



**Rainbow Acres Limited v NCBA Bank Kenya PLC (Civil Suit 97 of 2014)  
[2023] KEHC 957 (KLR) (Commercial and Tax) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 957 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 97 OF 2014  
A MABEYA, J  
FEBRUARY 17, 2023**

**BETWEEN**

**RAINBOW ACRES LIMITED ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff moved this Court vide the plaint dated 10/3/2014 which was variously amended resulting in the further further amended plaint dated 25/3/2021.
2. In a nutshell, the plaintiff sought several declarations including, that; the interest charged was over the contractual rate thus illegal, the defendant was not entitled to charge excess or penalty at 12% over its base lending rate, the amalgamation of the plaintiff's loan and current account was un-contractual and illegal, the defendant acted irregularly opening an overdraft account, the defendant was not entitled to debit the plaintiff's account with amounts paid to its auctioneer and Advocates on account of withdrawn Statutory Notice.
3. The plaintiff also sought several refunds plus interest thereon at 16% including; Kshs. 186,520/=, Kshs. 82,128/=, Kshs. 184,120/=, Kshs. 765,786.47 and Kshs. 3,619,657/=, respectively. These were monies debited on its account for various reasons. Alternatively, the plaintiff prayed for an order for accounts and any amounts found to be due be refunded to it.
4. In its amended defence dated 3/6/2021 the defendant denied the plaintiff's claims in total.
5. The parties filed their agreed issues for determination dated 4/3/2022 and agreed statement of facts dated 7/3/2022. The parties also filed a consent dated 7/3/2022 with directions on the disposal of the suit, including that the filed written statements be admitted in evidence without cross-examination,



the filed list and bundles of documents to be admitted in evidence and that the suit be determined through written submissions.

6. The documents relied on by the plaintiff was the further further amended plaint dated 25/3/2021, written statement of Ceasar Wanjao dated 2/6/2021, written statement of Wilfred Abincha dated 28/2/2022 and a list and bundle of documents dated 2/6/2021.
7. On the other hand, the defendant relied on the further amended statement of defence dated 3/6/2021, written statement of Ibrahim Ngatia, substituted witness statement of Jackson Nyaga dated 6/5/2020, list and bundle of documents dated 2/6/2021 and supplementary list of documents dated 26/11/2021.
8. The evidence on record is that the defendant loaned the plaintiff Kshs. 8,000,000/= on the basis of a Letter of Offer dated 18/10/2007 (“Offer Letter”) and mortgage instrument dated 29/10/2008. The interest rate was 2% per annum above the defendant’s base lending rate of 14% and the loan was to be repaid within 60 months.
9. The plaintiff offered suites C1 and C2 on properties L.R. No. 209/388/4 and 209/388/3/1 as security. At the time, the plaintiff had a current account no. xxxx with the defendant which the defendant later amalgamated with the plaintiff’s loan account no. xxxx. After the amalgamation, the defendant debited the current account with Kshs. 8,803,613.92 and treated the current account as being in arrears.
10. The defendant varied interest from time to time and also charged excess or penalty on any amount deemed to be in arrears. On 2/2/2012, the defendant debited the plaintiff’s account with Kshs. 186,520/= in auctioneers charges on account of the withdrawn notification of sale dated 9/11/2011. On 2/3/2012 and 6/6/2014, it debited the plaintiff’s account with Kshs. 82,128.00/= and Kshs. 184,120/= respectively in advocates costs paid to Wainaina Ileri & Co. Advocates for representing the defendant in this suit.
11. The defendant demanded payment of Kshs. 3,447,292.61 as at 1/9/2015 plus interest at 30% pa vide the notification of sale dated 3/9/2015. The plaintiff paid the defendant Kshs. 3,619,657.27 under protest which amount represented an overpayment of Kshs. 172,424.66/=. On 8/3/2016, the defendant forwarded to the plaintiff a duly executed reconveyance of mortgage.
12. It is against this background that the plaintiff brought the present suit. Its case was that the mortgage instrument was superior to the Offer Letter. That the loan was therefore governed by the terms and conditions in the mortgage agreement.
13. That the mortgage instrument did not provide for penalty and default interest nor excess interest of 12% pa on arrears. That the defendant issued a notification of sale and a statutory notice demanding Kshs. 8,370,428.58 but posted the same to a wrong address. The defendant owned up to the mistake and withdrew them but nevertheless debited the plaintiff’s account with Kshs. 186,520/- and Kshs. 82,128/-, respectively as auctioneer and advocate’s fees.
14. The plaintiff contended that when the defendant demanded Kshs. 9,570,140/= in 2012, the plaintiff denied having arrears and requested for a breakdown of the same and account statement but the defendant failed to avail the same.
15. When the statements were provided, the plaintiff engaged the Interest Rates Advisory Centre (IRAC) who scrutinized the same and established that as at 30/4/2013, the plaintiff owed the defendant only Kshs. 879,202.42. The plaintiff paid Kshs. 880,202.42 to cover those arrears. That as at 31/7/2013, the plaintiff had paid the defendant cumulatively a total sum of Kshs. 13,695,359.64.
16. The plaintiff further contended that the defendant had illegally and secretly amalgamated the plaintiff’s loan account with a current account. It thereafter transferred the purported arrears from the loan



