Jamii Bora Bank Limited v Ndonga (Civil Case 77 of 2016) [2024] KEHC 13524 (KLR) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13524 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL CASE 77 OF 2016

HI ONG'UDI, J

OCTOBER 31, 2024

BETWEEN

JAMII BORA BANK LIMITED .... PLAINTIFF

AND

DANIEL MACUA NDONGA .... DEFENDANT

JUDGMENT

1. The plaintiff's plaint dated 17th July, 2016 prays for judgement against the defendant for;

   i. The sum of kshs. 11,730,278.35 on the defendant's term loan account number 5071XXXXXX003.

   ii. Interest on (a) above at the rate of 21% per annum from 28th June 2016.

   iii. Default interest on (a) above at the rate of 27% per annum from 28th June 2016 until payment in full.

   iv. The sum of K.Shs. 11,910,122.30 on the Defendant's mortgage loan account number 5071XXXXXX004.

   v. Interest on (d) above at the rate of 18% per annum from 27th April 2014 until payment in full.

   vi. Default interest on (d) above at the rate of 27% from 27th April, 2016 until payment in full.

   vii. Costs of this suit plus interest thereon at court rates from the date of the judgment until payment in full.

   viii. Any other relief as the Honourable Court may deem fit and just to grant

2. The plaintiff filed substituted witness statement dated 17th February 2022 and signed by its legal officer. She stated that sometime in the months of September and November 2014, the plaintiff granted the defendant the following credit facilities upon the defendant's own request:

   a. A facility in the form of a term loan in the sum of kshs. 7,500,000/= exclusive of interest and other bank charges.

   b. A facility in the form of a mortgage loan in the sum of K.Shs. 10,000,000/= exclusive of interest and other bank charges.

3. It was further stated that the plaintiff disbursed kshs. 7,500,000.00 being the amount granted under the term loan facility to the defendant through his count number 5071XXXXXX003 sometime in September, 2014 while the mortgage loan amount of kshs. 10,000,000/= was disbursed to the defendant through his other loan account number 5071XXXXXX004 sometime in November, 2014 both accounts held with the plaintiff at its Nakuru Branch.

   4. She went on to state that in breach of his obligations under the aforestated terms and conditions of offer to repay the credit facilities granted on his own request, the defendant defaulted in making the payments resulting to his accounts with the plaintiff becoming grossly irregular with the amount due and outstanding on his term loan account number 5071XXXXXX003 being K.Shs, 11,730,278.35 and on his mortgage loan account number 5071XXXXXX004 being K.Shs. 11,910,122.30 as at 28th June 2016 which amounts continue to accrue contractual interest until payment in full.

   5. The defendant filed his statement of defence on 7th February 2017 where he admitted the contents of 1,2,14,15 and 16 and denied the contents of paragraphs 3,4,5,6,7,8,9,10,11 and 12 of the plaint.

   6. The defendant equally filed a witness statement dated 9th October 2022 in which he stated that on or about the month of November 2014 he approached the plaintiff with the idea of obtaining certain loan amounts from it. That he ended up acquiring two credit facilities from the plaintiff one in the form of a loan facility in the tune of Ksh.7,500,000/= (Kenya shillings Seven Million Five Hundred Thousand) and a Mortgage facility in the tune of Ksh.10,000,000/= (Ten Million Shillings).

   7. He further stated that an unfair and unreasonable charge of interest was set by the bank to ensure that upon the slightest default there was no way of regularizing his accounts and his properties as secured by the charges would be auctioned. Additionally, that if the contract between him and the bank was left to stand it would amount to an unfair bargain which is not only unreasonable but unconscionable with all intents and purpose of unjust enrichment of the bank at his expense.

   8. Parties agreed to canvass the suit, by written submissions.

Plaintiff's submissions

9. These were filed by the firm of Mutua Waweru & Company Advocates and are dated 11th September 2023. Counsel identified one issue for determination which is whether the defendant is indebted to the plaintiff as pleaded in the plaint.

