REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 220 OF 2007

DR. JOHN NJUGUNA MUGO.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff, **DR. JOHN NJUGUNA MUGO,** was a customer of the defendant, **KENYA COMMERCIAL BANK LIMITED,** at the material time.

2. It is common ground that on 23rd March 1990, the bank advanced a loan to the plaintiff, which was for use in purchasing a house.

3. At the time when the plaintiff procured the loan, he was working as a lecturer at the **UNIVERSITY of NAIROBI.**

4. The university had entered into an agreement with the bank, pursuant to which the employees of the university could obtain loans from the bank.

5. It was a term of the agreement between the bank and the university that the latter remit money directly to the bank, in order to service the loan which the plaintiff had obtained.

6. By a letter dated 23rd March 1990, the plaintiff instructed the university to deduct from his salary, the sum of Kshs. 3,814/- every month, and to remit the said funds to the bank.

7. As between the bank and the plaintiff, there was an agreement that;

a) The House Loan of Kshs. 182,880/- would be paid within a period of eight (8) years.

b) The initial rate of interest was 18% per annum, debited monthly by way of compound interest;

c) The bank reserved the right to charge such rate or rates of interest as it may in its sole discretion decide, from time to time;

d) The rate of interest would not exceed the maximum rate which may be laid down by the Central Bank;

e) The bank was not required to advise the plaintiff of any change in the rate of interest, and failure to do so would not prejudice the bank's right to recover any interest that had been charged.

8. According to the plaintiff, he paid the instalments due from the date of inception in 1990, until June 2000 when he left his employment at the University of Nairobi.

9. Upon the plaintiff leaving the university, his said former employer recovered Kshs. 78,430.05 from the plaintiff's terminal benefits, which they remitted to the defendant in August 2000.

10. By his calculations, the plaintiff had paid a total of Kshs. 730,064.60 to the defendant, whereas he was supposed to pay a sum not exceeding Kshs. 366,144.90.

11. It was the plaintiff's case that the bank was in breach of the contract between the parties, when the bank;

> **".....fraudulently and unlawfully increased the interest rates charged and allowed by law, and (also when it) opened an unauthorized loan account No. 314-032 651 029, called Commercial Loan Account."**

12. The following are the particulars of fraud, as enumerated by the plaintiff;

> **"i) Unlawfully and secretly opening a Commercial Loan Account No. 032 651 029.**
>
> **ii) Unilaterally, unlawfully and secretly increasing the interest rates charged on the loan.**
>
> **iii) Failing to disclose that the loan had been paid in full.**
>
> **iv) Indicating that the loan was in debit while it was in credit.**
>
> **v) Failing to disclose to the plaintiff that he had a credit balance due to him.**
>
> **vi) Continuing to receive remittances on account of instalments from the University of Nairobi when the actual amount due had been fully repaid.**
>
> **vii) Failing to advise the University of Nairobi to discontinue remittances when the loan had been fully repaid.**
>
> **viii) Failing to furnish the plaintiff with proper and accurate statement of accounts.**
>
> **ix) Destroying the statement of accounts in respect of the plaintiff's loan while clarification of the plaintiff's inquiries concerning the repayments of the loan was still pending, in order to conceal fraud."**

13. The plaintiff said that it was not until May 2001 that he became aware of the defendant's fraudulent dealings, and that he commenced investigations immediately thereafter.

14. The investigations and the audit which the plaintiff initiated, culminated in an admission by the defendant, that the bank owed Kshs. 198,958.22, to the plaintiff.