account to the current account and treated the facility as an overdraft as opposed to a loan. The overdraft attracted interest at a higher and outrageous rate of as high as 36% pa which was not provided for in the mortgage instrument which had not contemplated such a conversion.

17. IRAC established on 11/11/2014 that the plaintiff had overpaid the defendant by Kshs. 765,786.47. However, the defendant thereafter demanded non-existent arrears of Kshs. 3,447,292.61 and threatened to dispose the securities. The plaintiff paid Kshs. 3,619,657.27 under protest to avoid the disposal of the securities.
18. In the premises, the plaintiff contended that it did not owe the defendant any money as at 26/7/2013 but rather the defendant owed it Kshs. 4,838,211.74. In June 2014, the defendant again charged the plaintiff Kshs. 184,120/- on account of legal fees for defending the present suit.
19. On the other hand, the defendant's case was that both the Offer Letter and the mortgage instrument were fundamental to the governing of the loan and none superseded the other. That the defendant rightfully applied excess, default interest or penalty interest as the same were provided for under the Offer Letter.
20. That the banking facility, mortgage instrument and general terms on non-performing loans permitted the defendant to amalgamate all facilities under the plaintiff's name. That the amalgamation was a result of a migration to a new banking system and an overdraft was not created. That the defendant rightfully applied penalty interest of between 28 and 36% pa on the amalgamated account as the same was provided for under the Offer Letter.
21. That the plaintiff's defaults and dishonoured proposals on settlement necessitated the issuance of the statutory notice dated 19/5/2011. When the plaintiff failed to redeem the loan, the defendant instructed an auctioneer to recover the arrears. That it withdrew the statutory notice and notification of sale after establishing that it had sent the same to a wrong address.
22. It contended that the IRAC report was wrong as the total debt was Kshs. 2,525,611.85/= as at 1/7/2013. That the report was a mere report and was not binding on the Court. That the report was also made on the basis of wrong assumptions as it applied the interest rate in the mortgage instrument as opposed to the one in the Offer Letter.
23. The defendant issued another statutory notice on 10/12/2013 which provoked this suit. It admitted that it issued another statutory notice on 3/9/2015 demanding Kshs. 3,447,292.61/= for which the plaintiff paid Kshs. 3,619,657.27 under protest in full settlement of the loan whereby the defendant forwarded a duly executed reconveyance mortgage.
24. The plaintiff filed submissions and supplementary submissions dated 13/4/2022 and 13/6/2022, respectively while the defendant's submissions were dated 16/5/2022. The parties had agreed on 16 issues for determination which can be summarized into 4 as follows: -
  1. Where there are inconsistencies between a Letter of Offer and mortgage instrument, which one takes precedence? In the premises, was the defendant entitled to charge excess, default interest or penalty than stated in the mortgage instrument?
  2. Whether the defendant was entitled to amalgamate the plaintiff's loan and current accounts.
  3. Whether the defendant was in breach when it charged interest in excess of 2% more than its lending base rate of 14% pa and thereby clogged the plaintiff's equity of redemption.
  4. Whether the defendant was entitled to charge the auctioneers and advocates fees on the withdrawn notices and for defending the present suit.



