



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC CASE NO. 2186 OF 2000**

**SAMEH TEXTILES INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**ORIENTAL COMMERCIAL BANK LIMITED.....DEFENDANT**

**RULING**

1. In a Judgment of 6<sup>th</sup> November 2017 this Court made the following orders:-

[98] The significant finding that the Court has made in favour of the Plaintiff is that there was an overcharge of interest on the facility of 11th March 1995 on the basis of the increases introduced by the letters of 9th August 1995 and 18th November 1995. The impact of these unlawful increase in the rate of interest on the overall debt of the Plaintiff must be understood so that the Court makes its final orders in the matter. Unfortunately the expert opinion provided by PW2 has not helped this Court as it was based on other alleged breaches of the law which the Court has found were not proved.

[99] So as to make its final orders, the Court directs that the parties to jointly appoint an Accountant for purposes of working out the amount overcharged by the bank and to report on its overall impact on Sameh's Debt. These shall be undertaken within 30 days hereof.

2. The Accountants Report has taken some time coming. It was not until 15<sup>th</sup> August 2019 that the report of FCPA John Kabiru was filed. In it he concludes that the Bank overcharged the Plaintiff by Kshs.13,086,069 on both accounts (101027556/200138007 and 200138023) with an impact of overcharge of Kshs.36,133,350/= giving a total of Kshs.49,220,019/=.

3. Counsel for both sides made representations on the report. Mr. Koech for the customer asked the Court to accept the report as it is while Counsel Chacha Odera for the Bank strongly argued against the Court adopting the report and urged for a restatement or the taking of other or further accounts.

4. As I turn to consider these two competing positions, it helps to recall how a Court should receive, assess and use expert opinion. On this I always find the exposition by Mativo J in Christopher Ndaru Kagina v Esther Mbandi Kagina & another [2016] eKLR invaluable;-

“Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the courts' knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of the experts is to give their opinion based on their analysis of the available evidence. The court is not bound by that opinion, but can take it into consideration in determining the facts in issue.

.....my opinion, the factors which the court may take into account in determining the reliability of expert opinion, include:-

- a. the extent and quality of the data on which the expert's opinion is based, and the validity of the methods by which they were obtained;
- b. if the expert's opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- c. if the expert's opinion relies on the results of the use of any method (for instance, a test, measurement or survey),

whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;

d. the extent to which any material upon which the expert's opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;

e. the extent to which the expert's opinion is based on material falling outside the expert's own field of expertise;

f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);

g. if there is a range of expert opinion on the matter in question, where in the range the expert's own opinion lies and whether the expert's preference has been properly explained; and

h. whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

In addition, in considering reliability, and especially the reliability of expert evidence, the court should be astute to identify potential flaws in such opinion which detract from its reliability, such as:-

a. being based on a hypothesis which has not been subjected to sufficient scrutiny (including, where appropriate, experimental or other testing), or which has failed to stand up to scrutiny;

b. being based on an unjustifiable assumption;

c. being based on flawed data;

d. relying on an examination, technique, method or process which was not properly carried out or applied, or was not appropriate for use in the particular case; or

e. relying on an inference or conclusion which has not been properly reached.

5. While some deference will be given to the opinion of an expert, and in particular one like here which is made by a jointly appointed expert, a Court should not feel hamstrung to accept it if there appears to be glaring reason to question or doubt it.

6. Let me make two general observations of the report and the role of the parties in accounts taking. First, it is common ground that because of the sheer age of the dispute, dating back to 1995, some documents were missing. This was acknowledged by the Accountant who also set out the steps he took to mitigate any negative impact that would have been caused by the missing documents. He observed:-

“In performing the calculations the major limitations were missing documents, time taken to locate some documents and missing documents. To overcome some of these challenges fundamental assumptions were made. For instance some projections were made to capture overdraft balances in most bank statements. This was the most ideal way of concluding the exercise given that almost at all times the overdraft facility was constantly and steadily growing. In order to come up with balances over the month, opening and closing balances were averaged. This again was necessitated by ineligible balances. It is under these circumstances that the computations were carried. Despite the short comings it is my opinion that the computations reflect an accurate position of the overcharge and impact of the overcharge on the client's debt and may not be materially different when with complete records”.

