



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 102 OF 2016

REVITAL HEALTHCARE (EPZ) LTD.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

JUDGMENT

1. Through the plaint dated 14th March 2016, the plaintiff seeks the following reliefs against the defendant:

a) Judgment against the defendant for US\$ 266,654,79;

b) In the alternative to (a) above an order for the Taking and Settlement of Accounts predicated on the applicable lawful rate of interest as determined by the court:

c) Costs of the suit:

d) Interest on(a) and (c) at court rates;

e) Any further or other relief that this court deems just or expedient.

2. The plaintiff's case is that sometime in the years 2006 to 2008, the defendant offered it 3 financial facilities in the form of a Term Loan Facility of USD 1,350,000.00 under Account No. 7700084; a credit – Asset Facility of USD 250,000.000 under Account No. 7701978 and a Multi-Option Facility of USD 500,000.00 under Account No. 7700718.

3. The plaintiff states that under the terms and conditions set out in the letter of offer that it accepted the rate of interest was agreed at the “margin of 3.00% per annum (“the margin”0 plus the 3 months USD LIBOR but that in its letter dated 20th December 2008, the defendant notified the plaintiff of the change of rate of interest to the “the margin” of 3.00% plus 3 months USD Base Rate (currently at 6.0% per annum with effect from 15th January 2009.

4. The plaintiff states that the change of the applicable rate of interest from US LIBOR to the USD Base Rate culminated in a prejudicial escalation of 4.79% and unlawful levy of interest in the sum of USD 169,964.10 which the plaintiff now claims from the defendant.

5. The plaintiff highlighted the particulars of unlawful levy of interest and added that in its letter dated 14th November 2011, it sought supporting details for the charges levied on the facilities which particulars the defendant refused to provide.

6. The plaintiff's case is that the reason given for the change of interest rate was contrary to those set out in the Letter of Offer and did not have the approval of the Minister of Finance.

7. The plaintiff maintained that the defendant took advantage of its dominant position to skew the contract to its benefit without explaining to the plaintiff the contents of the Master Instalment Sale Agreement on which the Credit – Asset Facility was based.

8. At the hearing of the case, the plaintiff presented the testimonies of 2 witnesses namely, its director **Mr. Rajnikant C. Vora** who adopted his witness statement and plaintiff list of documents dated 29th August 2019 and **Mr. Wilfred Abincha Onono** (PW2) the Managing

Director of Interest Rates Advisory Centre (IRAC).

9. PW2 testified that he recalculated the interest rates that ought to have been charged in the loan facilities advanced to the plaintiff by the defendant based on the initial agreed interest rates and found that the plaintiff had been overcharged to the tune of USD 266,654.79.

10. On cross examination he conceded that his recalculation report did take into account the default interest rates.

Defendants case.

11. The defendant opposed the plaintiff's case through its statement of defence filed on 19th May 2016 wherein it raises the following Grounds of Preliminary Objection: -

a) The claim is time-barred by virtue of Section 4(1) (3) of the Limitation of Actions Act which states that an action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the cause of action.

b) The plaintiff's claim for a recalculation of interest after the defendant's letter dated 20th December, 2008 in 2016 is time barred as the suit should have been filed not later than 2014.

12. The defendant states that the plaintiff accepted the terms and conditions governing the respective loan facilities and adds that the interest was levied in accordance with conditions of the conditions which gave the defendant the contractual right to vary interest rates in the event that circumstances changed. In other words, the defendant denies the claim that it imposed unlawful levy of interest on the loan facilities.

13. The defendant maintains that the plaintiff did not complain about any of the terms and conditions stipulated in the letter of offer and that the Master Instalment Agreement was availed to the plaintiff who perused it before signing it on each page.

14. It is the defendant case that it reserved the right, during the term of facility, to review the 3.00% interest rate above the 3 months US LIBOR should there be any statutory change in liquid assets, capital requirements or unforeseen monetary or fiscal changes outside the defendant's control, which may have a negative effect on their profitability.

15. The defendant reiterated that the plaintiff is not entitled to the reliefs sought in the plaint for the following reasons: -

a) The interest computation by the Interest Rate Advisory Centre [IRAC] contravened the various contractual agreements between the plaintiff and the defendant.

b) IRAC cannot purport to re-write a contract duly executed between the plaintiff and the defendant.

c) The claim for interest refund is time-barred.

d) The plaintiff had on diverse occasions overdrawn its account thus attracting default interest computation.

16. At the hearing of the case, the defendants sole witness **Mr. Jairus Kemboi**, adopted his witness statement dated 6th July 2019 together with the defendants list of documents dated 19th May 2019.

17. His testimony was that the global recession of 2008 adversely affected the rates and that during the same period, the business environment in Kenya was negatively affected by the post-election violence thus necessitating the change in lending rates. He stated that the Interest Rates Advisory Centre report should not be adopted by this court as it purports to rewrite the contract between the parties.

18. He maintained that the bank varied the interest rates within the confines of the contract and issued the plaintiff with the requisite notification but that the suit was filed 8 years after the said notification and is therefore time barred.