5. Whether the plaintiff is entitled to the orders sought.
25. On issue 1, it is not in dispute that the parties executed two documents in relation to the subject loan of Kshs. 8 million. The first was the Offer Letter dated 18/10/2007. The second was the mortgage instrument dated 29/10/2008. Whereas the Offer Letter provided that an excess interest rate of 12% pa above the base lending rate was to apply for any amounts in arrears on the loan, the mortgage instrument made no provision for excess interest rate, creating an inconsistency between the two documents.
26. This inconsistency was not disputed. The plaintiff submitted that though the Offer Letter was an important document, the terms therein could not supersede the terms of a duly executed and registered mortgage instrument. It was thus submitted that the Offer Letter was secondary to the mortgage instrument as it provided that the drawdown of the loan was subject to perfection of securities.
27. On its part, the defendant submitted that both documents governed the contractual relationship between the parties. That though the mortgage instrument was silent on penalty interest, both documents provided that the defendant was at liberty to revise the applicable rate of interest at its own discretion.
28. In *Christopher Ndolo Mutuku & another v. CFC Stanbic Bank Limited* [2013] eKLR, the court held: -  
“The other issue that arise is, which as between the GTC and the Charge would apply to the Plaintiffs facility. I raise this issue because whilst the Defendant contend that the GTC allowed it to change its publicly quoted base rate from time to time, the Plaintiffs insist that the Charge document required that the Plaintiffs be notified of such change. My view is that, whilst a Letter of Offer may incorporate the General Terms and Conditions of a lender, once a subsequent document of contract such as a Charge is executed, it is expected that all terms and conditions contained in the Letter of Offer or such GTC are expressly incorporated or they automatically merge with the Charge. Therefore, when there arises a conflict between the terms and conditions in the G.T.C/Letter of Offer and the Charge, the provisions of the latter prevails. This is so because the Charge document is the later in time and it is assumed that when the parties execute the same, they are aware of the provisions of the earlier documents.”
29. Further, in *John Muriithi Gacugo Ng'ang'a v HFCK & anor* NRB HCCC No.15 of 2005 UR, Kimondo J delivered himself thus: -  
“The letters of offer executed by the parties are relevant in forming the foundation of the contract and the intentions of the parties. Of course, as between them and the charge instruments, the charge is superior and if there is any conflict, then the terms of the charge would supersede any other agreement between the parties.”
30. This was the same position taken in the cases of *National Bank of Kenya Limited v Joel Kiema Mutinda & another* [2019] eKLR and *Morris & Company v Kenya Commercial Bank Ltd* [2003] 2 EA 605.
31. From the foregoing, it is trite that though an Offer Letter plays an important role in forming the foundation of the contract, the security documents take precedence in case of conflict. It is the security documents that tie or crystalize the security and not the Offer Letter. With the Offer Letter alone, a Lender cannot purport to exercise any statutory power and/or seek to realize the security given. It is therefore expected that the Lender would include all the terms and conditions contained in the Offer Letter in the security document which is usually executed subsequently.