7. I did not hear any side argue that the missing documents would limit the accountant from effectively and fairly taking the accounts.

8. Second, once an order for accounts was made, parties to the accounts had an equal responsibility of providing whatever documents were within their powers and reach, and to duly cooperate with the accountant. The taking of accounts is not a trial where one side bears an onus of proof. Once a party has persuaded the Court that the taking of accounts is justified and an order is made, then all parties to the accounts taking must support the process so that the outcome is meaningful.

9. The first criticism made by the Bank was that the accountant calculated interest charge on a monthly basis instead of on a daily basis. The facility for which the accounts were to be taken was the 1995 facility and this Court therefore agrees with counsel Chacha that the manner of working interest would have to be as agreed upon by the parties in the letter of offer. On this, the letter of offer states:-

**INTEREST:** Interest on utilization of the overdraft will be charged at the aggregate of the Bank's base rate in force from time to time, presently 21% p.a and a margin of 6%p.a effectively 27% p.a at present. Interest will be calculated on a daily basis and the actual number of days elapsed in the year and recovered monthly in arrears on a date on each month convenient to the Bank.

**EXCESS PENALTY:** In the event that the overdraft facility is exceeded over the limit of Kshs.15,000,000/=, a penalty fee which will be determined by the Bank from time to time will be levied on the excess amount, presently at 10% p.a on daily excesses recoverable monthly in arrears on a date convenient to the Bank.

10. It is not explicit to this Court whether the missing documents was the reason why the accountant applied interest on a monthly basis

instead of at the end of each day. This in my view requires clarification.

11. A second issue raised and which would also have merit is that the relevant accounts for reporting would be that in respect to the facility of 11<sup>th</sup> March 1995. That account would be account No. 101027556/200138007. Although the element of account No. 200138007 is small (Kshs.205,552/=), it is not clear to this Court why the report included account No. 200138023 as well.

12. A third issue raised by the Bank was the accountant could not rework interest beyond the period beginning on 18<sup>th</sup> April 1997. The significance of the date being that by dint of the Central Bank (Amendment) Act 1996 (Act No. 6 of 1996), the power to fix maximum interest rates was taken away with the effect that the interest rate regime was liberalized. This argument ignores that the basis for requiring the accounts was that the Bank was in breach of the Provisions of Section 44 of the Banking Act on variation of interest rates and not because it had infringed on any maximum interest rate regime. There can be no basis to limit the restatement of account to 18<sup>th</sup> April 1997.

13. There is then a final observation made by the Bank. It is perhaps better not to paraphrase it;

“Interest overcharge impact interpretation in Mr. Kabiru’s report is flawed. Instead of reversing the amounts he identified as overcharge and then re-stating the accounts, he went ahead identifying the overcharge and then compound the overcharge”.

14. The accountant concluded that the Bank had overcharged the customer “by Kshs.13,086,699/= for both accounts and impact of the overcharge was Kshs.36,133,350 giving a total of Kshs.49,220,019”. Looking at main report, the Court has understood the actual overcharge reported to be Kshs.13,086,699. As to the impact of overcharge, the accountant states:-

“The implication of this is that the interest that was overcharged also earned interest for the Bank over the same period of time. This impaired the repayment ability of Sameh Textile Industries Ltd”.

15. The purpose of the report the Court had called for was to discover the actual overcharge by the Bank(s) so as to understand whether there was actual default by the customer and whether realization of securities was justified when they happened and, further, whether any monies would be due from the Bank to the customer.

16. As the parties herein are not agreed as to whether the conclusion reached by the customer addresses the object of the accounts taking, I invite the accountant to attend Court for clarification of these and the other matters raised.

17. The Court will then make any further orders it may deem fit.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> Day of February 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Njuguna for Koech for Plaintiff

Dar for Odera for Defendant

Court Assistant: Nixon