



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 144 OF 2003

BETWEEN

JOHN SILAS LENANA OLE PULEIY.....PLAINTIFF

AND

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED.....INTERESTED PARTY

RULING

Introduction and background

1. Before I deal with the Defendant's application, I propose to set out the background and context of the matter. On 16th October 2009, Khaminwa J., delivered a judgment awarding the Plaintiff Kshs. 5,938,849.60 against the Defendant. The Defendant preferred an appeal and in due course applied for a stay of execution. By a ruling dated 20th January 2010, Kimaru J., directed the Defendant to deposit Kshs. 6,500,000.00 in an interest earning account in a reputable bank as a condition for stay. An account in the joint names of the Plaintiff and Defendant's advocates was opened with the interested party ("Co-operative Bank"). By a judgment dated 19th July 2019 in Civil Appeal No. 206 of 2010, the Court of Appeal affirmed the award in favour of the Plaintiff.

2. After determination of the appeal, Co-operative Bank wrote to the Defendant that the total amount in the fixed deposit account was Kshs. 7,591,960.98. By a letter dated 18th September 2019, the Defendant's advocate inquired further requesting a breakdown of the interest rate applied over the period of 9 years on the sum of Kshs. 6,500,000.00 held in the fixed deposit account. Co-operative Bank did not respond to any further queries hence the Defendant's application. The Defendant contends that the principal amount in the fixed deposit account ought to have earned a minimum equivalent to the interest earned in the prevailing market rate in 365-day treasury bill which the period would be Kshs. 5,656,678.00 making a total of Kshs. 12,156,678.15.

Application

3. The issue for resolution concerns the amount due under the joint account deposited in the joint names of the Plaintiff's and Defendant's advocates names at Co-operative Bank. The Defendant has moved the court by the Notice of Motion dated 24th April 2020 made, inter alia, under **section 34** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* seeking the following orders:

[4] THAT this Honourable court do make an order that accounts be taken by a reputable firm of auditors to verify the interest that ought to have accrued on the sum of Kshs. 6,500,00.00 deposited in a joint interest account with Co-operative Bank of Kenya from 5th February 2010 to 19th August 2019 and a report filed in court within seven (7) days of the auditor's appointment.

[5] THAT this Honourable court do issue an order compelling Cooperative Bank of Kenya to pay to the Plaintiff/Respondent any shortfall that should have accrued on the sum of Kshs. 6,500,000 on taking of accounts and filing of the report in court.

[6] THAT, in the alternative to prayer five (5) above, this Honourable court do make an order that the amount of Kshs. 7,951,960.98 released to the Plaintiff/Respondent in satisfaction of the decree fully discharged the Defendant/Applicant and that any shortfall thereof ought to be paid by Cooperative Bank of Kenya within seven (7) days of filing the report in court.

[7] THAT, without prejudice to the foregoing, this Honourable court do make an order that the Plaintiff/Respondent ought to bear any loss arising from the deposit of the sum of Kshs. 6,500,000.00 in Co-operative Bank of Kenya.

4. The application is supported by the affidavit of Joseph Lule, the Defendant's Legal Officer, sworn on 24th April 2020 and a further affidavit sworn on 14th August 2020. The Plaintiff opposed the application through the replying affidavit of Nicholas Muturi, an advocate in the firm representing the Plaintiff, sworn on 11th May 2020. Cooperative Bank opposed the application through the replying affidavit of its Legal Officer, Lucy Muthama, sworn on 6th August 2020. The parties also filed written submissions which their advocates highlighted briefly.

Whether the court has jurisdiction

5. Before I deal with the substantive issues, I propose to dispose of the issue of jurisdiction of the court to entertain this application. The Plaintiff took the position that since the High Court and Court of Appeal had determined the matter with finality, this court was *functus officio* and it was the obligation of the Defendant to pay the full decretal amount.

6. The Defendant submitted that the court has jurisdiction since it is founded on **section 34(1)** of the **Civil Procedure Act** which provides as follows:

34(1) All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.

7. It is clear from the foregoing provision that the trial court retains jurisdiction to adjudicate on all issues arising between the parties to the suit in which the decree was passed. Counsel for the Plaintiff cited ***Leisure Lodges Limited v Japhet S. Asige and Another MSA HCCC No. 279 of 2004 (OS) [2018] eKLR*** where the court held that

[25] On the question that this court is *functus officio*, I do find that a trial court retains the duty and jurisdiction to undertake and handle all incidental proceedings even after a final judgment is delivered provided such proceedings do not amount to re-trying the cause but geared towards bringing the litigation to an end. That is the reason, the court must undertake settlement of a decree, if parties cannot agree, handle applications for stay, review, setting aside and even execution proceeding including applications under Section 94 of the Act.