10. He submitted that the plaintiff had demonstrated the indebtedness and entitlement to the reliefs sought in the plaint. Further that the loans advanced to the defendant were clearly evidenced by the

letters of offer for two facilities. Further, that the loan account statements also demonstrate that the loans were duly disbursed to the defendant and he defaulted in their repayments.

11. He further submitted that the first loan of kshs. 5,000,000/= was disbursed on 23rd September 2014 and the second loan of kshs. 2,500,000/= was disbursed on 7th October 2014. Thus, it was clear that the defendant defaulted in the repayment of the facility having made only four payments. The said payments include; kshs. 28,183/= on 31st October 2014, kshs. 4,965/= on 3rd November 2014, kshs. 50,000/= on 4th November 2014, kshs. 150,000/= on 6th November 2014, kshs. 160,000/= on 28th November 2014 and kshs. 389,282/= on 4th November 2014 which was the last payment ever made on that account.

12. He went on to submit that the mortgage loan amount was disbursed on 11th December 2014 but the defendant only made three payments on the said account. They include kshs. 98,497/= on 10th April 2015, kshs. 69,936/= on 21st April 2015 and kshs. 1,775,427/= on 15th February 2016 which was the last payment made on that account. That as a result of the default in the settlement of the loan amounts as agreed, the Plaintiff was entitled to exercise its statutory right of sale as a chargee over the two properties pursuant to the charge instruments. He added that the plaintiff's effort to pursue its rights under the charge documents were frustrated since National Land Commission had placed restrictions on the parcels of land and the Directorate of Criminal Investigations was investigating allegations of fraud against the defendant who was the registered owner.

13. Consequently, the plaintiff had no choice but to institute this suit for recovery of the defaulted sums since the defendant was bound by the terms for the grant of the loan facilities. The court's attention was drawn the decisions in National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & Another [2001]eKLR, Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014]eKLR and Jamii Bora Bank Limited v Wapak Developers [2018]eKLR. He urged the court to enter judgment as prayed in the plaint.

Defendant's submissions

14. These were filed by the firm of J.M Kariuki & Company Advocates and are dated 3rd November 2023. Counsel identified two issues for determination.

15. The first issue is whether the plaintiff's interest as charged was reasonable. He submitted in the negative and cited section 33B of the *Banking Act* which caps interest rate at 4% above the Central Bank of Kenya lending rate. While relying on the case of Nancy Muthoni Nyaruai v Grace Wanjiku Mugure [2021] eKLR, counsel submitted that the unlawful calculation of interest ought not to be allowed to stand.

16. On the second issue on whether the reliefs sought in the suit can issue, he submitted that apart from the unlawful interest rate the plaintiff's reliefs under the plaint were fatally defective and could not be issued by this court. Further, that section 44A of the *Banking Act* barred banks from recovery of more than double any sums lent out under any loan agreement. He placed reliance on the decisions in Mugure & 2 Others v Higher Education Loans Board (Petition E002 OF 2021) [2022]KEHC 11951KLR and *Hunkar Trading Company Ltd & Another v Family Bank Ltd (Civil Case 841 of 2021*) [2022] KEHC 515 KLR which cited the case of John G Kamunyu & Another v Safari "M" Park Motors [2013] eKLR.

17. In a rejoinder, the plaintiff filed further submissions dated 14th November 2023. Counsel submitted that the amendments to section 33 (b) of the *Banking Act* on capping of interest as introduced by the Banking (Amendment) Act, 2016 did not have a retrospective application and thus, did not apply to

the two facilities the subject of the suit herein. He placed reliance on the case of Longonot Ventures Ltd v Jamii Bora Bank Lid (2020) eKLR where the court held as follows;

> " Thus, the amendment to Section 33B (Repealed) did not provide a retrospective application of the capped interest rates for previously valid rights nor was it meant to inhibit the existing rights and obligations of parties as held in the case Vehicle and Equipment Leasing Ltd Vs. Jamil Bora Bank ltd (2017) e KLR where the court rendered and held that Section 33B of the Act does not apply retrospectively to affect and inhibit rights of parties which accrued prior to the 14th September 2016, the effective date. See also National Bank of Kenya Ltd Vs. Pipe plastic Samkolit Ltd & another, to the same effect."