32. It would be cumbersome and untidy for a borrower to be expected to have to look at the various documents executed to discern what the terms of the transaction he has entered into is.
33. In my view, the security documents executed after the Offer Letter are meant to crystalize what the parties have agreed in respect of a facility vis a vis a security. Unless however, the security document expressly incorporates the Offer Letter as being part and parcel of the security instrument.
34. In the present case, the mortgage instrument was executed after the Offer Letter. The terms therein superseded any founding document and the parties were therefore bound to the terms of the mortgage instrument. It is this Court's finding that in the face of the inconsistencies between the two documents, the mortgage instrument took precedent and therefore governed the contractual relationship between the parties.
35. The Court has seen the mortgage instrument dated 29/10/2018. It did not provide for excess, default interest or penalty interest. Consequently, the defendant contradicted the terms of the mortgage instrument dated 29/10/2008 by charging penalty interest, default interest and excess.
36. This Court rejects the defendant's submission that even in the absence of the provision on penalty interest, it had the mandate to levy the same as both documents authorized it to vary the interest rate. It is one thing to vary interest rate provided for in a security instrument, and it is another to charge interest that is not provided for at all. The defendant had no legal or contractual basis or authority to charge penalty interest or any other interest that was not provided for in the charge instrument.
37. On the second issue, it was the defendant's case that both the Offer Letter and the mortgage instrument provided for the defendant's right to amalgamate, consolidate and set off the plaintiff's accounts. That the plaintiff had a loan account with a balance of -Kshs. 8,798,564.92 and current account with a balance of -Kshs. 5,050.00. That it amalgamated the two and transferred the total balance of -Kshs. 8,803,614.92 to the plaintiff's current account. That the amalgamation did not result in creation of an overdraft as claimed.
38. For the plaintiff, it was submitted that though the mortgage instrument provided for amalgamation, the manner in which the defendant did the amalgamation was illegal and un-contractual. That after the amalgamation, the defendant created interest at high rates of up-to 36% pa. That the acts were calculated at unjustly benefiting the defendant by clogging the plaintiff's equity.
39. Clause 7 (f) of the mortgage instrument provided that: -

“ ... The lender may at any time and without notice to the mortgagor combine or consolidate all or any of the mortgagor's accounts with and liabilities to the lender and set off or transfer any sums standing to the credit or any one or more of such accounts in or towards satisfaction of the mortgagor liabilities to the lender’
40. From the foregoing, it is clear that the mortgage instrument allowed for amalgamation of accounts. Since amalgamation was permitted at any time, it does not matter that the same came before the lapse of the 60 months of the facility.
41. The Court is therefore unable to agree with the plaintiff that there was any intended ill motive with the amalgamation. Accordingly, the amalgamation of the plaintiff's loan and current accounts was contractual and legal.
42. On the third issue, the plaintiff submitted that once it was furnished with the mortgage instrument after numerous requests, it realized that the defendant had no contractual basis to apply penalty



interest. The plaintiff had previously contracted IRAC to analyze its accounts, and at the time, IRAC only took up the instructions relying on the Offer Letter and account statements and did so under the impression that the defendant could apply penalty interest. That upon establishing that the mortgage instrument did not grant the defendant that right, it contracted the services of IRAC once more to analyze its affected accounts and paint a clear picture of the status of the loan in light of the new circumstances.

43. IRAC's prepared a report dated 11/11/2014 which concluded that the plaintiff had overpaid the loan by Kshs. 765,786.47. The plaintiff also filed a witness statement by Wilfred Onono Abancha, the Managing Director of IRAC. That even despite that finding of excess payment, the defendant still demanded a further sum of Kshs. 3,447,292.61 for which the plaintiff paid Kshs. 3,619,657.27 under protest.
44. The defendant challenged the report by IRAC and submitted that the same was a mere opinion and was not binding on the Court. That the entries by the defendant bank were prima facie evidence of the validity of such entry. That without sufficient evidence by the maker, the report could not be relied upon as it was impossible to establish how the difference in the interest amount charged was arrived at. That the report ought to have applied interest on arrears at 12% above the base lending rate as provided for in the Offer Letter and not 2%.
45. The Court has considered the witness statement of Wilfred Abincha Onono, a managing consultant of IRAC, made on 28/2/2022 and the report dated 11/11/2014. Though the defendant implored this Court not to place any reliance on it as it was an expert's opinion, the defendant did not file any report itself, despite asserting itself as an authority on loan matters by virtue of being a banker.
46. Admittedly, an expert's witness is not binding on the Court. It only sheds light on an otherwise technical area which requires certain specialized skill. The general principle under section 48 of the [Evidence Act](#) on expert evidence provides a basis of the role played by experts in an adversarial litigation process.
47. In [Mombasa Maize Millers Kisumu Ltd & another v KT & another](#) [2019] eKLR explained an expert to be a person who is expected to be skilled in his field in which he is called upon to assist the court on the issues in dispute which require expert opinion.
48. Whether or not a trial court admits expert evidence is purely a question of fact for the court to decide depending on the circumstances of the case. In [Stephen Kinini Wang'ondy v The Ark Limited](#) [2016] eKLR, the court held:-

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called. While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence.”