8. The Court of Appeal in ***Adiel Muriithi Philip v Thomas Mainigi NYR CACA No. 282 of 2007 [2017] eKLR*** considered **section 34(1)** of the **Civil Procedure Act** and concluded that, "A plain reading of the above provisions shows that matters concerning discharge and satisfaction of the decree are determined by the court executing the decree." (see also ***Githunguri Dairy Farmers Co-operative Society v Ernie Campbell & Company Another NRB CACA No. 123 of 2011 [2018] eKLR***). This court is not being asked to rehear the merits of the suit. This has been settled by the decisions of the High Court and Court of Appeal. What the Defendant seeks is a determination of who should pay the shortfall of the decree which the Plaintiff now seeks to execute. This is a question relating to execution of the decree which this court has jurisdiction to determine.

Issues for determination

9. From the undisputed facts I have set out above and the prayers in the motion, there are two issues for determination:

- a. Whether the Plaintiff should bear the loss in interest having demanded that the sum of Kshs. 6,500,000.00 be deposited in Cooperative Bank.
- b. Whether Cooperative Bank should pay the shortfall in the interest that would have been earned on the Kshs. 6,500,000.00.

Whether the Plaintiff should bear the loss of interest

10. In the deposition of Mr Lule, the Defendant contended that when the order for security was made by Kimaru J., its advocates proposed to the Plaintiff's counsel they open a joint account at Housing Finance Bank at its branch at Rehani House. By a letter dated 25th January 2010, the Plaintiff's advocate rejected the proposal and instead demanded that a joint account be opened at Cooperative Bank, Business Centre Branch, Ngong' Road. The Defendant contends that since the Plaintiff insisted that the money be kept at Ngong Road, then any loss of interest or difference between the rate applied and the prevailing commercial rates should be borne by the Plaintiff. It asserts that the Defendant should not be made to suffer due to the choice and election made by the Plaintiff having fully complied with the conditions of stay.

11. The Plaintiff takes the view that in so far as the Defendant's application seeks to apportion liability for paying the decretal amount on the Plaintiff, it runs counter to the judgment and that the Plaintiff should not be denied the fruits of litigation. It avers that the order of Kimaru J., was that the decretal should be deposited in a joint interest earning account in a reputable bank and not in a specific bank. In any case, the Plaintiff takes the view that any alleged mishandling of the decretal sum cannot excuse the Defendant from satisfying the decree since it is the one which sought a stay of execution, it was incumbent upon it to ascertain the terms upon which it deposited the amount at Cooperative Bank.

12. On this issue I am constrained to agree with the position taken by the Plaintiff. The decree issued by the High Court and settled by the Court of Appeal is clear on his entitlement. That entitlement has been settled and cannot be varied at this stage. As the Plaintiff points out the decretal sum was deposited in a joint account in a “reputable bank” and as the party depositing the money securing the decretal sum, it was incumbent upon it to ascertain the terms upon which the decretal sum was being held as the purpose of the deposit was to secure its position vis-à-vis the Plaintiff. Conversely if the appeal had succeeded, the Defendant could not have blamed the Plaintiff for the disadvantageous terms upon which the money was held at Co-operative Bank.

13. I find and hold that the Plaintiff is entitled to every cent of the decretal sum under the decree.

Whether the Interested Party should pay the shortfall interest

14. The thrust of the Defendant’s case is that the court should order that accounts be taken on the rate of interest applied on the amount deposited with Cooperative. Before accounts can be ordered, the preliminary issue to be resolved is what interest rate is applicable and on what basis was the interest on the account calculated.

15. Cooperative Bank argued that the Defendant’s case is not based on any known legal, contractual or equitable grounds. Lucy Muthama, in her replying affidavit, deponed that apart from the account opening forms, there was no further agreement between the parties on the applicable interest rate. She explained that the Bank applied an interest of 3% on the principal deposit sum, which was the lowest prevailing rate at the time and came to the determination of the amount payable less withholding tax of Kshs. 945,139.72. She explained that the Bank is not in the ordinary business of investing monies in fixed deposit accounts in treasury bills unless specifically requested. She stated that the Defendant had a right to request for statements of account and had it done so, it would have known the applicable interest rate.