18. He submitted further that the suit herein was filed in August 2016, prior to the coming into effect of the said amendments. Thus, the reliefs sought in the suit in reference to the interest rates on the amounts owing were valid under the letters of offer that had already accrued to the plaintiff.

19. He further submitted that the right of the plaintiff to claim interest at contractual rates as long as the loan facilities remained outstanding had already accrued and unaffected by the amendments to section 33B of the *Banking Act*. He added that there was an inadvertent omission of the second page of the account statement which included the entries up to 28th June 2016 in its bundle of documents and a complete statement was annexed to these submissions. He urged the court to grant the prayers sought in the plaint.

Analysis and Determination

20. Upon carefully analyzing the facts, evidence both submissions and the law, I find the following issues to arise for determination.

    i. Whether the plaintiff illegally overcharged interest rates on the term and mortgage loan facilities advanced to the defendant.

    ii. Whether section 33B of the Act was applicable to the two loan facilities advanced to the defendant.

Whether the plaintiff illegally overcharged interest rates on the term and mortgage loan facilities advanced to the defendant.

21. The plaintiff in its plaint seeks for repayment of both term and mortgage loan amounting to kshs. 11,730,278/35 and kshs. 11,910,122/30 respectively advanced to the defendant on several dates via accounts 5071XXXXXX003 and 5071XXXXXX004. It also seeks for interest on the said loan amounts until payment in full.

22. The defendant in his defence does not dispute the said loan amounts. However, he stated that the plaintiff had charged unfair and unreasonable interest on the loans advanced to him in order to ensure that upon the slightest default there was no way of regularizing his accounts so that his properties used to secure the charges would be auctioned off. Further, in his submission he referred to sections 33B and 44A of the *Banking Act* and argued that unlawful calculation of interest ought not to be allowed to stand.

23. It is not in dispute that the plaintiff advanced loan facilities to the defendant on various dates in two different accounts and the defendant defaulted in repaying the same. This is evident from the letters of offer dated 9th September, 2014 and 13th November, 2014 annexed to the plaintiff's list and bundle of documents. The said letters of offer contain the loan amounts advanced, terms of the loan including the

interest rate to be charged upon repayment and in case of default. The said letters of offer are executed by both the plaintiff and the defendant.

24. Looking at the letter of offer for the term loan dated 9th September 2014, the clause on interest rate at page 2 states as follows;

> "Interest rates charged on the Term Loan Facility will be charged as indicated below for the time being, but subject to this condition may be changed by the Bank at its sole discretion without prior notice. The interest rate will be on reducing balance, calculated on a daily basis and debited monthly to the respective account:
>
> Term Loan Facility: Bank Base Lending Rate (21%p. a.) + 3%p. a; = 24%p.a.: EOL 27%p. a.
>
> Default/Excess Over Limit EOL Interest
>
> In the event that the Borrower does not pay any sums payable hereunder on due date interest will be charged on such sums at a per annum rate specified by the Lender in writing to the Borrower as the rate to be charged on default/EOL and in the absence of such specification the per annum rate which is equal to the aggregate of the rate then payable for the facility as hereinbefore provided the additional cost to the Lender of funding an amount equal to the sum unpaid plus Twenty Seven per cent (27%) on all monies due from (and including) the date of the same becoming due until actual payment of such sum (together with all accrued interest) in full and the Borrower hereby acknowledges and agrees that this rate represents a reasonable pre-estimate of the loss to be suffered by the Lender in funding the default of the Borrower.

