Santowels Limited v Stanbic Bank Kenya Limited (Civil Case 648 of 2004) [2018] KEHC 10046 (KLR) (Commercial and Tax) (22 March 2018) (Judgment)

Santowels Limited v Stanbic Bank Kenya Limited [2018] eKLR

Neutral citation: [2018] KEHC 10046 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 648 OF 2004

OA SEWE, J

MARCH 22, 2018

BETWEEN

SANTOWELS LIMITED .... PLAINTIFF

AND

STANBIC BANK KENYA LIMITED .... DEFENDANT

JUDGMENT

1. By a Plaint dated 26 November 2004 and filed herein on 29 November 2004, the Plaintiff, Santowels Limited, sued the Defendant, Stanbic Bank Kenya Limited (the Bank) seeking the following reliefs:

   (a) An Order that an account be taken and the Defendant be ordered to repay to the Plaintiff all sums paid as interest over and above 16.5% together with interest thereon;

   (b) In the alternative, Judgment be given in favour of the Plaintiff against the Defendant for the sum of Kshs. 8,978,813.63 plus interest thereon at court rates;

   (c) In the alternative, damages of Kshs. 8,978,813.63 be awarded plus interest from 13 October 2004 until payment in full for fraud and misrepresentation;

   (d) The Defendant be ordered to pay the costs of the suit;

   (e) The Defendant be ordered to pay the Plaintiff any sums that the Defendant has collected and converted to its own use from the Plaintiff's account secretly or unlawfully or in breach of its fiduciary duties and contractual rights as well as interest thereon from the date of the debits.

   (f) The Defendant be ordered to pay interest on such sum found due from it at court rates;

(g) Such further or other relief that may seem just to the Court.

2. The Plaint was thereafter amended twice, and by the Further Amended Plaint filed on 17 October 2016 (which was the last such amendment), the amount claimed was amended from Kshs. 8,978,813.63 to Kshs. 68,986,536.28. The Plaintiff's cause of action was that, in or about the year 1993, it appointed the Defendant as its Banker; and that between 1993 to 1997, it applied for overdraft facilities from the Bank, which the Bank agreed to provide at a variable interest rate of 3% above its base lending rate. It was further agreed that the Bank would reserve the right to vary the base rate and the spread. Hence, it was the Plaintiff's contention that the actual aggregate rates which the Bank stipulated, from time to time, as being applicable during the period of the facility were as follows:

(a) Base + 3% p.a. from 1 April 1993;

(b) Base + 4% p.a. from 17 June 1993;

(c) Base + 6% p.a. from 6 July 1995;

(d) Base + 3% p.a. from 31 December 1996

3. It was further the contention of the Plaintiff that, at all material times, the maximum rate that banks were entitled to charge its customers was 16.5% per annum on a reducing balance; and therefore that any sums charged by the Bank by way of interest for the period ending 18 April 1997 over and above 16.5% were charged unlawfully and are recoverable from the Bank. Accordingly, the Plaintiff prayed for an account, applying the lawful rate of interest and a refund order of any excess sums charged on it as interest by the Bank. The Plaintiff further contended, in the alternative, that in surreptitiously and dishonestly charging it unlawful interest, the bank acted in breach of its contractual obligations and in breach of its duties as a trustee, and is therefore liable to it in damages. Hence, at paragraph 10 and 10A of the Further Amended Plaint, the Plaintiff computed the amounts due to it, in the alternative, as a result of the Defendant's wrongful acts. In paragraph *10* the claim was computed as hereunder:

(a) For Current Account No. 151010727100/014/00/107271/01 - Kshs.56,884,464.02

(b) For Loan Account No. 1520107271 - Kshs. 3,601,209.53

(c) For Loan Account No. 013/20/107271/03 - Kshs. 1,598.70

(d) Loan Account No. 1510107271302/01320/107271/02 - Kshs. 8,498,764.03.

4. The Plaintiff averred that the overcharge was not discovered by it until early September 2003; and that, when the same was brought to the attention of the Bank, it responded by a letter dated 16 September 2003, agreeing to a recalculation of the interest with a view of having the matter resolved as soon as practically possible; but that it thereafter failed and/or refused to do so; hence the suit. The particulars of breach of Defendant's fiduciary duties were set out at paragraph 11 of the Further Amended Plaint as follows:

(a) It misrepresented to the Plaintiff that it was entitled to charge any rate of interest;

(b) It failed to act honestly;

(c) It acted unlawfully by surreptitiously by charging interest over and above the amount permitted by law and even over and above the rates stipulated by it in the agreement;

(d) It secretly made illegal debits.

5. The Defendant denied the Plaintiff's allegations and, on the 18 October 2016, filed a Further Further Amended Defence to the Further Amended Plaint. Its averments were that, as the Plaintiff's banker, it executed its contractual duty with all due diligence and in accordance with the usual banking practices and customs; and did, at all material times, properly and honestly account for all funds handled by it in connection with the Plaintiff's accounts. It denied that the contractual relationship between them constituted a trust. It set out the various facilities that the Plaintiff was granted vide the Letter of Offer dated 13 April 1993 in Paragraph 4 of the Further Further Amended Defence and conceded that the facilities were renewed and/or extended from time to time at the Plaintiff's instance. And while conceding that the interest rate was variable, the Defendant denied that there was any maximum rate at which banks were required, by law, to charge interest. It further denied that the rate of 16.5% per annum on a reducing balance was applicable to the subject facilities.

6. It was further the contention of the Defendant that the Plaintiff had not set out any proper grounds for the rendering of accounts; and that, in any event, it had accounted to the Plaintiff for all the funds held in the overdraft account which account was closed on or about 28 March 2002. The Defendant categorically denied that it had surreptitiously and/or dishonestly conducted itself or that it acted in breach of any of its contractual duties or obligations. It therefore denied its liability to the Plaintiff in the sum of Kshs. 68,986,536.28 as set out in Paragraph 10 of the Further Amended Plaint, or at all. It similarly denied the alternative claim for Kshs. 10,449,411.74 as being the amount of the overcharged interest per Paragraph 10A of the Further Amended Plaint.

7. At paragraph 8C of the Further Further Amended Defence, the Defendant averred that there was always an approved limit on the amount the Plaintiff could draw at any particular time; and that the Plaintiff having made withdrawals in excess of the approved limits on various occasions, it was permissible, by law and by the contract between the parties, for it to charge interest on all the amounts in excess of the approved limit. It was thus the contention of the Defendant that it did charge interest on the excess amounts, which interest was debited to the Plaintiff's account as is the normal banking custom and practice. The Defendant accordingly denied the particulars of breach set out in Paragraph 11 of the Further Amended Plaint, contending that they are not only scanty, but also insufficient to support any of the Plaintiff's claims. It therefore prayed that the Plaintiff's suit be dismissed with costs as it is in any case statute-barred.

8. The Plaintiff called Rajiv Raja (PW1) and Wilfred Onono (PW2) in support of its case. Hearing of the Plaintiff's case commenced on 28 June 2012 before Musinga, J. (as he then was) and was therefore taken over pursuant to Order 18 Rule 8(1) of the Civil Procedure Rules. PW1 is the Managing Director of the Plaintiff. He adopted the Witness Statement made and signed by him on 25 January 2012, and produced the 5 Bundles of Documents filed by the Plaintiff in support of his evidence herein. He testified that the Plaintiff used to bank with the Defendant's predecessor, Grindlays Bank (K) Ltd in the 1980s and 1990s, and that in the course of time, it obtained several facilities from the Bank, which were fully repaid as and when they fell due. PW1 further conceded that the Bank used to notify the Company of the various changes in interest rates; and that the same would be done monthly or as the Bank deemed fit and proper.

9. It was further the evidence of PW1 that between 1993 and 1997, the Plaintiff applied for and was granted an Overdraft Facility by the Defendant in the sum of Kshs. 10 million. The loan was to be repaid with interest at 3% above the Bank's variable lending rate. Mr. Raja added that the Plaintiff met its obligations in the belief and with the conviction that the Defendant was acting in good faith, until 2002 when the terms of the Bank became burdensome. It then requested the Defendant for recalculation of the interest for the entire period of the transaction, upon discovering that the interest rates had been capped by the Central Bank of Kenya during the time-period in issue.

10. PW1 testified that, since the Bank was unwilling to work on the recalculation, the Plaintiff commissioned Interest Research Bureau (K) Ltd (which entity was thereafter succeeded by Interest Rates Advisory Centre) to look at the relevant bank statements and verify the interest chargeable; and that it was then confirmed that the Defendant had indeed overcharged the Plaintiff on interest. PW1 added that the Plaintiff communicated the findings of Interest Research Bureau (K) Ltd to the Defendant in the hopes that an amicable settlement would be reached; and that the suit was filed only because the Defendant was not agreeable to any such settlement.

11. PW1 drew the Court's attention to the documents at pages 120 and 122 of Bundle 3 of the Plaintiff's Bundle of Documents to buttress his testimony that during the period in issue, the Central Bank of Kenya had capped the rate of interest chargeable by commercial banks at 16.5%; and yet the recalculation showed that the Bank was charging interests at rates higher than that prescribed limit. The affidavit of Brenda Aluoch filed herein on behalf of the Bank was also referred to by PW1 to show that the Bank was not certain as to the rates of interest that it charged the Plaintiff for the overdraft facilities, and that the Bank admitted to discovering the anomaly only in 2005. PW1 testified that in the wake of these discoveries of overcharge, the Plaintiff had no option but to terminate its relationship with the Defendant, which was done in 2002. The Defendant thereupon cleared all its outstanding loans and had its securities discharged. It thereafter demanded reimbursement for the interest overcharge.

12. PW1 concluded his evidence by pointing out that although the Bank admitted to the overcharge, it refused to undertake a recalculation or to pay the sum found due from it by Interest Research Bureau (K) Ltd. He also mentioned that soon after the Interest Research Bureau (K) Ltd closed its offices in Kenya, it sought a fresh opinion from Interest Rates Advisory Centre Limited (IRAC), whose findings were similar in respect of the interest overcharge. He produced the 5 Bundles of Documents filed herein on behalf of the Plaintiff and they were marked the Plaintiff's Exhibit Nos. 1 to 5 herein.

13. Mr. Wilfred Abincha Onono (PW2), the Managing Director of IRAC, gave his evidence herein on 12 October 2016. He similarly adopted his Witness Statement dated 11 October 2016 which was filed herein on 12 October 2016. He testified that, at the Plaintiff's request, his company carried out a recalculation of the interest payable by the Plaintiff in respect of the various facilities it had been granted by the Defendant Bank. His recalculation was in respect of the following account:

    (a) Current Account No. 1510107271001/014/00/107271/01 -

    (b) Loan Account No. 1520107271301

    (c) Loan Account No. 013/20/107271/03

    (c) Loan Account No. 1510107271302

14. PW2 then prepared two reports as set out in Bundles 4 and 5 (marked Plaintiff's Exhibit No. 4 and 5) and stated that in so doing, he looked at the Banking Facility Letters and the Bank Statements of all the 3 loan accounts; and that on the basis of those documents, he recalculated the interest due by applying the prevailing rates at the material time. He added that he prepared one of the reports (marked Plaintiff's Exhibit No.5) based on the contractual rates agreed by the parties; and that the other report (marked Plaintiff's Exhibit No. 4) was based on the legal rate of 16.5% per annum that the Bank ought to have applied, based on the CBK rates as communicated vide Gazette Notices from time to time. Thus, it was the testimony of PW2 that the sum due to the Plaintiff is either Kshs. 8,498,764.03 or Kshs. 68,986,536.28, based on either of the two scenarios presented in the reports.

