



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 2 OF 2014 (O.S)

AZHAR KAMAL CHAUDRY (suing as Legal

Representative of the Estate of

MR. ANJUM KAMAL CHAUDRY (Deceased).....PLAINTIFF

VERSUS

FIDELITY BANK LIMITED.....DEFENDANT

J U D G M E N T

1. In the file there exists a partial judgment entered by consent of the parties pursuant to a consent letter dated 29/7/2015. By that judgment parties resolved all their disputes in the suit save for two they left for the determination by the court. The outstanding issues were framed by the consent as follows:-

a) Whether the interest rates applied and charged to the loan facility secured by the charge dated 10/2/2011 over the suit property are fair, contractual and/or lawful?

b) Who should bear the costs of this suit?

2. To determine the two issues one need to understand the disputes as disclosed in the pleadings. In the originating summons dated the 3/01/2014 the plaintiff sought the court's determination of some 10 issues of which it must be deemed the consent determined all except question No. 7 and 10.

4. The suit sought the court's intervention on the contention that the defendant could not exercise its statutory right of sale of the suit property because the statutory notice issued was yet to expire and that pursuant to **Order 37 Rule 1(f)** it was mandatory to procure the leave of the court prior to exercising the statutory right of sale. The other ground advanced was that there was a dispute that the interest rates as charged was unfounded in law and unconscionable thus a clog on the equity of redemption.

5. In response to those assertions, the defendant filed a Replying Affidavit by one Sultan Khimji in which it is asserted that the due notices were served, that the statutory right of sale had accrued and that there was no justification to interfere with the scheduled realization.

6. All those contestation and opposing positions must be seen to have been resolved by the consent save for the two issues as said before.

Was the interest charged fairer contractual and/or lawful?

7. Indeed it is never the courts duly to re-write a contract between the parties [\[1\]](#). The court's duly is to enforce a contract and its terms as negotiated and concluded by the parties themselves.

8. Whether the interest charged was contractual essentially answers the question of its being fair. I hold the view that a contract is entered between parties only when both have fully internalised and appreciated its terms to meet their interests. There are however known circumstances when a contract could be set aside but that is only possible when the aggrieved party proves a vitiating factor. In this matter no known vitiating factor was alleged or proved and therefore the playing ground left for the court is to go through the contractual instruments and determine whether the interest charge was indeed contractual.

9. Unfortunately none of the parties has revealed to court what interest was charged otherwise than the rate revealed in the letter of headed '**Term Loan facility**' and dated 11/11/2010. In that letter at clause 6 pages the rate was agreed at 14.5% per cent subject to additional default

rate of 10% making an aggregate of 24.5 per cent in the event of default. There was however a reserved discretion upon the bank to vary the interest rates which has been confirmed by the Audit report prepared on behalf of the plaintiff to have been done on the various dates and communicated by a letter of 12/2/2013.

10. I do find that the interest rate charged was agreed between the parties and that nothing has been availed to me to prove that the agreed rate was departed from.

11. However in their submissions the parties have both addressed the court on the application of Section 44A Banking Act otherwise called the **Duplum Rule**. Even though the defendant has pointed out that is not part of the issue for determination, I do consider the matter is due for consideration by the court on the grounds:-

i. Both sides have extensively addressed the point as to avail it for the court's determination.

ii. The first issue as framed included the aspect of the legality or lawfulness of the interest charged and applied to the loan facility. That by itself invites the question as to whether when contractually applied it was still subject to the written law.

11. In **Unesco Paper Products Ltd -Vs- Business Forms & Systems Ltd CACA 32 Of 2017, Mombasa (unreported)**, the court of appeal set the law on when a court may decide an un-pleaded issue. The court said:-

“However, if in the course of trial an un-pleaded issue arises, evidence is adduced, the parties submit on it and then leave it to court's determination, the court may address that issue; notwithstanding that it had not been pleaded”

12. This is exactly what happened in this case if one just reads the submissions by both parties.

13. I take the view that the question of lawfulness begs the question whether the interest rate as applied, charged and debited into the plaintiff's account was lawfully done and thus recoverable in full. That is where the application of Section 44A comes in. The provision in plain words mandate that a lender can only recover the outstanding principle on the date the loan becomes non-performing together with the contractual interest not exceeding the principle as well as expenses incurred in recovery.