15. However, the plaintiff believes that the bank owed him a total of Kshs. 5,258,694.38, which is made up as follows;

> **a) Excess Payments Kshs. 522,479.49**
>
> **b) Excess Interest, other levies and interest on**
>
> **excess payments Kshs. 1,973,839.89.**
>
> **c) 14 hours spent at Muindi Mbingu branch consulting**
>
> **the bank on loan arrears. Kshs. 70,000.00.**
>
> **d) 12 hours spent at University of Nairobi, Finance**
>
> **Department consulting on loan arrears. Kshs. 60,000.00.**
>
> **e) 10 hours spent at University Way branch concerning**
>
> **the fictitious "Commercial Loan Account" Kshs. 50,000.00.**
>
> **f) 18 hours spent collating documents, which were submitted**
>
> **to the Manager University Way Branch. Kshs. 90,000.00.**
>
> **g) 22 hours spent consulting IRAC. Kshs. 110,000.00.**
>
> **h) 22 hours spent collating document requesting**
>
> **by IRAC. Kshs. 110,000.00.**

i) 76 hours spent on travels to and from Nairobi

to attend to these matters at KCB Headquarters

or at University Way Branch. Kshs. 380.000.00.

j) Cost of 4 trips @1,500/- each way. Kshs. 12,000.00.

k) 30 hours spent in seeking legal advise. Kshs. 150,000.00.

l) Cost of Professional services to work out what

the bank owed the plaintiff. Kshs. 1,370.000.00.

m) Cost of instructing a lawyer on these matters. Kshs. 350,000.00.

n) Cost of delivering letters to the CEO of the Bank. Kshs. 375.00

o) Cost of attending the meeting called by the Manager,

Customer Service. Kshs. 10,000.00

TOTAL Ksh. 5,258,694.38

16. The plaintiff's prayers in the Plaint were for judgement in respect of;

"i) Kshs. 5,258,694.38 together with interest at 19% per annum calculated daily.

ii) Consultancy fee paid to Interest Rates Advisory Centre.

iii) Cost of the suit and Interest".

17. The court has been told that the non-disclosure of the rate of interest applicable, led to an ambiguity, and that where ambiguity arises in a contract, it must be construed against the maker.

18. In this case the bank did not issue notices to the plaintiff concerning increases or any other variations to the applicable rates of interest.

19. I believe that that is why the plaintiff blamed the bank for unilaterally, unlawfully and secretly increasing the rate of interest charged on the loan.

20. In my considered opinion, the bank's failure to notify the plaintiff about the increase in the rate of interest cannot be deemed to have been unlawful.

21. I say so because in the contract between the parties, it was expressly stated that the bank had reserved the right to charge such rate or rates of interest as it may, in its sole discretion decide.

22. Therefore, the fact that the bank made decisions to vary the rate of interest from time to time, without any consultation with the plaintiff or even notification to the plaintiff, after the decision was made, was not unlawful.

23. The plaintiff was not right when he insinuated that there was something untoward about the fact that the bank's decision was secretive and unilateral.

24. I say so because apart from the contractual recognition of the fact that the bank could vary the rate of interest, at its sole discretion, the contract also expressly provided that the bank was not required to advise the plaintiff of any change in the rate of interest.

25. Of course, when the duration within which the loan was to be repaid remained constant *(as eight years)*, the loan could only be cleared within that period of time if an increase in the rate of interest was followed by a proportionate increase in the monthly instalments payable by the plaintiff.

26. In an ideal situation, therefore, the parties ought to have imposed an obligation on the bank, to notify the plaintiff and also the University of Nairobi that there was a need to vary the monthly repayments upwards, whenever the rate of interest had been increased.

27. In the case of **HOUSING FINANCE COMPANY of KENYA LIMITED Vs GILBERT KIBE NJUGUNA (NRB) Hccc No. 1601 of 1999,** the Court held as follows;

"Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with a meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

28. In this case, the contract expressly provided that the bank was free to vary the rate of interest, and that it could do so at its sole discretion.

29. Although the contract provided that the bank was under no obligation to notify the plaintiff about the changes to the rate of interest, it does appear that some information, in that regard, was transmitted to the plaintiff. I so find because the plaintiff did exhibit an Internal Memo from the Deputy Finance Officer at the University of Nairobi, dated 6th March 1997.