15. On behalf of the Defendant, evidence was led from Nahashon Maina (DW1). DW1 adopted his Witness Statement dated 16 November 2016. He testified that, having worked for the Bank for close

to 30 years, he knew the Plaintiff as a customer of the Bank in respect of whom the Bank maintained both current and loan accounts; and that there were various facilities advanced by the Bank to the Plaintiff over time, which included term loans, overdrafts, Letters of Credit and Bank Guarantees. He made reference to the various facility letters exhibited at pages 2 to 63 of the Defendant's Bundle of Documents (marked Defendant's Exhibit No. 1) and stated that those letters set out the terms of engagement between the Plaintiff and the Bank, including the rate of interest chargeable.

16. It was further the testimony of DW1 that at the commencement of the facilities that are the subject of this suit in 1993, the Defendant made it clear, vide the Letter of Offer dated 13 April 1993 (at page 2 of the Defendant's Bundle of Documents) that the interest rate chargeable for the Overdraft Facility was 3% per annum above the lender's Base Rate of 19.5% per annum, compounded, with monthly rests; and the Term Loan had similar provisions. He added that all the Letters of Offer were signed by the Plaintiff to signify acceptance; and that the Bank used to communicate with the Plaintiff regarding variation of interest rates, to which no exception was taken nor any objection raised by the Plaintiff. It was further the testimony of DW1 that during the period material to this suit, the interest rates were contractual; and that it was therefore purely a question of the cost of funding and the Bank's margin.

17. Thus, according to DW1 the terms were negotiated and the Plaintiff accepted the facilities on the agreed terms; and so the claim by the Plaintiff that the Bank overcharged on interest is not correct. He also pointed out that there were times when the Plaintiff exceeded the Overdraft Facility and had to be charged interest, as had been provided for in the case of such eventualities. It was further the testimony of DW1 that the Bank used to provide Statements of Account to the Plaintiff on a monthly basis, and at any other time on request. He made reference to pages 94 to 151 of the Defendant's Bundle of Documents in which copies of those statements were exhibited, and confirmed that the same statements are comprised in the Plaintiff's own Bundle of Documents marked the Plaintiff's Exhibits No. 1 and 2).

18. DW1 confirmed that he was aware that the Plaintiff had contracted IRAC to recalculate the interest applicable and payable in respect of the various facilities that it obtained from the Bank. He however denied that the Bank had agreed to engage in a recalculation of the interest applicable to the Plaintiffs' accounts. He also confirmed that the Plaintiff has since closed all the accounts it maintained with the Bank; and that by the time the accounts were closed, the Plaintiff had repaid all the sums due on facilities offered to it. He concluded his evidence by denying the allegations by the Plaintiff that the Bank acted fraudulently; and restating that there was nothing in law prohibiting the Bank from charging contractual interest rates. He produced the Defendant's List and Bundle of Documents marked as Defendant's Exhibit No. 1 herein.

19. Having carefully considered the pleadings filed herein by the parties, the evidence adduced in support thereof, as well as the written and oral submission made by Learned Counsel, there appears to be no dispute that the Plaintiff was, at all material times, a customer of the Bank, or that it obtained various facilities from the Bank in respect of which loan accounts were opened in its name by the Bank. In particular, it was common ground that by a Letter of Offer dated 13 April 1993 (at page 2 of the Plaintiff's Bundle 3, marked Plaintiff's Exhibit No.3), the Plaintiff was offered certain facilities by Grindlays Bank International (Kenya) Limited (hereinafter Grindlays Bank) as follows:

    (a) An Overdraft Facility up to Kshs. 10 Million

    (b) An On Demand loan up to Kshs. 1,500,000

    (c) A Sight and/or Usance Letter of Credit Facility up to Kshs. 5,000,000; and

    (d) A Guarantee Facility of Kshs. 610,000

20. The facilities were for the provision of working capital and/or the furtherance of the Plaintiff's trade. They were all for a period of one year, ending 31 March 1994, but were renewable. The Overdraft and On Demand Loan were repayable with interest at the rate of 3% and 3.5% per annum above the Lender's Base Rate, which was then 19.5%. The terms set out in the Letter of Offer included the provision of security by the Plaintiff as follows:

    (a) First registered Legal Charge for Kshs. 15 million over LR No. 12773, North West of Athi River Township in Machakos District;

    (b) Further registered Legal Charge for Kshs. 5 million over LR No. 12773, North West of Athi River Township;

    (c) Debenture over all Company assets for Kshs. 15 million;

    (d) Supplemental Debenture over all company assets for Kshs. 5 million;

    (e) Directors personal joint and several Guarantees for Kshs. 25 million.

21. There is no dispute that the Plaintiff accepted the terms of the facilities and duly signed the Letter of Offer to signify its acceptance. The parties were further in agreement that the Overdraft Facility was renewable annually and that the parties did renew and/or enhance the same from time to time as evidenced by the letters at pages 9, 11, 12, 23,42, 58, 71, 88 of the Plaintiff's Exhibit No.3; and that ultimately, the facilities were fully paid and the securities discharged by the Bank.

22. The dispute between the parties is basically over the various rates of interest that were charged by the Bank during the currency of the facilities. Whereas it is the contention of the Plaintiff that the Defendant loaded its accounts with unlawfully high rates of interest, which it is entitled to recover, the Defendant maintained that the rates charged were all contractual. Hence the parties agreed on the following issues for the Court's determination vide their joint Statement of Issues dated 23 February 2005:

    (a) Did the Defendant owe a fiduciary duty to the Plaintiff? If so, did it act in breach of this duty?

    (b) Was the maximum interest chargeable by the Defendant until 18 April 1997 limited to 16.5%?

    (c) Has the Defendant charged and collected more than the amount it was lawfully entitled to charge until 18 April 1997? If so, how much was overcharged and how much further interest has accrued on the overcharged amount?

    (d) Has the Defendant charged and collected over and above the agreed rates from 19 April 1997? If it has charged over and above the agreed rates of interest, how much is the overcharge and how much further interest has accrued on the overcharged amount?

    (e) What is the applicable period of limitation;

    (f) Is the Plaintiffs claim or any part thereof statute-barred?

    (i) Did the Defendant receive payment of all the interest claimed by it? Was such payment made as a consequence of a mistake or fraud? Was the mistake a mistake of law? Did the Plaintiff serve the Defendant with a notice of the mistake before filing suit?

    (j) If the Plaintiff's claim or any part thereof is statute-barred, did the time start running again as a result of the Defendant's letters of 10 September 2003 and 16 September 2003?

(k) Was the Plaintiff always notified of the rates of interest applicable to its accounts? Were the said rates contractual?

23. Thus, having considered the pleadings and the evidence adduced herein as well as the parties' written submissions, included the uncontested aspects of the case, the issues for determination can safely be reduced to the following:

(a) Whether the Plaintiff's claim or any part thereof is barred by dint of Section 4(1)(a) of the *Limitation of Actions Act*;

(b) Whether or not the Defendant overcharged on interest; and is so, by how much; and whether the sums are recoverable.

(c) Whether the Defendant owed a fiduciary duty to the Plaintiff; and if so, whether it acted in breach of that duty for which damages are payable.

(a) On Limitation:

24. The issue of limitation was not only pleaded by the Defendant, but was also taken up by way of a Preliminary Objection following the notice in that regard dated 14 November 2005. By that notice the Defendant indicated that it would, at the hearing of the suit raise an objection on a preliminary point of law to be argued in limine on the grounds that:

(a) The suit herein is statute-barred under the provisions of Section 4(1)(a) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya; Alternatively;

(b) The claim for account is statute-barred under the provisions of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya.

25. The Preliminary Objection was thus argued and ruled on by the Court on 25 July 2006. It was the view of the Court that the Preliminary Objection was grounded on contested facts, in particular, the question whether by a letter dated 16 September 2003, the Bank agreed to recalculate the interest charged and reimburse the Plaintiff for the overcharge; which letter was disowned by the Defendant in its pleadings. Here is what Azangalala, J. (as he then was) had to say on the Preliminary Objection:

> " On a consideration of the pleadings parts of which have been referred to above, it becomes obvious that a determination of the issue of limitation cannot be made without considering the evidence. The Plaintiff has pleaded that its claim has been admitted in letters dated 10.9.2003 and 16.9.2003. That position is contested by the defendant. To resolve the conflict must of necessity involve a consideration of the evidence…It is also obvious that the defendant does not admit that the facts as pleaded by the plaintiff are correct. Indeed all the pertinent facts are disputed…It is clear from my above consideration of the defendant's Preliminary Objection that the same is not a proper Preliminary Objection and is overruled with costs to the plaintiff."

26. Thus, the first issue that falls for my determination is whether the Plaintiffs suit is time-barred by dint of Section 4(1)(a) and Section 4(3) of the *Limitation of Actions Act*, which stipulates that:

> " The following actions may not be brought after the end of six years from the date on which the cause of action accrued--
>
> (a) ctions founded on contract;"

27. There is no question, from the Further Amended Plaint, that the suit seeks to recover sums alleged to have been unlawfully charged as interest by the Bank between 1993 and 1997. Accordingly, it was the submission of the Defendant, as pleaded in paragraph 15 of the Further Further Amended Defence filed on 18 October 2016, that the suit was filed outside the six years limitation period. Counsel for the Plaintiff countered these arguments by relying on the Defendant's letter dated 16 September 2003, (exhibited at page 109 of the Plaintiff's Exhibit No. 3) which, he posited, opened up the issues and the period of limitation beyond the six year window ending 2003. He added that, since the Plaintiff's accounts were running accounts, they were inseparable.

28. A look at the pleadings and the evidence adduced herein shows that, although the Plaintiff appointed the Defendant as its Banker in 1993, the relationship involved various facets and facilities that would be renewed or enhanced from time to time. Hence, while the transactions pleaded in paragraphs 4 to 8 of the Further Amended Plaint were confined to the years 1993-1997, the Schedule of Letters set out in Part B of paragraph 10A are manifest that they were issued between 8 January 1998 and 2 February 2000. In the premises, and granted the concurrence between the parties that the accounts were not fully paid until 2003, it cannot be said that this suit, which was filed on 29 November 2004, is time-barred.