25. In the letter of offer for the mortgage dated 13th November 2014, the interest clause at page 2 states as follows;

> "The interest rates charged on the Mortgage Loan Facility will be charged as indicated below for the time being, but subject to this condition may be changed by the Bank at its sole discretion subject to 30 days prior notice. The interest rate will be on reducing balance, calculated on a daily basis and debited monthly to the respective account:
>
> Current rate: 18% p.a. EOL 27% p.a.
>
> Default/Excess Over Limit EOL Interest
>
> In the event that the Borrower does not pay any sums payable hereunder on due date interest will be charged on such sums at a per annum rate specified above or as may be specified by the Lender in writing to the Borrower as the rate to be charged on default/EOL and in the absence of such specification the per annum rate which is equal to the aggregate of the penal rate then payable for the facility as hereinbefore provided the additional cost to the Lender of funding as indicated above on all monies due from (and including) the date of the same becoming due until actual payment of such sum (together with all accrued interest) in full and the Borrower hereby acknowledges and agrees that this rate represents a reasonable pre-estimate of the loss to be suffered by the Lender in funding the default of the Borrower."

26. Under clause 2 of the Charge document dated 29th September 2014 it is stipulated as follows: -

> "The Chargor shall pay commission, fees and other usual bank charges as well as interest up to the date of payment (as well after as before any demand, judgement, bankruptcy or liquidation of the Chargor) on all the monies and liabilities from time to time due and

payable hereunder such interest to be calculated at the rate of Twenty Four percent (24%) per annum or at the rate or rates set out in any facility letter, letter of commitment, loan agreement, letter of variation or other agreement exchanged with the Bank (as may be amended, supplemented, varied or reviewed from time to time) or at such other rate or rates (not exceeding any maximum permitted by law) from time to time agreed with the Bank and in the absence of such agreement at such rate or rates as the Bank may, in its sole and absolute discretion, from time to time determine. If the Chargor defaults in making any payments hereunder or exceeds the authorised limit for the banking facilities the Chargor shall pay interest on that excess sum or any portion remaining unpaid from the due date of such payment until actual payment thereof at rate of Twenty seven percent (27 %) per annum or at such rate or rates over and above the rates specified in Clause 2(a) above as agreed with the Bank...."

27. Clearly, from the letters of offer and respective charge instrument the defendant was very much aware of the interest to be charged on his loan facilities and the plaintiff had the power to vary the interest rate at any time.

28. In the case of Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited [2013] eKLR Mabeya J stated at paragraph *18* that: -

> " I have endeavoured to analyse the documents placed before me to be able to decipher how the parties intended to deal with each other. They indicated in the charge document that the facility attracted interest and they agreed on the rate of interest. The parties also agreed that the defendant could change that rate of interest at its discretion from time to time but also indicated how such change would be effected. Clauses 2 and 11 of the Charge must be given effect. I cannot re-write the agreement of the contract between the parties. I have to give effect to its letter and spirit even if it causes hardship to either of them. The parties executed the same willingly and they are therefore bound by it."

29. Similarly, in the case of Desai & Others vs Fina Bank Ltd [2004] 2 EA 46 at 51, it was stated as follows:-

> " In Fina Bank Ltd vs Spares and Industries Ltd [2000] 1 EA 52, Tunoi, Shah and O'Kubasu JJA after considering the allegations of the high and onerous rates of interest by the bank and criticizing the trial judge for falling into the serious error of being a sympathizer although it is human to feel Shah said in his judgment:
>
> > " '...the function of the court is to enforce what is agreed between the parties and not what the court thinks ought to have been fairly agreed between the parties...."

30. In the case of Morris and Co. Ltd vs Kenya Commercial Bank Ltd & Others [2003] 2 EA 605 as follows: -

    130. And this is what Ringera J, had this to say on the subject of interest rates in the case of Morris and Co. Ltd vs Kenya Commercial Bank Ltd & Others [2003]EA 605:

    > " As regards interest, I can only say that it behoves parties to read the contracts they sign and to believe that the terms thereof are not mere words but covenants to be enforced. If the lender reserves to himself the right to charge such interest as he shall determine and to vary the same without reference to the borrower, so it shall be."

