judge analysed the law; cited **Suderji Nanji Ltd v Bhaloo (1958) EA 762** and **Bagahat Ram –vs- Raven Chond (2) 1930 A.I.R Lah 854** and followed Majanja J in Mwanahamisi Omar Mzee Also Known as **Fatuma Mohamed Ali Omar v Chengo Kahindi Birya & another [2018] eKLR** noting thus –

"I agree with the plaintiff's counsel that the defendant ought to have raised the issue well before final written submissions were filed. However, the law is also clear that under sections 19(3) and 20 of the Stamp Duty Act, there is a statutory right availed for unstamped documents to be stamped out of time, for payment of requisite penalties, and thereafter for them to be relied upon. I am prepared to go this route."

The Learned Judge went that route and at paragraph 56 of his judgment he ordered –

"56. Applying the above provision, I will order that subject to the plaintiff effecting the payment of stamp duty on the unstamped receipts, evidence of which shall be produced to the Registrar of the High Court within forty five days from the

date of this judgment, the amount of Kshs.283, 834.00 is hereby awarded as special damages. As indicated, this special damages is conditional on payment of requisite stamp duty as assessed by and paid to the collector of stamp duties."

49. In the instant suit, I find that defendant's objection under Stamp Duty Act had not been taken up in the Court of Appeal when dealing with an application to stay sale of his property by auction and when he wanted the Court to review the decision of the High Court rejecting his plea to set aside judgment of 16th September, 1999. It was not an issue when he sought review in the first place. As shown the Defendant admitted the terms of the agreement on oath in an affidavit of 26th February 2004.

50. The law he now seeks to rely on to thwart the Plaintiff's case is clear and has been explained severally by the Court of Appeal since 1958: his objection is not one to defeat the Plaintiff's case. Furthermore, in view of the age and the history of the case, the objection cannot be allowed to stand.

51. It is submitted by the plaintiff that he has taken steps to have the agreement assessed for stamp duty which has been assessed at Kshs.440.00. He has been told that he cannot pay the duty unless he supplies the Tax P.I.N. of the Defendant. This is a compulsory requirement under the new digitalized procedures for payment of Stamp Duty. I find that it would be just and proper for the Court to direct that the Defendant, who enjoyed the use of the Plaintiff's money when he was hard up, to return the favour and supply the P.I.N. to enable the State collect its revenue on the agreement that the Defendant benefited under. The defendant ought not deliberately cause the Plaintiff to be charged with the offence of failing to pay duty assessed. I find that this would be most reasonable and sensible resolution of the objection as it conforms to the law as elucidated herein above. I find the court herein could as well take any of the courses outlined by the Court of Appeal in **Abok James Odera t/a A.L. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** and can collect the duty assessed through the Deputy Registrar and forward it to the collector of stamp duty. In view of the provision of the Stamp Duty Act, under section 19(3) and 20, which provides a statutory right for unstamped documents to be stamped out of time, for payment of requisite penalties, and thereafter for them to be relied upon, I am convinced of sale action is taken, that would prejudice no party in this case. In view of the steps taken so far by the plaintiff, I find that it would be just and proper to direct that the defendant, who engaged the use of the plaintiff's money do give his pin number as failure to pay to have paid stamp duty and had agreement stamped is not fatal merely because it has not been stamped and is enforceable and admissible in evidence. In the alternative I find this court can collect the assessed stamp duty through the Deputy Registrar and forward it to the collector of stamp duty if the defendant do not comply with plaintiffs request for his pin number **(see Abok James Odera t/a A.L. Odera & Associates vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR.**

52. In view of the above, I find the contract between plaintiff and defendant to be valid and enforceable.

E) Whether the Memorandum of Agreement is illegal, null and void"

53. The defendant herein has challenged the legality and/or validity of the memorandum of the agreement on the grounds under the **Banking Act – Part II Section 3(1) (Cap 488) Laws of Kenya** which provides:-

"No person shall in Kenya, transact any banking business or financial business UNLESS it is an institution, or duly approved agency……which holds a valid licence."

54. It is defendant's contention that the plaintiff advanced the money on interest because he was in business which was in contravention of the law as he was not authorized to levy interest on the advanced amounts. The defendant further urges the money Lenders Act was repealed in 1984 making it illegal for an individual to lend money on interest without a licence to do so, urging thus this has been caught up by the maxim **"EX TURPI CAUSA NON ORITUR ACTIO"**

55. The plaintiff on his part contend that though the defendant pleaded the Memorandum of Agreement is **"illegal",** in the witness stand he did not give any evidence in examination-in-chief to show the illegality. It is further urged neither were the particulars of illegality pleaded with specificity required under the former and current Civil Procedure Rules in the filed defence of 2006 or in what the plaintiff's refers to as invalid defence of 6th August 2015 nor averred in the witness statement.

