



**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**

**FINAL JUDGMENT**

1. In a decision of 6<sup>th</sup> November 2017 this Court ordered for the taking of accounts so as to return its final verdict in this matter.

2. I stated:-

[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.

3. Accounts were taken by John Kabiru who was jointly appointed by the parties and reduced into a report on 5<sup>th</sup> August 2019. The conclusion reached by the accountant was that the Defendant overcharged the 1<sup>st</sup> Plaintiff by Kshs.13,086,069/= and the impact of the overcharge was Kshs. 36,133,350/= giving a total of Kshs.49,220,019/=.

4. The accounts were rejected by the Bank and in reacting to those issues, the Court invited the accountant to attend Court for clarification of certain matters. In the decision extending that invitation the Court identified at least three issues that required more clarity:-

i. Why the accountant calculated interest on a monthly basis instead of on a daily basis as stipulated by the contract between the parties?

ii. Why the accountant included workings on account No. 200138007 when in fact it was outside the scope of the order for taking of accounts?

iii. Whether his report was a restatement of accounts as envisaged by the Court order?

5. Mr. Kabiru attended Court on 22<sup>nd</sup> June 2020 and was cross-examined by Counsel Chacha Odera for the Bank. The highlights of his testimony can be outlined.

6. Kabiru was quick to concede that the contract provided for the calculation of interest on daily balances. He, however, explained that his workings were based on the monthly balances because some statements were missing. He however made the point that workings on a daily balance would yield an even greater overcharge in favour of the customer.

7. Another matter, and which this Court thinks to be of some significance, is that whilst the balance of an overdraft could change on a daily

basis depending on credits and debits made to it, the accountant noted that in respect to the customer's overdraft account, it was not fluctuating and was growing steadily overtime.

8. Regarding why he included account No. 200138023 in his report, the accountant noted that it was included as part of his mandate in the letter of instructions of 5<sup>th</sup> November 2018 jointly issued by counsel in this matter.

9. Lastly, he reiterated that the conclusion of his accounts was a restatement of the account and that he had worked out the impact of the over-charge.

10. At the end of it all, the Plaintiffs, unsurprisingly asked the Court to accept the report. The Bank on the other hand asked this Court to find that the Plaintiffs had not proved its case as required by law.

11. This Court has considered the further submissions of counsel, the pleadings in this matter, the judgment delivered and the main submissions. The task of the Court at this ultimate stage is twofold:-

i. Whether to accept the accountant's report.

ii. And if so, what orders to make on the prayers sought by the Plaintiffs.

12. This Court does accept the emphasis made by counsel for Bank that the accounts taking was a post-judgment exercise and the Court should not be straddled by the task of filling in the gaps in the Plaintiff's case. Emphasized as well, is that the taking of accounts was on the basis of incomplete documents and that the Plaintiff ought to have taken advantage of the forum for discovery of documents to complete his case.

13. It is of course true as submitted by counsel for the Bank that the burden of proof resides with the party that asserts. The Plaintiff's case is, substantially, an assertion that the Bank overcharged the 1<sup>st</sup> Plaintiff and consequently unlawfully sold part of the securities on the basis of a supposed default. The Plaintiffs needed to prove these assertions on a balance of probabilities. Does the accountant's report help it reach that threshold?

14. Right away, this Court must ignore any findings in the report in regard to account No. 200138023 as there was no infraction of the Bank on this account and no order for account taking was made for it.

15. As to the other accounts, the Court must mull over the question whether the accounts made on the basis of incomplete documents is sufficiently credible as to prove an overcharge on the part of the Bank.

16. Stressed by the accountant was that he was able to work out the overcharge on the basis of monthly balances. In the report he explains:-

“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”.

17. This Court takes it that the outcome of the exercise is a fair reflection of the accounts based on workings on monthly balances. The result would certainly have differed if daily balances had been used. But the point made by the accountant, and which has not been challenged by the Bank, is that the workings on monthly balances are more benign to the Bank. Put differently, the workings do not prejudice or disadvantage the Bank.