31. In view of the authorities cited above, there is no doubt that interest is a contractual issue and the court should be reluctant to interfere with the interest rate agreed by the parties unless the same is shown to be illegal, unconscionable or fraudulent as doing so would amount to re-writing the contract. The parties herein agreed on the rate of interest to be applied and the plaintiff had authority to vary the same without reference to the defendant.

32. For the said reasons, it is my humble opinion that the interest rate applied by the plaintiff was in accordance with the terms of the contract between the parties herein and this court should not interfere with the same.

Whether section 33B of the *Banking Act* was applicable to the two loan facilities advanced to the defendant.

33. The defendant contends that section 33B of the *Banking Act* caps interest rate at 4% above the Central Bank of Kenya lending rate and that unlawful calculation of interest ought not to be allowed to stand.

34. In a rejoinder, the plaintiff argued that Section 33B (Repealed) did not provide a retrospective application of the capped interest rates for previously valid rights nor was it meant to inhibit the existing rights and obligations of parties.

35. The said section was introduced by the Banking (Amendment) *Act No 25 of 2016* and it came into operation on September 14, 2016. It provides as follows: -

> " 1. A bank or a financial institution shall set
>
> a. the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and
>
> b. the minimum interest rate granted on a deposit held in interest earning in Kenya to at least seventy per cent, the base rate set and published by the Central Bank of Kenya.
>
> 2. A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law.
>
> 3. A bank or financial institution which contravenes the provisions of subsection (2) commits an offence and shall, on conviction, be liable to a fine of not less than one million shillings or in default, the chief executive officer of the bank or financial institution shall be liable to imprisonment for a term not less than one year."

36. In Vehicle And Equipment Leasing Limited v Jamii Bora Bank Limited [2017[eKLR also cited by the plaintiff, the court analyzed the purport and applicability of section 33B and held that: -

> " Law as a social tool does not operate in a vacuum. The mischief intended to be cured by parliament, in my view, was the run-away rates of interest then allegedly being levied by licenced banks and financial institutions. This, it may be safe to conclude, was catered for by s.33B (2). One must also be conscious of the fact that as at the time of the amendment and introduction of s.33B, there already existed thousands of Kenyans and other borrowers burdened by high and, occasionally, usurious interest rates. There was a hue and cry by the already burdened borrowers. It may be safe to infer, albeit not conclusively, that s.

33B (1) took care of the lot....I hold the interlocutory view that s33 of the Act does not apply retrospectively to affect and inhibit rights of parties (both credit providers and credit consumers) which accrued prior to September 14, 2016. Any interest, in my view which was to be charged by banks after September 14, 2016 had (has) to be subjected to the provisions of the law, including s.33B."

37. This court associates itself with the above reasoning. It is the duty of the court to take cognizance of the intention of section 33B of the Act and the injustice that it sought to cure. According to the bank statements found in the plaintiff's list and bundle of documents and which has not been challenged by the defendant, the term loan facility was disbursed on 23rd September 2014 and the mortgage loan on 11th December 2014. The bank began charging interest on 23rd October 2014 and 12th January 2015 respectively.

38. The defendant herein had all the time and opportunities to approach the plaintiff for a re-negotiation of the interest rates when the Banking (Amendment) *Act No. 25 of 2016* came into operation. He did not do that yet that was the only avenue open to him to have the rates adjusted if the plaintiff was ready and willing to accommodate him. The court will not do that for him.

39. In view of the foregoing, it is my finding that the said loan facilities were not subject to section 33B which was introduced by the Banking (Amendment) *Act No 25 of 2016* and the same came into operation on 14th September, 2016.

40. The upshot is that the plaintiff has proved its case on a balance of probabilities. I hereby enter Judgment for the plaintiff as prayed with costs.

Orders accordingly.

DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE