REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 295 OF 2017

VEHICLE AND EQUIPMENT LEASING LTD.....PLAINTIFF/APPLICANT

-VERSUS-

JAMII BORA BANK LIMITED.....DEFENDANT /RESPONDENT

RULING

1. The Applicant through a Notice of Motion dated 7th September 2017 seeks several prayers, the main prayer being an order of review of this Court's Ruling dated 31st July 2017, under prayer No. 7 where the Applicant prays as follows;

> *"that the honourable Court be pleased to review its ruling dated 31st July 2017 to the extent that the interest rate between the Plaintiff and Defendant herein was not predetermined, pre-calculated and earned as at 31st July 2017 and that the Defendant be ordered by the Court to comply with Section 33B of the Banking Act and apply the lawful rate being 14% interest on all loan facilities the Plaintiff has with the Defendant."*

2. It should be noted that at the time of making the order of 31st July 2017, the trial Court, it made an order for the Defendant to furnish the Plaintiff with Statement of Accounts showing how much interest rate the Bank had charged the Plaintiff since 14th September 2014. It was after the supply of the statements and the subsequent reconciliation that it became apparent to the plaintiff that the Bank had misled the Court that the interest rates had been pre-calculated and that the Bank had been verifying the interest rates and based on that discovery, the Applicant preferred this Application for review. The Applicant seeks therefore prayer No. 10 of the Application dated 13th July 2017 be allowed to the effect that the Defendant Bank be ordered to comply with ***Section 33B*** of the Banking Act, which caps interest rate charged by financial institutions to 4% above the base rate set by the Central Bank of Kenya.

3. The Application is opposed. The Defendant/Respondent opposed grounds of opposition dated 25th July 2018; setting out two (2) main grounds of opposition being as follows;

> *a) That the reasons advanced in the Notice of Motion Application dated 7th September 2017 do not meet the established threshold for review of Court orders; and*
>
> *b) That the Notice of Motion Application dated 7th September 2017 challenges the ratio decidendi of this Honourable Court in its ruling of 31st July 2017 and thus amounts to a disguised appeal.*

4. The Application is premised on ***order 45 Rule 1*** of the Civil Procedure Rules which provides:-

> *"(1) Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."*

5. In the instant Application it is important to note that the Applicant has not preferred an appeal nor has it issued any Notice of Appeal to

date but only preferred review of this Court's Ruling dated 31st July 2017.

6. From the pleading and facts of this matter, and the ruling of the Court and the Application before Court, the issue arising for consideration and determination can be summed up as follows:-

a) Whether the Application meets the threshold for granting orders of review as sought?

7. An Applicant seeking orders of review of a Court's ruling or Judgement or an order of the Court is required to establish the following:-

> *a) Discovering of new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made or;*
>
> *b) On an account of mistake or an error apparent or on the face of the record or;*
>
> *c) for any other sufficient reason desiring to obtain a review of the decree or order;*
>
> *d) Application for review should be made without unreasonable delay.*

8. The Applicant's Application has set out twenty (20) grounds for seeking review of the Ruling dated 31st July 2017, however it appears the Applicant is seeking review of the Court's ruling on the basis of an error apparent on the face of record. During the hearing of the Application, the Applicant shifted the goal post and urged there is a new and important matter or evidence and that there also exists other sufficient reasons to warrant review of the Honourable Court's orders of 31st July 2017. I shall therefore proceed to interrogate whether any of the three grounds of review have been established in this Application.

9. The Applicant urge there is discovery of a new and important matter or evidence that could not be produced at the time of the hearing of the Application. It is contended that the Applicant was not in possession of the Bank statements which were crucial in the determination of the issue of the interest rate applied by the Defendant. That it was after the Court issued its ruling allowing the Applicant to be furnished with detailed account showing any interest charged on credit facilities since 14th September 2014, it was able to make the discovery of a new and important evidence. That further following an order on 13th December 2017 for joint reconciliation, the status of accounts presented new and important facts which neither the Court nor the plaintiff/Applicant had an opportunity to look at and consider during the hearing of the Application emerged.

10. It is contended by the Applicant that the Defendant/Applicant had intentionally misled the Court in believing that the interest that had been charged and failed to be disclosed to the Court, the Bank had calculated and charged interest on discretionary basis and ignored the provisions of Section 33B of The Banking Act; and went on to charge interest above the contractual rate or pre-calculated, predetermined or agreed interest.