29. Secondly, and more importantly, it was the contention of the Plaintiff, per paragraph 11 of the Further Amended Plaint that the Bank acted fraudulently and in breach of its contractual duties and obligations. The particulars thereof were accordingly given in that paragraph. It was further the contention of the Plaintiff that the fraud was not discovered until September 2003. The allegations of fraud were responded to vide paragraph 9 of the Further Further Amended Defence, and there is nothing therein or in the evidence adduced by the Defendant to displace the Plaintiff's contention that the particulars of fraud only came to its attention in September 2003. Accordingly, by dint of Section 26 of the *Limitation of Actions Act*, the cause of action is presumed to have arisen in September 2003. That provision states that:

> " Where, in the case of an action for which a period of limitation is prescribed, either--
>
> (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

30. It was the contention of the Plaintiff that it had no way of knowing the correct rate of interest and trusted the Bank to act in good faith; and in its letter dated 14 June 1996(at page 37 of the Plaintiff's Exhibit No. 3), the Plaintiff did raise its concerns to the Defendant over the rates of interest chargeable between 1995 and 1996, and requested for a recalculation. The overcharge was consequently conceded to by the Defendant and a refund made in respect of three of the facilities (see pages 38-40 of the Plaintiff's Exhibit No. 3). Subsequently, after the Plaintiff closed its accounts with the Defendant, it required a recalculation of interest rates and verification of all the debits into their four bank accounts with the Defendant, and had to engage Interest Rates Research Bureau (K) Ltd for the exercise. The letters exhibited at pages 106 - 115 show that the Defendant contributed to much of the delay in the recalculation.

31. Of particular note is the Defendant's letter dated 10 September 2003, by which the Defendant intimated that:

> "...We have noted that Santowels who were our customers have engaged your services to ascertain the accuracy of interest levied and paid by themselves for various facilities that were extended to them while banking with us. We wish to advise that given the volume of data that we have to go through and the manual nature of this exercise before reaching a substantive conclusion we therefore trust that you shall bear with us for a little while. Legally, claims of this nature can only hold for the last seven years and to that extent therefore, we are only confining our interest verification to the period 1997 up to and including 2000.
>
> We however remain committed to resolving the matter as soon as practically possible..."

32. Apart from being an admission that the sums could not be ascertained without a verification exercise, the Defendant conceded that the period in issued extended to the year 2000. Secondly, the Defendant committed itself to an amicable resolution of the matter, and reaffirmed this by its letter dated 16 September 2003, by which it agreed to verification of their accounts for the entire period from 1997 up to and including 2000; and only reneged on this by its letter dated 30 October 2003.

33. Thus, I would agree with Counsel for the Plaintiff that time began to run for purposes of Section 4(1)(a) and Section 4(3) of the *Limitation of Actions Act* from 16 September 2003. I am thus satisfied that the suit was filed within the prescribed time for it. The same would obtain in respect of the claim for accounts.

(b) Whether or not the Defendant overcharged on interest; and if so, by how much; and whether the sums are recoverable.

34. There is no contestation that the Plaintiff was granted, at its request, several banking facilities including overdrafts, Letters of Credit, Bonds and term loans, by the Defendant during the period in issue. It is common ground that on 13 April 1993, the Defendant initially advanced to the Plaintiff the following facilities, which were thereafter variously extended or renewed:

   (a) An Overdraft Facility for Kshs. 10 million;

   (b) A loan of Kshs. 1.5 million;

   (c) Sight/Usance Letter of Kshs. 5 million; and

   (d) Bank Guarantee of Kshs. 610,000;

35. The documents were exhibited at pages 9, 11, 12, 23, 42, 58, 71, 88 of the Plaintiffs Exhibit No. 3 and pages 2-67 of the Defendant's Bundle of Documents. There is no contestation that the facilities were to attract interest as stated in the respective Facility Letters. Thus, the Facility Letter of 13 April 1993 provided for interest at 22.5% while the Letter of Offer of 3 September 1998 provided for interest at 3% above the Lender's Base Rate of 29% (page 71 of the Plaintiff's Exhibit No. 1). The evidence adduced herein also shows that by a series of letters exhibited at pages 68 to 93 of the Defendant's Bundle of Documents,(which were also exhibited by the Plaintiff at pages 19 to 22, 31 to 33 to 35, 52 to 57, 67 to 70, 81 to 87 and 98 to 104 of the Plaintiff's Exhibit No. 3), the Defendant communicated to the Plaintiff interest rates changes that affected the facilities from time to time. An example thereof is the letter of 1 October 1997 (page 56 of the Plaintiff's Exhibit No. 3) which provided for the rate of 31% per cent; and so the question to pose is whether, in the circumstances, it can be said that the Defendant acted in breach of the contract between the parties, and the applicable law at the time, by charging rates

that it charged by way of interest and penalties on the facilities? Or can it be said that the Plaintiff was made to bear the burden of higher interest rates while the Defendant knew or ought to have known that the rates applied upon its account were unlawful?

36. It is a cardinal principal that parties are bound by their contracts and that it is not the duty of the Court to rewrite contractual terms for the parties. Hence, in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] KLR 112 the Court of Appeal expressed itself thus on the matter:

> " A Court of law cannot re-write 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 charge.
>
> As was stated by Shah JA in the case of *Fina Bank Limited v Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
>
> "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's function to allow a party to escape from a bad bargain".