18. There is another reason why this Court accepts the report notwithstanding that some Bank statements were missing. It is not in contention that the account was an overdraft and movement on the account would be on a day to day basis as transactions hit the account. But the accountant observed that, in respect to the account in question, the overdraft was not fluctuating and was growing steadily over time. This Court therefore accepts the explanation by the accountant that the average of the monthly balances gives an accurate status of the account.

19. Lastly, the accountant told Court that his conclusion was a restatement of the account. This was not debunked and the Court has no reason to doubt it.

20. This Court has looked at the pleadings and finds that in partly pleading the charge of excessive interest the Plaintiff does not allege fraud on the part of the Bank (*See Paragraph 36 of the Further Amended Plaintiff*). For that reason, the threshold of proof that was to be reached by the Plaintiffs was simply that of on a balance of probabilities. This Court is persuaded that the Plaintiffs has proved their case that there was an overcharge notwithstanding some missing documents.

21. The consequence is that I find that the Bank overcharged the customer by Kshs.12,911,464/= and the impact of the overcharge was Kshs.36,103,033/= giving a total of Kshs.49,014,467/=.

22. A further conclusion is that there was no default on the part of the customer as to warrant the sale of the two charged properties, namely,

Mombasa/Block XXXIII/12 and Mombasa/Block XXXIII/30.

23. As to those two properties the Plaintiffs had sought for an order for their value at prevailing market price (Prayer 3) and damages at the rate of 20% of their value (Prayer 7). The only evidence regarding the value of those two properties, came from the Defendant's witness. Mr. Wilfred Machini produced 2 sets of valuation report.

A report of Wyco Valuers of:-

i. 14<sup>th</sup> May 1997, Market value of Mombasa/Block XXXIII/12 Kshs.12,500,000/= (D. Exhibit 29).

ii. 15<sup>th</sup> May 1997, Market value of Mombasa/Block XXXIII/30 Kshs.8,500,000/= (D. Exhibit 30).

24. On 26<sup>th</sup> October 2000 the following market values were returned by Yusuf Datoo Associates:-

i. Mombasa/Block XXXIII/12 Kshs.6,000,000/= (D. Exhibit 27).

ii. Mombasa/Block XXXIII/30 Kshs.3,500,000/= (D. Exhibit 28).

25. In the main submissions, the Plaintiff's counsel asked this Court to find it as curious that the valuations of 2000 had reported a drop in value of the properties from 1997. The Court was urged to take judicial notice that ordinarily real estate appreciate in value over time. This really is a strange proposition to make to Court because it is equally true that at times real estate prices take a dip. The Court says nothing more on this other than to observe that it was upon the 2<sup>nd</sup> Plaintiff to prove the latest value of his properties and having failed in that obligation, must live with what is on record. The conclusion I reach is that the latest values of the two properties are Kshs.6,000,000/= and Kshs.3,500,000/=.

26. There is no proof that the Defendant was either highhanded, malicious or outrightly reckless in selling the property so as to deserve a further sanction by way of damages other than paying back the value of the two properties. No case for further damages has been made out.

27. Although the Plaintiff had also sought an overcharge of Kshs.80,295,064.77, the amount proved is Kshs.49,220,019. Yet, and this is singularly important, looking at the evidence placed before Court, I see no evidence that the 1<sup>st</sup> Plaintiff indeed paid the overcharged sum so as to deserve a recompense. What I understood to be the case constructed by the Plaintiffs is that as result of the overcharge, an artificial default was created and that was used to justify the sale of the charged properties. I have not seen evidence of payment made towards the overcharge.

28. The upshot is Judgment is entered for the 2<sup>nd</sup> Plaintiff as against the Defendant as follows:-

28.1. Damages of Kshs.9,500,000/= being the value of the sold properties.

28.2. Interest on 28.1 above at Court rates from the date of Judgment.

28.3. Costs of the suit.

**Dated, Signed and Delivered in Court at Nairobi this 29<sup>th</sup> Day of September 2020.**

**F. TUIYOTT**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17<sup>th</sup> April 2020, this Judgment has been delivered to the parties through virtual platform.

**F. TUIYOTT**

**JUDGE**

**PRESENT**

**KoECH for Plaintiffs.**

**Miss Kadima holding brief for Chacha Odera for the Defendant**