



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

HCCC NO. 74 OF 2011

CHRISTOPHER NDOLO MUTUKU.....1ST PLAINTIFF

CAROLINE NJOKI MUTUKU.....2ND PLAINTIFF

VS.

CFC STANBIC BANK LIMITED.....DEFENDANT

RULING

1. This matter does not go away.

2. On 18th January 2019 this Court directed as follows:-

[29] For that reason I ask the parties to jointly agree on an Accountant within 21 days hereof and in default of agreement, the Accountant shall be appointed by Chairperson, the Institute of Certified Public Accounts of Kenya. The parties shall also, within the same period, agree on the parameters for Account taking which must be in comport with the Directions issued by Judge Mabeya on 15th February 2013 and clarified by this Decision. The report of the Accountant to be presented to this Court within 60 days of his/her appointment.

[30] In respect to fees and charges of the Accountant, the same shall be shared equally by the Parties however the party in whose disfavor the Report is made shall reimburse to the other the half share paid.

3. Joint accountants, Messrs Labchey & Associates, were appointed by parties and who upon carrying out an audit returned the following verdict:-

[7] From the foregoing we certify that the amount computed as overpayments to Stanbic Bank Kenya by Christopher Ndole Mutuku and Caroline Njoki Ndolo is Kshs.1,336,592 at the completion of the loan repayment in February 2012 as shown in Appendix attached to this report".

4. The Plaintiffs accept that report and urge this Court to find that they are entitled to a refund of the overpaid amount of Kshs. 1,336,592.00 together with interest thereon from 21st February 2012 when the overpayment was made until payment in full. The Plaintiffs' also ask for costs of the suit as costs follow the event.

5. The Defendant has urged the Court to disregard the report and raises some issues. One, that the report of the Auditor is not exhaustive for the following reasons:-

1. The auditor who submitted his report dated 30th September 2019 ought to have considered the information in the affidavit of Boniface Machuki filed on the 11th February 2011 is vital.

2. The information contained in the affidavit of Hamilton Suba filed on the 4th October 2012 is also critical. At page 9 and 10 of the exhibit annexed to that affidavit is a breakdown that showed the default interest. At page 11 is a breakdown of the account. As at that time when the sums were computed the Defendant was even charging any interest lower than what the court decreed in its ruling of 15th February 2013. The rate it was charging between 15th of July 2010 and 15th July 2011 was 14.25%

3. The auditor's report is not explicit on the details of what material he reviewed to reach his determination.

4. The auditor admitted that he did not bother to reconcile the statement of account with the deposit slips on the basis that this was beyond his remit.

5. The auditor during cross-examination admitted that there were sums that were paid but he did not report on them as they were not repayments for the loan.

6. The other is that report did not capture the payments made towards costs like commitment fee, auctioneers, legal and valuation costs. It is argued that only on being identified and reported that a determination can be made that all payments on the deposit slips that were relied on only went towards reduction of the loan.

7. This Court agrees with the proposition rehashed in Stephen Kinini Wang'ondou -vs- The Ark Limited [2016] eKLR on how a Court should use expert evidence. The Judge Mativo observed;

“.....The fundamental characteristic of expert evidence is that it is opinion evidence. Generally speaking, lay witnesses may give only one form of evidence, namely evidence of fact. To be practically of assistance to a court, however, expert evidence must also provide as much detail as is necessary to allow the court to determine whether the expert's opinions are well founded.

8. Parties herein agreed that the accountant Cyprian Laban Chege be cross-examined in respect to the audit he carried out. The cross-examination was conducted before Lady Justice Muigai.

9. The Accountant said partly;-

“In the schedule I have not included the borrower's payments for auctioneer's fees, legal fees as it does not cover the repayment”.

10. Elsewhere, he testified:-

“I relied by the Bank deposits that confirmed the payment, I did not include Auctioneers fees and legal fees. If anything did not come to the Bank I do not know. I did not seek any clarification and I did not inquire as to the Bank's computation. I did not include Auctioneers fees, valuation, and legal fees. I do not have a separate list of the said charge. The extra charges were demanded for and paid. The same account that is where these charges were made and there are bank repayments but I did not include the same”.

11. Whether or not such charges as auctioneers fees, legal fees and valuation fees was to be excluded has been determined by this Court in its previous ruling of 18th January 2019. Then I said;-

[25] This Court has looked at paragraph 14 of that decision (which is reproduced in full earlier in this decision). It would be to stretch ones understanding of the emphasized part of that passage to illogical limits to read into it a finding that the penalty interest, default charges or other charges charged by the Bank were unlawful.

[26] Even if the Court were to be wrong in this view, to allow the Plaintiffs to take up the issue of additional charges and costs would be to allow them to traverse beyond their pleadings in a manner that is not permitted in law. Both in the original Plaintiff of 25th January 2011 and its amended version of 12th March 2012, the Plaintiff raise issues around the rate of interest only and not other charges and costs. Parties are bound by their Pleadings and I am not told that the question of other charges and costs were embraced by the Bank as further issues falling for determination by the Court. (See Odd Jobs vs. Mubia (1970) EA 476).

12. I would then think that the Auditor's report as to whether or not the Plaintiffs have overpaid their commitment to the Bank would be incomplete until payments made towards auctioneer's fees, legal fees and valuation fees are brought into Book.

13. Ultimately, I direct that all payments made towards auctioneer's fees, legal fees and valuation fees be identified by the accountant and report to Court within 60 days of today whether it affects the findings he made on 30th September 2019 and if so, in which manner.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of January 2020

F. TUIYOTT

JUDGE

PRESENT:

Mutuku for Plaintiff

Kimani for Ogunda

Court Assistant: Nixon

By consent the accountant to appear before Court on 14th February 2010 at 11.00. Summons to issue.