30. Through that memo, the plaintiff was notified that there had been frequent changes in the interest rates over a period of three years. He was further notified that there was need for his;

"……current monthly instalment (to) be stepped up proportionately in order to cater for the additional charges. In this regard, the amount involved will be deducted at the rate of Kshs. 4,000/- per month with effect from March 1997. The deductions will run concurrently with your normal loan deduction".

31. Although the notification arrived after a considerable build-up of arrears, which were partly attributable to the increase in the rates of interest, it follows that the plaintiff was not kept completely in the dark.

32. But it is not only through the internal memo that the plaintiff obtained information concerning the status of his loan account.

33. From his pay slips, the plaintiff received information concerning both the instalments being deducted from his salary for use to pay the House Loan, but also the particulars of the arrears of the said loan.

34. On the question concerning the bank's obligation to maintain the customer's account in a meticulous manner, there cannot be any doubt. A bank cannot be excused if it maintained shambolic records of its customer's accounts and transactions.

35. In this case, the plaintiff testified that the bank had messed up its records by introducing unknown accounts, which were replete with suspicious calculations.

36. The plaintiff submitted that some of the mistakes committed by the bank were so glaring that any diligent person would have discovered and corrected them.

37. An example of the glaring mistake was when the bank credited the sum of Kshs. 26,326/55 to a *"Commercial Loan Account"*, whilst the plaintiff had never operated such an account with the bank.

38. The bank did not provide any explanation for that error. I therefore find that, to that extent, the plaintiff proved that the bank had committed a glaring error in the manner in which it operated the plaintiff's account.

39. On the question of the recalculations which were done by **WILFRED ABINCHA ONONO (PW2),** I find that the same are not reliable. I so find because the witness readily conceded, in his Report, that when he was undertaking the task of recalculations, the following statements of account were missing;

a) The period between 21st December 1990 and 30th March 1991;

b) The period between 10th March 1992 and 31st December 1992;

c) 11th March 1993 to 18th May 1993;

d) 8th July 1993 to 4th January 1994;

e) 31st March 1994 to 1st July 1994; and

f) 30th June 1995 to 6th January 1996.

40. As far as **PW2** was concerned, his recalculations were still correct, even though he did not have the statements of account for the periods set out above.

41. The witness described himself as an Independent Witness. He also said that he was neutral.

42. He considered himself to be neutral and independent because the information he used was extracted from the statements of account which were maintained by the bank, and which were provided to him by the plaintiff.

43. Notwithstanding his assertion of independence and neutrality, the witness did not explain why he failed to ask the bank for copies of the missing statements of accounts.

44. I would have expected a witness who was independent and neutral to seek the input of all the parties who are in dispute.

45. However, the Report cannot be dismissed in its entirety. I find that it can be enriched by being given the missing information.

46. On the other hand, I find that it was not the mandate of **PW2** to make determinations on issues of law.

47. By deciding what was or what was not lawful, **PW2** overstepped his mandate. The power and authority to adjudicate on legal issues is vested in the Judiciary, pursuant to Article 159 of the Constitution of Kenya.

48. The witness is neither a Judge nor a magistrate.

49. He has not demonstrated to this court that he was clothed with the requisite legal authority to make pronouncements on legal issues. Therefore, I find that his purported pronouncements were made without the requisite authority of the law.

50. In my considered opinion, if **IRAC** wished to have a determination on the matters concerning the applicable rates of interest which banks can lawfully charge their customers, he would have to move the court appropriately.

51. He cannot move the court to make a determination by giving evidence in a case. He would have to bring a case, as a substantive party, and then seek declaratory judgement. Until and unless the issues were determined by a court of competent jurisdiction, any views expressed by either a party or by a witness, is nothing more than a personal opinion.

52. The Constitution recognizes the right of every person to hold and to freely express an opinion. However, if such an opinion purports to provide an interpretation of a provision of the law, it is not a binding opinion, unless it had been given by a court of competent jurisdiction.