14. Unfortunately for the court, I have no workings, as said before, on what rate interest was applied on which dates hence, I go with the provision of the law that a fact is not proved when it is neither proved nor disproved^[2].

15. That leave me with the statement of accounts as the only source of information to establish what would be legally maximum recoverable by the bank.

13. It is common ground that the last payment was made on the 20/1/2012 in terms of paragraph 8 of Mr. Khamji's Replying Affidavit. That being the case the loan became non-performing on or about the 20.4.2012 in terms of section **44A(5)c of the Banking Act** as read with **CBK Prudential Guidelines (guidelines on risk classification of assets and provisioning CBK/PG/04**. To help the parties determine their dispute one need not engage in so much arithmetic if the words of the act are read and assigned their natural meaning and purport. I do consider the position taken by the defendant as the accurate formula save that the interest, however long the period of application, should not exceed the principal sum on the date the loan became non-performing.

14. Accordingly, to determine the sum payable pursuant to section 44A of the Banking Act the formula should be:

- Outstanding principal sum at the time the loan became non-performing, plus,
- Interest at the contractual rates nor exceeding the principal sum, plus,
- Expenses incurred in recovery of the sum owed by the debtors.

15. Both sides agree that the principal sum outstanding as 21/4/2012, the date the loan became non-performing, was Kshs.17,000,000/= (*see paragraph 6 of the submissions by both parties.*) The figures to be used must as of necessity be those found in the account statement as maintained by the bank and exhibited in the Affidavit of SULTAN KHIMJI. According to that statement there was no sum disclosed to have been expended by the defendant to recover the debt. There is thus nothing to show that any expenses were ever incurred. Without such material, I do find that no recovery expenses are due to the defendant.

16. Just before the time the security was sold the debt had grown from the sum of 19,086,869.00 as at 28.4.2012 to the sum of Kshs.31,900,000/= as at 5/3/2014 according to paragraph 4 of the Affidavit sworn by F.Kinyua Kamundi, advocate on 20/5/2015. In my view and calculations the total sum payable to the defendant thus must not exceed Kshs.34,000,000.00 worked out as follows:-

Principal sum Kshs 17,000,000.00

Maximum interest payable Kshs 17,000,000.00

Expenses towards recovery Kshs Nil

Total 34,000,000.00

17. For that sum due, the defendant was paid a sum of Kshs.35,000,000/= thus representing an over payment of Kshs.1,000,000/=

18. In the end, on this issue, I do find that the interest rate applied was lawful and contractual but such was capped to no more than the principal sum at the time the loan became non-performing. No interest could be recoverable beyond the legal ceiling imposed by the Banking Act.

19. On costs, even though the matter was substantially settled by the parties' consent, it resulted in the security being sold which was the one thing the suit sought to forestall. To that extent it cannot be denied that the plaintiff did not achieve what he set to achieve. He failed in his pursuit and therefore the suit ended by him failing and the defendant succeeding. For that reason and the law remaining that costs follow the events, and while appreciating that the matter has been concluded with little or just controlled contestation, I do order that the plaintiff shall pay to the defendant 2/3 of the costs of the suit to be agreed or taxed by the taxing officer.

20. Having so found that the defendant has been paid in full, subject only to the determination of the costs payable, I do order that the sums kept in the escrow account in the names of the advocates for the parties together with interests earned so far be released to the plaintiffs' advocate on behalf of the plaintiff.

21. It is so ordered.

Dated and delivered at Mombasa this 22nd day of February 2019.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Abdul Jalil Yafai v Farid Jalil Mohammed [2015] eKLR

[\[2\]](#) Section 3(4), Evidence Act