

[2] In construing this provision of the Trust Territory Code, this Court has held consistently that its jurisdiction depends upon timely filing of the notice. *You v. Gaameu*, 2 T.T.R. 264, 266; *Aguon v. Rogoman*, 2 T.T.R. 258, 260-261; *Milne v. Tomasi, et al.*, 4 T.T.R. 488. As pointed out by the court in *You v. Gaameu* (supra), the right of appeal is neither a matter of inherent right nor a requirement of substantial justice; instead, it is a matter granted and governed by the provisions of the Code.

[3] Relief from the requirement of timely filing is available only under the most unusual circumstances. The only such circumstance recognized by this court has been that the failure to file on time was the result of some default on the part of an officer of the court. *Ngiralois v. Trust Territory*, 3 T.T.R. 637. No such circumstance is present here.

Accordingly, and upon its own motion, the Court hereby orders that the purported appeal herein be, and it is dismissed.

HUMIKO KINGZIO and EICHI MOBEL, Plaintiffs-Appellees

v.

THE BANK OF HAWAII, KOROR BRANCH,
KOROR, PALAU, Defendant-Appellant

Civil Appeal No. 109

Appellate Division of the High Court

Palau District

December 4, 1975

Action to recover interest charged at rate in excess of lawful limit on loans of more than \$300. The Appellate Division of the High Court, Williams, Associate Justice, held that it was improper for District Court to grant summary judgment to plaintiffs where lending bank used "Block/Add on" method of computation and charged rates of interest varying from 6% to 12%, depending on type of loan and when loan was made, and where there were many instances where actual rate of interest specified in original loan contract was higher than

1% per month on balance due but none of loans in question exceeded usury rate of 2% per month on balance due prohibited by statute.

1. Usury—Money Had and Received—Recovery

Common law action for money had and received is available in an appropriate case to recover usurious interest paid; however, availability of this common law remedy exists only if it is declared illegal to collect excess interest or statute provides that contract to collect excess interest above stated rate is void in whole or in part.

2. Usury—Money Had and Received—Recovery

Where statute setting legal interest limit does not impose criminal sanctions or declare contract above stated rate void, but merely prohibits courts from lending their aid to enforcement of contracts for more than stated rate, common law right to maintain action to recover interest in excess of stated rate does not exist. (33 TTC § 251)

3. Usury—Money Had and Received—Recovery

Trial court erred in granting borrowers summary judgment to recover interest paid in excess of 1% per month on loans exceeding \$300 where lending bank used "Block/Add on" method of computation and charged rates of interest varying from 6% to 12%, depending on type of loan and when loan was made, and where there were many instances where actual rate of interest specified in original loan contract was higher than 1% per month on balance due but none of loans in question exceeded usury rate of 2% per month on balance due. (33 TTC §§ 251, 253)

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Before BURNETT, *Chief Justice*, HEFNER, *Associate Justice*, and WILLIAMS, *Associate Justice*

Defendant-Appellant appeals from a Summary Judgment entered in favor of Plaintiffs-Appellees in Palau District High Court Civil Action No. 569.

The complaint in this action was filed by the named plaintiffs in their own right and on behalf of numerous other persons similarly situated claiming they had obtained loans from the defendant and were charged interest at a rate in excess of that allowed by law. Plaintiffs prayed for judgment in an amount equal to the interest paid in excess of the lawful limit and, in cases where loans had not been repaid, for a reformation of the loan contract to conform to the requirements of law.

The defendant entered a general denial in accordance with Rule 8(d) of the Rules of Civil Procedure of the High Court of the Trust Territory.

After discovery was obtained by Plaintiffs they filed motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. Their motion was directed at only a part of the claim for relief alleged in the complaint. They asked for judgment only for Plaintiffs Humiko Kingzio and Eichi Mobil and for those members of the purported class who borrowed more than \$300.00. The sole basis for the relief requested was an alleged violation of 33 TTC Section 251.

Both Plaintiffs and Defendant filed memorandums and documents in support of their respective positions on Plaintiffs' motion for summary judgment. After hearing, the trial court entered judgment granting Plaintiffs' motion for summary judgment. The Court awarded Plaintiffs Kingzio and Mobil a sum equal to all interest they had allegedly paid on their loans. In addition, the trial court held that each person who, during the period from February 15, 1965 (the effective date of 33 TTC Section

251) until October 4, 1973, obtained a loan "exceeding the sum of \$300.00, payable in installments on which interest of more than one percent (1%) per month on the balance was collected . . ." could recover all interest collected by the defendant bank. It is from this decision that Defendant appeals.