56. The defendant in witness stand under cross-examination and examination by the Court, the Defendant said that he wants the agreement declared illegal because "it hasn't been registered. It is also asking for high interest". And eventually when asked, *"If you had gotten the final 8 million and you failed to repay would you still say it is illegal""* He answered *"No. I am willing to pay but*

only what is fair". When asked by the Court, *"You are saying that you want to pay the balance of 4 million after 22 years. Is that fair""* The Defendant could not answer. He kept mum.

57. The defendant further in his witness stand testified that the agreement is illegal because at the time of borrowing and giving over his matrimonial home as security he was *"under pressure";* he did not demonstrate what pressure and how it affected his signing the agreement; he claimed to have been under pressure with an overdraft at Habib Bank where 13 Million was needed but he gave no cogent evidence of that pressure or the arrangement with that Bank and how he dealt with it, if at all; he said the contract with K .J. Shah became illegal because Shah did not give him the full 13 Million to sort out Habib Bank but he could not point to any instance when he alerted the Plaintiff of his woes with Habib Bank; asked why he did not go to a bank or financial institution and pledge any of his other properties in London and Nairobi so as to avoid the *"illegality"* with the Plaintiff he said he needed the money Shah could give urgently.

58. I have considered the submissions by both sides on the alleged illegality under the Stamp Duty Act, and it has been demonstrated that an agreement do not become illegal merely because it has not been stamped but it is not even fatal but it can upon fulfilment of certain conditions be admissible and enforceable. On issue of the interest the defendant readily admitted the interest rate. In **Ajay Indrvada Shah v Guilders International** Bank **Ltd [2002] 1 EA 269,** a case with issues arising at about the same time as the issues in this case, the parties were negotiating an interest rate of 32% - 36% and the High Court fixed the rate of interest, and the Court of Appeal upheld, a rate of 35%. So the going rate was 36% when the parties entered into the agreement in this case. This was the Plaintiff's evidence when asked where the rate of interest came from. It was in usage, in the trade; it was the going rate. I find that the court cannot interfere with it even if the Defendant had come to court in time and given its evidence as the court is obliged to enforce the agreed rate of interest. The court may take judicial notice of the trade usage pursuant to section 60 of the Evidence Act. The court is not supposed to rewrite contract for the parties.

59. Where a money lending bargain appears on the face of it or on the evidence adduced to be unconscionable the lender may have to show that the contract ought not to be altered but that, on the facts of the case, where the borrower was a merchant of mature age and there was no evidence of fraud, trickery, pressure or undue advantage taken on the part of the lender or mental incapacity on the part of the borrower, the latter was not entitled to relief merely on the ground that the bargain was a hard bargain.

The principle in the above continue to rule the day the law of contracted precedent clearly points out that the parties will be held to their intentions. The defendant was not blind or otherwise incapacited or that he lacked alternative when he entered into contract on 17th December 1996 in presence of his counsel; an experienced senior counsel.

60. In **Kairu v Shaw and others [1986-1989] EA 221(CAK) (per Madan CJ at page 227j and 228f –g)** the Court of Appeal held that when interpreting a contract the Court ought to give effect to the intention of the parties as far as possible and in particular avoid deviating interpretations, however, easy or possible they may appear to be. In this case the Defendant has already been to court asking to be allowed to pay the decretal sums by instalments: thus admitting on the record the terms of the contract. He has furthermore, offered to pay part of the decretal sum or paid by tendering Kshs.3, 000,000/=. I find that it would be futile to declare illegal a contract, that has already been accepted and when entered into openly and without coercion.

61. Further to the above in **National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another [2001]KLR 112 – under holding 1 and at page 118** it was held:-

"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. … it is ordinarily no part of equity's function to allow a party to escape from a bad bargain."

62. During the hearing of this suit the defendant was asked severally whether anyone had forced him or tricked him into the bargain he made with the Plaintiff in presence of his friend and lawyer the late senior counsel Satish Gautama Advocate. He said there was no force or coercion or trickery and he knew what he was signing. He gave evidence that he willingly gave over the documents required for executing security over his property by equitable mortgage as per the agreement. I find that it is improper for the defendant to challenge the legality of what he voluntary admitted and signed to be bound by the agreement under no coercion or duress.