37. In the instant matter, the Plaintiff pleaded fraud and dishonesty, and has accused the Defendant of surreptitiously debiting its account with unlawful interest. It adduced evidence to the effect that, after the Defendant reneged on its recalculation offer, it approached the Interest Rates Bureau and thereafter IRAC for interest recalculation. Accordingly, Mr. Onono (PW2) testified that he looked at the Statements of Account and the relevant Facility Letters and came up with two scenarios. In the first scenario, PW2 based his recalculation on the contract between the parties as evinced by the Facility Letters. His recalculation showed that, as at 31 December 2004, the Defendant owed the Plaintiff Kshs. 10,449,411.74 in overcharged interest. This conclusion is supported by the report marked Plaintiff's Exhibit No. 5. According to that Report, the recalculation by PW2 revealed the following:

(a) Current Account No. 1510107271001/014/00/107271/01: The recalculation difference in the outstanding cleared balance on 31 August 2000 between the Bank's credit balance of Kshs. 10,801.15 and IRAC's credit of Kshs. 4,703,700.20 is Kshs. 4,692,899.05 infavour of the Plaintiff; and that the account having been redeemed on 10 July 2000, the outstanding balance on 31 December 2004 was a credit of Kshs. 9,668,519.77.

(b) Loan Account Number 1520107271301: The recalculation difference in the outstanding cleared balance on 31 March 1998 between the Bank's nil balance and IRAC's credit of Kshs. 288,535.46 is Kshs. 288,535.46 in favour of the Plaintiff. The Account was redeemed on 31 March 1998 and therefore the outstanding balance as of 31 December 2004 was a credit of Kshs. 1,096,431.87.

(c) Loan Account Number 013/20/107271/03: The recalculation difference in the outstanding cleared balance on 31 July 2000 between the Bank's credit balance of Kshs. 63,338.81 and IRAC's credit of Kshs. 64,174 is Kshs. 835.89 in favour of the Plaintiff. The account was redeemed on 10 July 2000, and therefore the outstanding balance on 31 December 2004 was a credit of Kshs. 1,973.54.

(d) Loan Account Number 1510107271302/01320/107271/02: The loan of Kshs. 15 million was redeemed on 31 October 1999; and therefore the recalculation yielded a debit balance of Kshs. 125,451.97 as at 31 December 2004.

Accordingly, the global summary of the foregoing is that a total sum of Kshs. 10,449,411.74 is due from the Defendant to the Plaintiff in interest overcharge, based on the contractual rates.

38. The second scenario was worked on the basis of the applicable interest rates at the time as set by the Central Bank of Kenya under Section 39 of the *Central Bank of Kenya Act*, Chapter 491 of the Laws of Kenya, as read with Section 44 of the *Banking Act*, Chapter 488 of the Laws of Kenya. It was therefore the evidence of PW2 that the rate applicable to the Overdraft was 16.5%, and 19% on the term loan facility. He accordingly came to the finding that the Bank had overcharged the Plaintiff by an amount of Kshs. 68,986,536.28 as shown in the second report and documents marked Plaintiff's Exhibit No. 4. His recalculation was as follows:

    (a) Current Account Number 1510107271001/014/107271/01: The rate of 4% interest applicable to Treasury Bills was applied by dint of Section 39 of the *Central Bank of Kenya Act* to yield unlawful interest of Kshs. 3,716,245.82. Hence the recalculation difference in the outstanding cleared balance on 31 August 2000 between the Bank's credit balance of Kshs. 10,801.15 and IRAC's credit of Kshs. 34,214,153.20 amounted to Kshs. 34,203,352.05 in favour of the Plaintiff.

    (b) Loan Account Number 1520107271301: The recalculation difference in the outstanding cleared balance on 31 March 1998 between the Bank's Nil balance and IRAC's credit of Kshs. 1,170,050.36.36 was Kshs. 1,170,050.36 in favour of the Plaintiff. PW2 added that since this account was redeemed on 31 March 1998, there was an outstanding credit balance of Kshs. 3,601,709.53 in the account.

    (c) Loan Account Number 013/20/107271/03: The recalculation difference in the outstanding cleared balance on 31 July 2000 between the Bank's credit balance of Kshs. 63,338.81 and IRAC's credit of Kshs. 64,174.70 was Kshs. 835.89 in favour of the Plaintiff. The account was redeemed on 10 July 2000; and therefore the outstanding balance on 31 December 2004 was a credit of Kshs. 1,598.70.

    (d) Loan Account Number 1510107271302/01320/107271/02: According to PW2, this account was redeemed on 28 February 1999; and therefore the recalculation yielded a balance of Kshs. 4,145,238.17. That since the account was extended up to 31 December 2004, the outstanding balance as at that date was a credit of Kshs. 8,498,764.03.

39. The legal regime at the time was that, vide Section 39 of the *Central Bank of Kenya Act*, the Governor of the Central Bank had powers to determine and regulate the minimum and maximum rates of interest chargeable by commercial banks. It provided that:

> " The Bank may, from time to time, acting in consultation with the Minister, determine and publish the maximum and minimum rates of interest which specified banks or specified financial institutions may pay on deposits and charge for loans or advances:
>
> provided that the Bank may in consultation with the Minister determine different rates of interest--
>
> i) for different types of deposits and loans; and
>
> ii) for different types of specified bank and financial institutions."