19. On cross examination, he stated that the contract provided for the reasons that could trigger a change in the in the interest rates and that the defendant complied with Section 44 of the Banking Act regarding changing the interest rates.

20. Parties filed written submissions in support of their respective positions which I have carefully considered.

Analysis and determination.

21. Having considered the pleadings filed herein, the testimonies of the witnesses and the parties written submissions, I note that the main issues for determination as ad follows: -

a) Whether the plaintiff's case is time barred.

b) Whether the plaintiff has made out a case for the granting of the reliefs sought in the plaint.

22. Before zeroing in on the issues for determination, I wish to highlight the undisputed facts of this case which were as follows: -

- i. That the plaintiff and defendant had a banker/customer relationship.
- ii. That the defendant offered the plaintiff three (3) loan facilities in 2006, 2007 and 2008 as follows: -
 - a) Term Loan Facility for USD 1,350,000.00 under A/C No. 7700084;
 - b) A Credit – Asset Facility for USD 250,000.00 under A/C No. 7701978; and
 - c) A Multi-Optional Facility USD 500,000.00 under A/C No. 77000718.
- iii. That the interest rate agreed upon as per the offer letter dated 10th January 2006, was at the “margin of 3.00% per annum (“the margin”) plus the 3 months USD LIBOR.”
- iv. That by a letter dated 20th December 2008, the defendant notified the plaintiff of the change of the interest rate agreed upon from, margin of 3.00% per annum plus the 3 months USD LIBOR, to margin of 3.00% per annum plus the 3 months USD BASE RATE, with effect from 15th January 2009, which was then 6.0% per annum. The notice invoked condition 6 of the Standard Terms and Conditions version 001/002, whose ingredients were not disclosed to the plaintiff.
- v. The change of the applicable rate of interest culminated to a prejudicial escalation of 4.79% and an unlawful levy of interest in the sum of US\$ 169,964.10, thereby occasioning loss to the plaintiff.

Whether the plaintiff’s suit is statute barred.

23. The defendant invoked the provisions of Section 4(1) (a) of the Limitation of Actions Act in support of the argument that the plaintiff’s claim is time-barred. The said section stipulates as follows: -

“(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(a) actions founded on contract;”

24. The basis for the law on limitation of actions was aptly captured by Potter J. in *Gathoni v Kenya Co-operative Creameries Ltd* Civil Application No. 122 of 1981 as follows.

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

25. In the instant case, the action by the defendant that the plaintiff complains about is the increase/change of interest rates that was occasioned by a letter dated 20th December 2008.

26. According to the defendant the cause of action accrued on 20th December 2008 and the plaintiff therefore ought to have instituted the suit within 6 years from December 2008. I note that the instant suit was however filed on 5th April 2016, more than 7 years after the alleged breach of the terms of the contract in question.

27. It was not in doubt the cause of action arose at the point when the alleged unlawful change in interest rates occurred through the letter dated 20th December 2008 which is the date of the alleged breach of contract. I also note that the plaintiff did not object to the increase in interest rates or explain the delay in filing the suit.

28. My finding is that the cause of action having arisen in 2008 and the present suit filed in 2016, the suit is statute barred. I am guided by the decision in *South Nyanza Sugar Company Limited v Dickson Aoro Owuor* [2017] eKLR wherein it was held: -

“[17] There is no doubt in this matter that the parties entered into a contract and which contract was allegedly breached. What is for determination is when exactly the cause of action accrued since from that time the limitation period of 6 years starts running. I do not find that issue difficult to decide on. I say so because when a party enters into a contract for a specific period of time, it does so in the understanding and belief that each of the parties to the contract will observe its part thereof until full execution of the contract. It is only when one of the parties happen to be in breach of the contract that a possible cause of action arises as at that date of the alleged breach and not at the end of the contract period.”

29. My findings on the preliminary point of Limitation of Actions raised by the defendant would have been sufficient to determine this matter but I am still minded to consider the substantive issue of whether the plaintiff has made out a case for the granting of the reliefs sought in the plaint.

30. As I have already stated in this judgment, the gist of the plaintiff’s claim is that the defendant imposed unlawful interest rates to the loan facilities thereby culminating in prejudicial escalation of the loan amount due contrary to the express terms of their contracts.

31. On its part, the defendant maintained that the interest charged was lawful and in line with the contractual agreements contained in the

letters dated 10th January 2006, 20th April 2007 and 25th April 2008 in respect to Term Loan Facility, Credit Asset Facility and Multi-Option Facility respectively.

32. I have perused the Letter of Offer dated 10th January 2006 in respect of the Term Loan Facility. I note that it stipulates as follows in respect to interest, Default Rate and Change of Circumstances

Interest

Interest will be levied in accordance with condition 6 of the conditions.

Subject to the provisions of conditions 6, interest will be calculated on a floating rate basis at a percentage rate per annum equal to the aggregate of the margin of 3.00% per annum ("the Margin") plus 3 months of USD LIBOR and to be paid starting date of the First drawdown.