63. In the case of **Surgipharm Ltd v Awuondo [2003] KLR 193** it was held that where the intention of the parties has been reduced to writing, it is in general not permissible to adduce extrinsic evidence contained in writing either to show that intention or

to contradict, vary, or add to the terms of the contract.

64. In the case of **Richard Akwesera Onditi v Kenya Commercial Finance Company Limited [2010] eKLR** in the Court of Appeal there was a case of a borrower who badly needed money, got it from the financial institution and got into a difficulties over repayments. The Court of Appeal noted and held *"Furthermore the appellant willingly executed documents of charge to secure the balance of the loan and gave out 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."***

65. In the instant suit, the defendant further in support of the *"illegality tag"* alleged that the Plaintiff had no right of place to lend him money on the terms and in the circumstances he did. Yet, it was the Defendant's own oral evidence that he is the one who sought out the Plaintiff for the loan and they even became friends! A loan similar to the one in this case was approved of and enforced by Ringera J *(as he then was)* in **Morjaria v Kenya Batteries (1981) Ltd & 2 others [2002] 1 KLR 406.** His Lordship's holding in the matter is apt and relevant. He held at page 409 lines 8 - 30 -

"a) Interest was not to be charged if the borrower paid on due date and any adverse consequences arising from levying of interest on the loan were self-inflicted and the borrower could not be heard to complain.

b) It is not the business of the Court to re-write contract for parties. If the parties have negotiated and agreed on a genuine pre-estimate of the loss one would suffer if the other did not honour its part of the bargain, the defaulting party cannot be heard to complain that the estimate is too high."

66. This court note, that the defendant has come to this court urging that he wants a court determined rate of interest notwithstanding the other plaintiff has signed on the rate of interest. The holding in the headnote in **Shah v Guilders International Bank Ltd [2002] 1 EA 269** puts paid to the search for justice on those terms, especially since the Defendant readily agreed and admitted the rate of interest and willingly signed for that interest rate. The Court of Appeal held:-

"Where the parties to a dispute had not agreed on the rate of interest payable, section 26(1) of the Civil Procedure Act, conferred on the court the discretion to award and fix interest rates with regard to decrees for the payment of money. Where the rate of interest has been agreed, the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent. In this instance, there was no evidence as to what the ruling rate of interest was nor had any evidence been placed before the court as to how it was to exercise its discretion under section 26. In arriving at the figure of 35%, the court had been exercising a discretion. For an appellate court to interfere with that exercise, the Appellant had to show that in coming to its decision the court either took into account irrelevant matter, that it failed to take into account a relevant matter or that the decision itself was plainly wrong. The Appellant had failed to demonstrate any of these matters and even if the appellate court thought the figure high, that alone was not enough to entitle it to substitute its discretion for the lower court's"

67. The above was a suit instituted on 17 August 1999 and with a history similar to this one, only that in that case the lender was a the Bank and the Court fixed the rate of interest payable on a decretal sum in default of defence at 35% which was upheld by the Court of Appeal to apply from the date of the loan till payment in full.

68. Having very carefully considered the counsel rival submissions and authorities relied upon and the law as well as the evidence adduced before the court by both parties, I find the defendant has failed to demonstrate that the memorandum of agreement is illegal, null and void. I find the Memorandum of Agreement is valid and enforceable.

F) Whether in absence of defence and counterclaim whether a claim for rectification of Land Register can ensure"

69. The defendant and plaintiff entered into a written agreement for securing an urgent loan by the defendant from the plaintiff. The defendant gave his property as security under an equitable mortgage permitted by Equitable Mortgage Act (Cap 291). **PW2** Mr. Mwangi Njihia attested to the terms of the agreement as having been freely entered into. He testified that everything was done over board and that there was no illegality. The agreement was partly performed. The defendant stated on oath that he readily

delivered the title **L.R. No.209/8191/8** Lavington, Nairobi and signed memorandum of charge in terms of clause 5. I therefore find in view of the above there was part performance of the contract. I find that there was no averment that the contract is non-performable.

70. The order sought for revocation by the defendant is premised on declaration that the Memorandum of Agreement of 17th December 1996 is null and void and unenforceable. The agreement has to be set aside before such orders are granted. The vesting order that led to registration of the plaintiff as registered proprietor under the Registration of *Titles Act (cap. 281 now repealed)* was on the enforcement of the parties agreement. The Defendant had failed to show that the vesting order had been obtained un-procedurally, irregularly, by mistake, or by corrupt means. He failed to do so. Even if we are gratuitous and take up his defence of November, 2006, the actions on contract are not such for which time could be extended under sections 27 and 28 of the Limitation of Actions Act.