40. There is no dispute that the Defendant was one of the specified banks for purposes of Section 39 of the *Central Bank of Kenya Act*, which was in force until 18 April 1997 when it was repealed by Section 17 of the Central Bank (Amendment) *Act No. 9 of 1996*. Before that repeal, the Governor of the Central

Bank of Kenya issued several Gazette Notices, one of which was Gazette Notice No. 1617 of 1990. It wasto the following effect:

> " In exercise of the powers conferred by sections 39 and 41 of the *Central Bank of Kenya Act*, it is notified that the Central Bank of Kenya has determined the following to be the minimum rates of interest which specified banks and special financial institutions may pay on deposits and charge for loans, advances or instalment facilities:
>
> (a) The minimum rateof interest payable by specified banks and specified financial institutions on deposits or savings shall be 13.5 per cent per annum.
>
> (b) The maximum rate of interest which specified banks may charge for loans or advances granted for a term not exceeding three (3) years shall be 16.5 per cent per annum calculated on a reducing balance method, with monthly rests.
>
> (c) The maximum rate of interest which specified banks may charge for loans or advances granted for a term exceeding three (3) years shall be 19 per cent per annum calculated on a reducing balance method, with monthly rests.
>
> Provided that interest rates on term loans granted for a period exceeding three (3) years outstanding in the books of specified banks on 31st March, 1990, shall continue at existing rates until 31st March, 1991, when interest rates may be re- negotiated between the parties subject to the maximum interest rate of 19 per cent per annum.
>
> (d) The maximum rate of interest which specified financial institutions may charge for loans, advances or instalment facilities shall be 19 per cent per annum calculated on a reducing balance method, with monthly rests.
>
> This notice shall be deemed to have come into effect on 1st April, 1990, and supersedes Gazette Notice No. 4939 of 1989 and Gazette Notice No. 1458 of 1990."

41. There is no gainsaying therefore that, vide the Gazette Notice aforementioned, interest rates for loans and advances for less than 3 years was capped at 16.5% up to 23 July 1991 when, by Gazette Notice No. 3348 of 23 July 1991, the Governor revoked Gazette Notice No. 1617 of 1990. Accordingly, the Plaintiff was duty-bound to restrict interest and penalties if any within the limits set by the Central Bank of Kenya in accord with the aforementioned Gazette Notices. This is the decision that Emukule, J. came to in Desai and Others v Fina Bank Limited [2004] 2 EA 46, which I entirely agree with. Here is what the learned Judge had to say:

> " Until its repeal, section 39 of the *Central Bank of Kenya Act* (Chapter 491) empowered the Central Bank to determine and publish maximum and minimum rates of interest. After the repeal ... section 44 of the *Banking Act* (Chapter 488) remained as a regulatory provision, restricting increase of "rates of banking" without prior approval of the Minister..."

42. An argument was presented by Mr. Mogeni, Learned Counsel for the Plaintiff that, notwithstanding the revocation of Gazette Notice No. 1617 of 1990 by Gazette Notice No. 3348 of 23 July 1991, the cap on interest continued until the repeal of Section 39 by Section 17 of *Act No. 9 of 1996*. According to Mr. Mogeni, the Governor's powers under Section 39 were limited to setting the minimum and maximum rates of interest, and did not include repeal of any provision of the law for the capping of

interest rates, which was provided for in substantive legislation. Counsel further cited Sections 3 and 31 of the *Interpretation and General Provisions Act*, Chapter 2 of the Laws of Kenya as to the definition of the word "repeal" and in support of the argument that no subsidiary legislation should contradict or be inconsistent with the Act. To further buttress his arguments Counsel for the Plaintiff relied on Section 43 of the *Interpretation and General Provisions Act*, which provides that:

> "Where a written law confers power or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office."

43. Counsel for the Defendant, on his part, submitted that since the revocation by the Governor was not challenged in a Court of law, the same stands and cannot be impugned as proposed by Counsel for the Plaintiff; as that would be akin to impeaching the powers of Governor under Section 39 of the *Central Bank of Kenya Act*. He relied on the cases of National Bank of Kenya Ltd v Cador Investment Limited HCCC No. 2005 of 2000 and Nairobi Ujuzi Company Limited v Equatorial Commercial Bank Limited [2015] eKLR in urging the Court to find that Mr. Onono's recalculations were premised on a misapprehension of the applicable law.

44. Having considered the foregoing arguments in the light of the applicable law, I am not persuaded by Mr. Mogeni's argument that, notwithstanding the revocation vide Gazette Notice No. 3348 of 23 July 1991, Gazette Notice No. 1617 of 1990 continued in force until the repeal of Section 39 of the *Central Bank of Kenya Act* in 1996. This is because Section 39 gave the Governor the discretion to cap interest rates; and to my mind, that discretion entailed the power not to set any limits if that was in the best interest the sector players, the economy and the public at large.

45. Whereas it is true to say, as did Mr. Mogeni, that the Governor has no powers to repeal a provision in an Act of Parliament vide subsidiary legislation, it is not true that this is what the Governor purported to do through Gazette Notice No. 3348 of 23 July 1991. The notice simply reads:

> "In Exercise of the powers conferred by section 39 of the *Central Bank of Kenya Act*, Gazette Notice No. 1617 of 1990 is revoked."

46. Thus, what was revoked was Gazette Notice No. 1617 of 1990. It was not a repeal of Section 39 of the *Central Bank of Kenya Act*, either in fact or by implication, as was alleged by Mr. Mogeni and, there being no indication that that revocation was challenged or nullified, Gazette Notice No 1617 of 1990, which provided for interest rate of 16.5% for loans for periods of less than 3 years, stood revoked as of 23 July 1991. However, there remained residual powers of control by the Central Bank of Kenya under Section 39 of the *Central Bank of Kenya Act* during the time period between 23 July1991 and 1996, when Section 39 was ultimately repealed; and thereafter under Section 44 of the *Banking Act*. Accordingly, in addition to notifying their customers of any variations in the rate of interest chargeable, the specified banks and financial institutions still had the additional responsibility of ensuring that the approval of the Minister was obtained prior to any such variation, in accordance with Section 44 of the *Banking Act*.