53. As regards Rebates, the plaintiff complained that the bank had discriminated against him, by denying him the benefit of a rebate similar to that which the bank had given to some other individuals whose loans had been guaranteed by the University of Nairobi.

54. First, the issue about rebate does not arise from the pleadings, and therefore does not fall for determination by this court.

55. In any event, the plaintiff recognizes that the provision of rebates, by the bank, was not a legal entitlement. He described the rebate as being a privilege.

56. A privilege is not a legal right that the court can compel the defendant to extend to the plaintiff.

57. I also note that by the date when the bank applied rebates to the loans of some of the members of staff of the University of Nairobi, in May 2001, the plaintiff's loan had already been repaid in full.

58. However, I do not consider the fact that the plaintiff had already paid off the loan prior to the bank giving a rebate, to be a bar, of itself, to having the plaintiff being considered as a beneficiary of such rebate.

59. In my understanding, the bank provided a rebate because the University of Nairobi staff, who had taken out loans had complained about the adjustments which the bank had been making to their respective loan accounts.

60. As the University stated in the letter dated 24th May 2001, the bank had written-off some of the loans, and therefore the bank was expected to refund some money to the staff whose accounts had been negatively impacted by the adjustments complained about.

61. When **DW1, CHARITY CHEPKORIR CHERWON,** testified she said that the reason why the bank was offering rebate was due to the erroneous deductions or overpayments of loans.

62. Therefore, as the bank has, in principle, admitted that the plaintiff had overpaid his loan, there is no reason why the defendant should deprive him of the rebate.

63. Although the rebate was not a contractual or statutory right to which the plaintiff was entitled, I find that the bank has not shown why it made a choice to discriminate against the plaintiff.

64. Not only has the bank conceded the overpayment by the plaintiff, the bank also acknowledged that it had credited money from the plaintiff into a wrong account. Although the erroneous posting was not a deduction, but it had the effect of erroneously portraying the plaintiff as being in arrears whilst that was not the position.

65. As I approach the tail-end of this judgement I now wish to provide answers to the Agreed Issues, as follows;

1. The defendant was entitled to vary the rate of interest applicable to the loan which it granted to the defendant.

It was an express term of the contract that the bank had no obligation to notify the plaintiff about the variations.

2. The defendant was entitled to vary the rate of interest at its sole discretion. It was necessary for the bank to justify such variations.

3. The repayment of the loan was not guaranteed by the University of Nairobi in such manner as would render the university liable to pay off the loan if the plaintiff failed to do so.

However, there was an agreement pursuant to which the plaintiff authorized the university to deduct the monthly instalments directly from his salary, and to remit such instalments to the bank.

4. The loan was not paid within the period of eight (8) years as had been scheduled.

5. The plaintiff has failed to prove any of the allegations of the fraud allegedly perpetrated by the bank.

Indeed, in his submissions, the plaintiff alluded to negligence, rather than fraud.

6. The plaintiff ultimately overpaid the loan. On the question about the extent of the overpayment, I will address it later.

7. The overpayment is attributable to several factors, including miscommunication between the bank, the university and the plaintiff; as well as the errors of commission made by the bank. An example of such an error is the opening of a Commercial Loan Account, without the knowledge or concurrence of the plaintiff.

8. The plaintiff has definitely suffered loss and damage due to the actions of both the university and the bank.

9. The plaintiff failed to lead evidence to enable the court determine the question concerning the entitlement, (or otherwise) of the bank to levy any other charges apart from interest.

10. The plaintiff is entitled to compensation, but not to the degree claimed.

66. I will now explain answer No. 10 above.

67. As the recalculations by **IRAC** have been held to be unreliable, the quantum of Kshs. 522,479.49, in respect to *"Excess Payments"* cannot be upheld. So too, the sum of Kshs. 1,973,839.89.