The counterclaim of 6th August 2015 challenges the Memorandum of Agreement. It was filed out of time and indeed after a period of about 18 years and without sanction of the court. The question raised under paragraph 12 of the defence and counterclaim whether the plaintiff has irregularly transferred the suit premises into his own name, which the defendant contends is unlawful and untenable in the counterclaim herein, depends on determination of the validity of the Memorandum of Agreement, which the court has no jurisdiction to enquire into as this court has found the counterclaim to be time-barred.

71. The defendant's evidence is that he voluntarily and willingly willingly surrendered the title documents with the signed Memorandum of Charge to charge the property to the Plaintiff, should it be necessary under the agreement. He signed the Memorandum of Agreement with clauses 2, 5 and 7. He granted the Plaintiff irrevocable authorization to utilize the Memorandum of Charge and the Title if he did not exercise his option to pay under clause 4 of the agreement. The defendant admitted that clause 4 option to pay up 5 Million with interest so he could access the next tranche of 8 Million on 2nd April 1997 was not exercised, hence admitting that he was in breach.

72. Further under clause 7 of the Memorandum of Agreement the defendant was required to execute and deliver to the Plaintiff two promissory note each for Kshs2, 500,000/= payable on 31st March, 1997. The promissory notes would be returned to the Defendant if he failed to exercise the option to pay off the 5 Million borrowed under the first two tranches of the loan. The defendant failed to execute the promissory notes. The defendant in his evidence admitted this breach when he was giving evidence.

73. Notwithstanding the defendant failure on his part to comply with the terms of the agreement the plaintiff waited and gave the defendant sufficient time to comply. For one year the plaintiff waited and did not use the memorandum of charge to which he was entitled until 15th October 1998. The statutory order in the suit was issued and registered in October 1999 to prevent the plaintiff's security being spirited away. This was happening at the Lands Registry and in the Court Registry both of which the Defendant and his counsel had open access to. There was nothing secret or vindictive or irregular at all as the plaintiff acted openly and without malice.

74. In the instant suit, it is clear that the defendant exhibited the draft Memorandum of Appeal against the Ruling of 13th February, 2004 which ordered sale of the suit property. The defendant tries to suggest that the court failed to hear him on the application for stay of the sale. However, the fact is that there was no appeal against the sale. The application for stay of the order for sale was dismissed. The Court of Appeal noted that the Defendant was the author of his own miseries. Defendant was even ordered at one time to pay deposit towards mesne profits which he did not.

In view of the foregoing there is no doubt that the property vested in the plaintiff on the 27th February 2004 in execution of a valid order of the court that has never been set aside or appealed against.

75. Under section 24 of the Registration of Titles Act (Cap 281) of the Laws of Kenya in force in November 2006, under the Land Registration Act, 2012 No. 3 of 2012, and section 106 and 107 thereof, where another person had become registered owner of one's property, the law direct that one would sue for damages and not for the property. The Land Registration Act, however allows challenge to title and rectification of register under section 26 and 80. The defendant who is in possession has acknowledged that the plaintiff is the registered proprietor. There is now no valid challenge to the plaintiff's ownership. In view of the foregoing I find the defendant has not established the condition-precedent for an order of rectification.

76. Having come to the conclusion that I have, I am satisfied the plaintiff's case is meritorious. I proceed to grant the following orders in favour of the plaintiff:-

a) That under Sections 19(3) and 20 of the Stamp Duty Act, there is a statutory right availed for unstamped documents to be stamped out of time for payment of requisite Stamp Duty and penalties and their being unstamped do not make an agreement unenforceable nor fatally defective or inadmissible. As the Stamp Duty over Memorandum of Agreement of 17th December 1996 has already been assessed by the collector of Stamp Duty, I direct the plaintiff to pay the assessed Stamp Duty to the collector of Stamp Duty within 14 days from the date of the judgment herein and cause the same to be filed in Court Registry within 4 days from the date of stamping.

b) A declaration be and is HEREBY issued that Parcel No. L.R. No. 209/8192/8 Lavington, Nairobi is property of the plaintiff.

c) The Defendant's counterclaim is dismissed with costs.

d) The Defendant is HEREBY directed and ordered to grant vacant possession of Land Parcel No. L.R. 209/8192/8, Lavington, Nairobi to the Plaintiff within the next sixty (60) days from the date of judgment in default eviction do issue.

e) The Plaintiff is awarded costs of the suit.

Dated, signed and **delivered** at **Nairobi** this **19th** day of **September, 2019.**

…….

J .A. MAKAU

JUDGE