47. In the premises, I am in complete agreement with the finding of the Court in National Bank of Kenya Ltd v Cador Investment Limited HCCC No. 2005 of 2000 that:

> "...before the repeal of sections 39, 40 and 41 of the *Central Bank of Kenya Act* and effective from 23rd July 1991 interest rates had been freed from control or regulation by the Minister through the *Central Bank of Kenya Act*, although the residual power to do so was maintained under S. 39, 40 and 41 of the *Central Bank of Kenya Act* until those sections were repealed

by the Central Bank of Kenya (Amendment) *Act 1996 (No. 9 of 1996)*. Upon repeal of those provisions the residual powers to issue control on or regulate interest rates charged by banks and other financial institutions was also removed and has not to date been re-imposed. The total effect of the revocation of Gazette Notice No. 1617 of 1990 by Gazette Notice No. 3348 of 1991 and subsequent repeal of Sections 39, 40 and 41 of the *Central Bank of Kenya Act* was firstly to free bank interest rates regime from control or regulation by the Minister for finance through the Central Bank of Kenya and secondly the power of the Central Bank of Kenya to issue instructions under sections 39, 40 and 41 of the Act was removed from the Governor by the repeal of those sections. This meant that specified banks and other institutions were at liberty to negotiate interest rates with their borrowers."

48. Accordingly, there being no evidence that the Defendant applied for or obtained the approval of the Minister to charge interest rates above the applicable rate at the time of 16.5% between 1991 and 1997, it would follow that the interest charged by the Defendant was unlawful, for Section 44 of the *Banking Act* is explicit that:

> "No institution shall increase its rate of banking or other charges except with the prior approval of the Minister."

49. And in Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR, the Court of Appeal was explicit that the burden is on the bank to prove that approval was sought and obtained. It held thus:

> "The trial court held that the appellant, because she is the one who claimed that the bank acted without the minister's approval, was the one to adduce evidence to prove this assertion. With respect, this is not the correct position. It is generally true that he who asserts must prove. That much is contained in Section 108 of the *Evidence Act*. However, ...under Section 112 of the *Evidence Act*, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him...it was the respondent bank which fell within Section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the *Banking Act* places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the Minister?"

50. The Court of Appeal proceeded to apply the decision of the High Court (Sergon, J.) in John Gatu Nderitu v Kenya Commercial Bank Ltd [2011] eKLR and held that:

> "...it was the bank that is enjoined to provide documentary evidence to the Court to the effect that it had complied with Section 44 of the *Banking Act*. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate."

51. It is not lost on the Court that the thrust of the Defendant's case was that the rates it charged were contractual and that it notified the Plaintiff of the variations as demonstrated by the letters exhibited

at pages 68 to 93 of the Defendant's Exhibit No. 1 herein. However, in Section 52(3) of the *Banking Act* is the provision that:

> "This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the *Central Bank of Kenya Act*."

52. Thus, by parity of reasoning, the Defendant ought not to be allowed to retain sums that were paid to it in contravention of the provisions of the two Acts aforementioned. Put differently, it is not permissible for parties to contract out of the express stipulations of statute. Accordingly, it is my considered finding that the Defendant did overcharge the Plaintiff on interest, and that it is immaterial that the Plaintiff was notified of the variations vide the letters at pages 68 and 93 of the Defendant's Bundle of Documents.

53. Having given consideration to the two scenarios, it is noted that In the premises, and going by the principle it is ordinarily no part of equity's function to allow a party to escape from a bad bargain; and considering that the court's function is to give effect, within the confines of the law, to the wishes of the parties as expressed by the terms of their contract, I would adopt the scenario presented by Mr. Onono in the recalculation contained in the Plaintiff's Exhibit No. 5, which was premised on the parties' contractual documents, that the Plaintiff was unlawfully overcharged interest by the Defendant to the tune of Kshs. 8,498,764.03, and I so find. It is further my finding that the said sums are recoverable by the Plaintiff from the Defendant.

(c) Whether the Defendant owed a fiduciary duty to the Plaintiff; and if so, whether it acted in breach of that duty for which damages are payable.

54. It is trite that the relationship between a bank and its customer is contractual. (See Selangor United Rubber Estate Ltd v Craddock [1968] 2 All ER 1073); and the purpose of damages for breach of contract is for the claimant to be put, as far as possible, in the same position he would have been if the breach complained of had not occurred. This principle was enunciated in Hudley Baxendale [1854] 9 Exch. 341 thus:

> "where two parties have made a contract which one of them had broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either naturally that it is in accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."

55. The same principle was applied in the case of Gedion Mutiso Mutua v Mega Wealth International Limited [2012] eKLR, thus:

> "The principal guiding the award of general damages for breach of contract was restated in Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa [1995-1988] 2 EA 289 ...that it is quite clear that no general damages may be granted for breach of contract...That notwithstanding, the general law of contract is that where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things from such a breach of contract itself, or such as may be reasonably supposed to have been

> in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. the plaintiff is to be paid compensation in money for the loss of that which he would have received had the contract been performed and no more. Loss has been defined to mean loss of a pecuniary kind, loss of property, or of the use of property or the means of acquiring property, but it does not include damages for the disappointment of mind or vexation caused by hurtful or humiliating manner in which the defendant broke the contract..."

Since breach of contract was neither alleged nor proved, there would be no basis for awarding the Plaintiff any additional sum to the Kshs. 8,498,764.03 aforementioned.

56. In the result, Judgment is hereby entered for the Plaintiff in the aforesaid sum of Kshs. 8,978,813.63 plus interest thereon at court rates from the date of filing this suit till payment in full, as well as costs of the suit. The rest of the prayers were either in the alternative or have been overtaken by events and therefore stand dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF MARCH, 2018

OLGA SEWE

JUDGE