68. Meanwhile, as regards the time spent by the plaintiff in meetings with officers of the bank, or the university or even with those at **IRAC,** the plaintiff has not provided any legal justification why the defendant should be compelled to compensate him.

69. He was pursuing information, documentation and professional help in putting together his case. He has not shown that the preparations he undertook constituted a loss for which the defendant should be compelled to compensate him.

70. I also find that the plaintiff has not provided any legal justification for the rates which he applied to value the hours which he had used during his preparation of the case.

71. In any event, I hold the view that the costs incurred by the plaintiff cannot be claimed as damages, to compensate him.

72. In litigation, if the court awards costs to a party, the same would ordinarily be subject to taxation.

73. Furthermore, even when a party is able to prove that he paid his advocate, or his professional adviser, or his witness, a particular sum of money, the court would ordinarily not order that such sums be reimbursed to the party.

74. Party and Party costs are controlled by law. The rationale for the said control is that there was a genuine need to keep the access to justice, affordable.

75. A party may hire an expensive advocate to represent him. However, even if the party was successful, he cannot expect that the fees which he paid to his advocate would simply be reimbursed by the other party.

76. The Advocates Remuneration Order has provisions for costs in respect to such items as Meetings, Letters and Attendances. If the plaintiff can bring himself within the said provisions, he might get the costs.

77. On the other hand, I appreciate that when the plaintiff was taking part in meetings which were intended to address his claim, he could not have been going about his normal tasks.

78. However, the plaintiff has not provided evidence to prove the actual losses suffered by him during the time he spent in that regard. I would have expected the plaintiff to show the court what he was earning in the months when his time was spent wholly in his work. Thereafter, the plaintiff ought to have given particulars of the days when he had to stay away from his income-generating work, so as to focus exclusively on the meetings for the purposes of his claim against the bank.

79. If he was able to prove a loss of income during the time spent on matters pertaining exclusively to the claim he made in this case, it is possible that the court may have found in favour of the plaintiff for loss of income.

80. In this case, the plaintiff has not provided evidence to prove the loss of income which was attributable to the time spent exclusively in attending to this claim against the defendant.

81. Therefore, the claim amounting to Kshs. 2,762,375/- is rejected in total.

82. However, I find that the plaintiff is entitled to a refund of the money which he paid over and above the amount which the bank was entitled to recover as payment for the loan.

83. Whilst the bank states that sum is Kshs. 198,958.22, I believe that that figure is, in all probability inaccurate.

84. I therefore direct that before I can pronounce the final figures, there shall be a recalculation by an Accountant, to determine the correct figure.

85. The parties will, within 10 days from today, agree on an Accountant who will carry out the calculations. The bank is ordered to pay the fees payable to the Accountant.

86. If the parties are unable to agree on an Accountant, each of them will suggest two names, and the court will appoint one person from the list of four.

87. The Accountant will have 14 days from the date of his appointment, to file his/her report in court.

88. Meanwhile, I order that the sum being refunded to the plaintiff shall attract interest at 19% per annum from 1st July 2000 until payment in full. That date has been informed by the fact that the University of Nairobi had clearly stated that the plaintiff's House Loan was paid in full by June 2000.

89. Of course, the bank did offer to pay to the plaintiff the sums in excess of what had been payable by the plaintiff. Although the plaintiff declined to receive that payment, because he believed that it constituted only a fraction of his entitlement, the bank continued holding onto the money.

90. If the bank had sent the money to the plaintiff, there would have been no reason why the portion of the refund, which had already been received, could attract interest from the date of receipt.

91. And if the bank made a choice to continue holding onto the money in an account where it did not attract interest, that would the action of an imprudent person. Such action cannot be permitted to prejudice the plaintiff. It is for that reason that the final figures, once ascertained by an Accountant will attract interest from 1st July 2000.

92. Finally, the defendant will pay to the plaintiff, the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of March 2018.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Otieno for the Plaintiff

Kimani for the Defendant.