16. The Defendant’s position is that Co-operative Bank has not explained how the 3% interest rate was arrived at. In the absence of such an explanation, the Defendant submits that Central Bank of Kenya’s treasury rates are applicable during the period of the deposit and ought to be applied. Mr Lule deponed that at the opening of the joint account, it was agreed that Cooperative Bank would apply the prevailing commercial rates for fixed deposit accounts and on rolling over, it would confirm that rate, if it was lower than the previous one. In the circumstances, Cooperative Bank should explain how the interest rate was computed and why a lower rate than the prevailing market rate was applied.

17. Counsel for the Defendant relied on the case of *Thomas Adong Onuko Kisumu Expert Tailoring House v Small Enterprising Finance Company Limited KSM HCCC No. 110 of 1996 [2017] eKLR* where the Court directed that accounts be taken in a case where money was deposited in a joint account as follows:

I have considered the application, the grounds of opposition and the rival submissions of the Advocates carefully and I am persuaded that the application has merit. I do agree with Mr. Mwamu's submissions that this was not an ordinary account like the one in **Jetha Shah V. Kantilal Narshi Shah and Another (Suppra)**. This was a decretal sum deposited in an interest earning account in the joint names of the Advocates for the parties in this case as security for costs following an application by the Defendant/Judgment Debtor/Respondent for stay of execution.

On the merits I am satisfied that there is necessity for taking of accounts in this matter. There is a reason why it is ordered that decretal sums be deposited in joint interest earning accounts the most important one being so that the decree holder does not suffer any prejudice were the decretal sum not paid to him and the appeal dismissed as happened in this case. The record shows that on 16th October 2008 when the Advocates for the parties were canvassing the application for stay of execution Counsel for the Defendant/Judgment Debtor/Respondent intimated to the Court that the amount in the account at that time was Kshs. 1,203,772/=. It is also on record that while granting the stay Mwera J ordered a sum of Kshs. 400,000/= released to the Plaintiff/Decree Holder/Applicant. We do not know if that was done. The sum in the account also continued to earn interest and yet none of the Advocates seems to be sure how much interest was earned. It is thus in the interest of justice that accounts be taken.

18. The Defendant submits that just like the aforesaid case, the court should order accounts to be taken as it not clear on what basis interest was applied to the joint account and that Cooperative Bank did not respond to its letters to requesting it to furnish a basis for the amount it paid out to the Plaintiff.

19. As earlier stated, Cooperative Bank’s position is that the Defendant has not shown basis for claiming interest pegged on the treasury bill rates. It has cited several authorities for this proposition including *Chitty on Contracts (27th Ed), Vol. 2 para. 36 224* in which the learned authors state that, “At Common Law the general rule is that interest is not payable on a debt or loan in the absence of an express agreement or some course of dealing or custom to that effect.”

20. I agree with the position taken by Cooperative Bank that the Defendant bore the burden to establish a legal basis for the interest rate it claimed. The Defendant did not establish an agreement or prove that there was a trade custom and usage that Banks are required to invest money in fixed deposit accounts in Treasury Bills or award interest thereon equivalent to that accruing on Treasury bills. The Bank on the other hand has explained that in the absence of any agreement, it applied interest at 3% per annum. The Defendant has not disputed that the amount accumulated on the deposit is based on the 3% rate applied. Since the Defendant has not shown the basis for any other rate of interest, no purpose will be served by ordering accounts.

21. The answer to the second issue is that in the absence of an agreement between the Plaintiff, Defendant and the Cooperative Bank on any other interest other than the interest applied by the bank, Cooperative Bank was entitled to apply 3% interest. The necessary conclusion is that Cooperative Bank is not liable for the shortfall of interest due to the Plaintiff.

Disposition

22. For the reasons I have set out, I dismiss the Notice of Motion dated 24th April 2020 with costs to the Plaintiff and the interested party.

DATED and DELIVERED at NAIROBI this 30TH day of SEPTEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Issa instructed by Issa and Company Advocates for the Defendant/Applicant.

Ms instructed by Kigano and Associates Advocates for the Plaintiff/Respondent.

Ms Asli instructed by Ahmednasir, Abdikadir and Company Advocates for the Interested Party.