49. From the foregoing, expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It has already been established that the defendant



- irregularly applied excess, default interest and penalty interest in calculating the plaintiff's loan arrears. The expert report is based on the same foundation, that penalty interest ought not to have applied. What the report does then is that it sheds light on the correct loan status upon recalculation and reconsideration of the plaintiff's account, to determine the correct amount outstanding, if any.
50. It is imperative to note that the defendant did not file its own report by an expert to challenge IRAC's report or provide a comparative analysis for this Court's consideration. In the circumstances of this case, the expert report before Court is imperative in the determination of the question of interest applicable and whether the plaintiff is owed any refunds as claimed.
  51. The defendant's submission that the report ought to have factored in the interest rate provided for in the Offer Letter and not the mortgage instrument fails. This is so because the Court has already found that the mortgage instrument was the governing document.
  52. Further, *vide* the consent dated 7/3/2022, both the witness statement and report were admitted as evidence without cross-examination of the makers. The report found that the defendant owed the plaintiff Kshs. 765,786.47.
  53. From the foregoing, it is evident that the defendant breached the contractual interest rate by applying other interests not provided for in the mortgage instrument. The effect was that the defendant clogged the plaintiff's equity of redemption not only by applying interest not provided for but by also demanding further payments.
  54. On the 4<sup>th</sup> issue, it was not disputed that the defendant issued a notification of sale and statutory notice in December 2011 demanding Kshs. 8,370,428.58. The same were withdrawn upon realization that they were sent to the wrong address. The defendant debited the plaintiff with Kshs. 186,520/= and Kshs 86,128/= on account of auctioneer's and advocates fees.
  55. The Court's view is that, having admitted that the notices were sent to the wrong address, they were ineffective. The defendant was the one to bear its consequences and the plaintiff. It does not matter that the defendant was entitled to issue those notices in the first place.
  56. Although the defendant submitted that it used the postal address used in the mortgage instrument, there was no evidence such as the postal payment receipt to indicate that the postal address used was the one availed by the plaintiff.
  57. The defendant submitted that the claim for a refund of the auctioneers and advocates fees was statutorily time barred as the accounts were debited in February 2012, and the claim for refund was brought *vide* the further amended plaint on 11/11/2020.
  58. The Court notes that this issue was never pleaded in any of the defendant's pleadings. It also did not form part of the agreed issues for determination dated 15/3/2022. To introduce this issue by way of submissions is tantamount to ambush litigation. It is rejected.
  59. The final issue is whether the plaintiff is entitled to the orders sought. The Court has found that the terms of the mortgage instrument superseded those of the Offer Letter. That the defendant had no contractual basis to apply excess, default interest or penalty interest. It has also been established that as a result of the illegal application of interest not provided for in the mortgage instrument, the plaintiff had overpaid Kshs. 765,786.47 as at 31/7/2013. That amount is refundable.
  60. The defendant however made a further demand for Kshs. 3,447,292.61/= causing the plaintiff to pay to it Kshs. 3,619,657.27/= to save its properties. This amount ought not to have been paid and is therefore refundable.



61. It has also been established that it was not upon the plaintiff to settle the auctioneers and advocates fees for the withdrawn statutory notice. Those sums are therefore refundable.
62. Accordingly, the plaintiff has proved its case to the required standard. Judgment is hereby entered in favor of the plaintiff against the defendant in terms of prayers a, d, and a sum of Kshs. 4,654,091.74 together with interest thereon at Court rate from the date of filing suit until payment in full.
63. The plaintiff is awarded costs of the suit plus interest at court rate.

It is so decreed.

**DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