Interest shall be debited to your current account monthly in arrears.

Default Rate.

Default Interest will be calculated at a percentage rate per annum equal to the aggregate of 15.50% per annum.

Change of Circumstances.

The Bank reserves the right to review the terms of this facility including but not limited to the right to demand immediate payment of any amounts outstanding in respect of these facilities in the event of any change in applicable law or regulation or existing requirements of, or any new requirements being imposed by, the Central Bank of Kenya or any governmental, fiscal, monetary, regulatory or other authority the result of this in the sole opinion of the Bank is to increase the cost of the Bank of funding, maintaining or making available the Facilities (or any undrawn amount thereof or to reduce the effective return to the bank.

33. As regards Asset Finance Facility, I note that the Letter of offer dated 22nd November 2006 stipulates as follows on Interest Rate at Clause 1 thereof: -

"Interest Rate

The interest rate charged will be 3.00% above the 3-month USD LIBOR and will be subject to variations in this rate from time to time, as stipulated in Clause 2 of the attached Master Instalment Sale Agreement. Interest rates will be calculated on a nominal annual compounded monthly("NACM") basis.

We reserve the right during the term of this facility to review the interest rate should there be any:

Statutory change in our liquid assets or capital requirements.

Unforeseen monetary or fiscal changes outside our control, which may have a negative effect on our profitability."

34. On the Multi Option Facility, I note that while Clause 7.1 of the Letter of Offer dated 25th April 2008 states that interest rate was agreed at 3% per annum above 3 months USD LIBOR Clause 7.3, 7.6 and 7.7 stipulates as follows: -

***"Clause 7.3-* The bank reserves the right to determine and change the applicable reference rate or rates in connection with any part of the facility and methods of calculating the interest applicable from time to time with full power and authority to the bank different rates for different accounts and/or transactions."**

***Clause 7.6 - Additional interest-* Should the amounts drawn by the Borrower during the continuance of this facility be in excess of the facility committed by the Bank under the Facility Letter the Borrower shall pay interest on such excess at a percentage rate annum equal to 10.50% for USD borrowings, which the Borrower acknowledges and agrees is a reasonable pre-estimate of the loss to be suffered by the Bank in funding the additional requirements by the borrower. Advising this rate does not constitute an agreement by the bank to allow drawings in excess of the agreed overdraft limit and the Borrower understands that cheques and other instruments may be returned unpaid if there are insufficient funds in the Borrowers current account.**

***Clause 7.7- Default Interest.* If any sum payable by the Borrower with respect to the Facility is not paid when due, the Borrower shall (without prejudice to the exercise by the bank of any other right, or remedy in favour of the Bank) pay to the exercise by the Bank of the percentage rate per annum equal to 10.50% for USD borrowings on all monies due with effect from the date of the same becoming due until actual repayment of such acknowledges and agrees that the Default Rate represents a reasonable pre-estimate of the loss to be suffered by the Bank in funding the default of the Borrower."**

35. I further note that all the 3 letters of offer were duly executed by the plaintiff's Managing Director **Rajnikant C. Vora.**

36. Having regard to the above provisions of the Letters of Offer, I find that even though the interest rates applicable to various loan facilities advanced to the plaintiff was agreed upon, such rates were not cast in stone as the defendant reserved the right to vary the rates in the event of the statutory change in liquid assets or capital requirements and unforeseen monetary or fiscal changes outside its control, or in the event of default.

37. I further note that Standard Terms and Conditions (version 001/002) that were attached to the respective letters of offer state as follows at paragraph 6: -

“Subject to the provisions and condition 6, interest will be calculated on a floating rate basis at a percentage rate per annum equal to the aggregate of the margin of 3.00% per annum (“the margin”) plus the 3 months USD LIBOR, and to be paid starting date of the First drawdown.”

38. My finding is that the parties herein are bound by the terms and conditions of the agreement that they voluntarily entered into and that the defendant was within its right to notify the plaintiff, as it did, of the changes in the interest rates through its letter of 20th December 2008. Needless to say, it is trite law that parties are bound by the terms of their agreement and that the court cannot rewrite the agreement between the parties. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit(K) Ltd & Another* [2001] eKLR it was held: -

“This, in our view, is a serious misdirection on the part of the learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As stated by Shah JA in the case of Fina Bank Ltd v Spares and Industries Ltd [2000] 1 EA 52: “It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity function to allow a party to escape from a bad bargain.”

39. I find that the plaintiff herein having voluntarily executed the Letters of Offer without any objection is bound by the said contracts and cannot turn back and claim that the defendant used its position of strength to coerce it into signing the agreements.

40. In sum, I am not persuaded that the plaintiff has made out a case against the defendant for the granting of the orders sought in the plaint.

41. Consequently, I dismiss the plaintiffs suit with costs to the defendant.

Dated, signed and delivered via Microsoft Teams at Nairobi this 16th day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Angwenyi B. for D. Angwenyi for the applicant.

No appearance for respondent.

Court Assistant: Sylvia.