With respect to loans over \$300.00, the Trust Territory Code makes a clear and significant distinction based on the amount of interest to be collected. Two types of regulations are contemplated.

First, if the lender receives more than 2% per month, he violates the criminal law as set forth in 33 TTC Section 253 which reads:

Any person who directly or indirectly receives any interest, discount, or consideration for or upon the loan or forbearance to enforce the payment of money, goods and things in action, greater than two percent per month, shall be guilty of usury, and upon conviction thereof, shall be imprisoned for a period of not more than six months, or fined not more than one hundred dollars, or both.

The imposition of criminal penalties clearly manifests an intent to protect the borrower and contracts to recover interest in excess of the 2% per month are void at least with respect to the interest in excess of 2% per month. *Kawauchi v. Tabata*, 413 P.2d 221 (1966).

On the other hand, the Trust Territory Code does not extend the same treatment to loans with interest rates of more than 1% but less than 2% per month. These loans are governed by 33 TTC Section 251 which reads:

No action shall be maintained in any court of the Trust Territory to recover a higher rate of interest than two percent per month on the balance due upon any contract made in the Trust Territory on or after February 15, 1965, involving a principal sum of three hundred dollars or less, nor to recover a higher rate of interest than one percent per month on the balance due on any such contract involving a principal sum of over three hundred dollars.

In contrast to 33 TTC Section 253, Section 251 does not prohibit the charging of interest of more than 1% per month or punish the lender if he does so. It merely limits the amount of interest a lender can recover, if he sues on the loan contract, to 1% per month.

The trial court did not properly perceive the difference between 33 TTC Section 251 and 33 TTC Section 253, in holding that, in the absence of a statutory provision authorizing suit, a borrower has a common law right to recover interest paid.

[1] The common law action for money had and received is available in an appropriate case to recover usurious interest paid. However, the availability of this common law remedy exists only if it is declared illegal to collect excess interest or the statute provides that a contract to collect excess interest above the stated rate is void in whole or in part. *Young v. Barker*, 342 P.2d 150 (1959); *Alabama Cash Credit Corporation v. Bartlett*, 144 So. 88 (1932); *Annotation, Right in Absence of Statute Expressly So Providing To Recover Back Usurious Payments*, 59 A.L.R.2d 522 (1966).

[2] Where a statute does not impose criminal sanctions or declare a contract above the stated rate void, but merely prohibits the courts from lending their aid to enforcement of contracts for more than the stated amount, the common law right to maintain an action to recover interest in excess of the stated rate does not exist. *Marshall v. Beeler*, 178 P. 245 (1919); *Gross v. Coffey*, 20 So. 428 (1896); *Carey v. Discount Corp.*, 36 Haw. 107 (1942).

During the period in question the defendant used a "Block/Add on" method of computation and the rates of interest varied from 6% to 12% depending on the type of loan and when it was made. Since the "Block/Add on" method of computation is applied to the original outstand-

ing principal amount of the loan and the rate of interest did go as high as 12%, there are many instances where the actual interest rate specified in the original loan contract is higher than 1% per month on the balance due. However, none of the loans in question exceed the usury rate of 2% per month on the balance due as prohibited by 33 TTC Section 253.

Under such circumstances the bank is precluded by 33 TTC Section 251 from seeking aid of the courts in collecting any interest in excess of 1%, but the borrower cannot recover interest paid. To hold otherwise would eliminate the statutory distinction between 33 TTC Section 251 and 33 TTC Section 253 and be contrary to the long-standing and well established authority cited herein regarding a borrower's right to recover usurious interest.

[3] Therefore, the trial court's entry of summary judgment in favor of Plaintiffs must be reversed.

Although Appellant has raised numerous other allegations of error by the trial court, discussion of these issues herein is not necessary in view of our ruling on the issue of a borrower's common law right to recover excess interest.

It remains to consider what further proceedings, if any, should be taken. Appellees' motion for summary judgment and their brief on appeal concede their cause of action is based upon alleged violations of 33 TTC Section 251. Our decision on this question is conclusive against the plaintiffs' right to maintain this action and this court should now end litigation and render a final judgment. 5B C.J.S. Appeal and Error, Section 1924, p. 418.

It is Therefore Ordered, that the summary judgment entered by the trial court, is hereby reversed and judgment is entered for the defendant dismissing this action.