11. A new and important evidence must be that which after exercise of due diligence, was not within the party's knowledge or could not be produced at the time the order was made. In the instant matter, the Applicant had not been provided with its Bank statements; and could not establish the interest rate charged by the bank and whether interest rate was contrary to the provisions of section 33B of the Banking Act until the Court had made an order enabling the Applicant to be supplied with its Bank statements and reconciliation was done. The Court was misled to believe that interest rate was pre-determined and pre charged taking into consideration of the content of section 33B of the Act. The Applicant discovered after reading the statement, that the Defendant had misled the Court that it was charging the interest rate at the contractual rate when indeed they had been charging interest at Bank's sole discretion and that the Bank was also charging interest on the facilities at different discretionary rates, some as high as 28%; and that the interest rate was not pre-calculated, predetermined and agreed upon as the Defendant had claimed since a pre-calculated rate would mean that the interest rate would have stagnated at a flat rate of 14% as per the letter of offer dated 8th May 2015.

12. For Applicant to satisfy the discovery of new and an important evidence it has to show that it could not have produced the new evidence in spite of exercise of due diligence, that it had no knowledge of the existence of the evidence, or that it had been deprived of the evidence at the time of trial. I have therefore carefully considered the Applicant's evidence, and I am satisfied it had been deprived of the crucial evidence at the time of the trial and secondly the Defendant deliberately misled the Court and failed to disclose material relevant facts during the hearing and pending the determination of the issue pending before the Court at the time of the trail. The non-disclosure in my view deprived the court crucial material facts for its consideration among all other relevant evidence and make a decision not based on all facts and as such I find justice could not have been done to both parties as required. It is my finding therefore that the Applicant has satisfied the grounds herein that would justify the granting of the Application for review of the Courts' order of 31st July 2017.

13. I now turn to consider whether there is any other sufficient reason to warrant granting a review. My understanding of any sufficient reason for review is not limited to whether it's a new and important evidence or whether due diligence has been exercised but it should be a reason that is good enough/sufficient upon interrogation and which does not lie well in the face of justice.

14. In the instant matter, it is urged the Defendant could in referring to the Applicant, failed to disclose material facts and proceeded to mislead the Court on the charging of the interest. The defendant acted contrary to section 33B of the Banking Act. There is also admission that the Defendant's letter dated 16th February 2018, that they overcharged the interest rate; meaning they all know they acted contrary to the parties contractual Agreement and deliberately choose not to disclose their position to the Court. Should the Court of now shut its eyes on such a matter and let the Defendant continue benefiting from a ruling that was obtained through misleading the Court and unjustly? I find the Court that would so, would be abdicating from its duty to give justice to all irrespective of their status as enshrined in Article 159(2) of the constitution of Kenya 2010.

15. I have no hesitation to state that Court of law is are required to do substantive justice to all litigants. This Court has jurisdiction and power in execution of its duty to correct and revisit any injustice caused by an earlier on order or ruling of the Court. A party should not be subjected to a ruling that has been obtained either through non-disclosure of material facts or through misleading the Court. It is Court's duty to ensure that its jurisprudence stands on proper facts and the application of law on the correct facts short of that there would be no justice especially where the party has admitted going behind the central agreement and openly having overcharged on the interest.

16. I now turn to consider whether the Application was made without unreasonable delay. The ruling in this matter was delivered on 31st July 2017 and the present Application was filed on 14th September 2017; after a period of 1½ months since the delivery of the ruling sought to be reviewed; not this in my view is an inordinate delay.

17. Having said so much, I find the Applicant has demonstrated that its application is justified; bearing also in mind that the Defendant has through its letter of 16th February 2017 admitted that it overcharged the interest rate and further the Hon. Justice Onguto (deceased) in his Ruling of 31st July 2017 , in paragraph 42 having stated as follows;

> *"I would agree with Ms. Muraguri that, for as long as Section 33B of the Banking Act is in force and there is in existence a credit facility, a bank ought to be obligated to observe the provisions of law as to statutory rates of interest. It would likely lead to an absurdity to argue that facilities which existed prior to 14th September 2016 may be subjected to any contractual, even usurious, rates notwithstanding the rather express prohibitory provisions of the Act."*

18. I have considered the Defendant's grounds of opposition and in view of the conclusion that I have come to, find that the same are without merits, I find the application do meet the established threshold for review of the Court order and that it does not amount to a disguised appeal.

19. The upshot is that the Applicant's Application dated 7th September 2017 is merited and is granted in terms of prayer No. 7 of the Application; being as follows:-

> **a) The Courts Order of 31st July 2017 is reviewed to the extent that the interest rate between the Plaintiff and the Defendant herein was not predetermined, pre-calculated and earned as at 31st July 2017 and that the Defendant is hereby ordered to comply with Section 33B of the Banking Act and apply the lawful rate being 14% interest on all the loan facilities the Plaintiff has with the Defendant.**
>
> **b) Costs of the Application to the Applicant/Plaintiff**.

Dated, signed and delivered at Nairobi this 20th of December 2018.

J. A MAKAU

JUDGE