



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NO. 634 OF 2012**

**NATIONAL BANK OF KENYA LIMITED..... APPELLANT**

**- V E R S U S -**

**BART MASILA MBUVI .....RESPONDENT**

**JUDGEMENT**

1. National Bank of Kenya Ltd, the appellant herein filed an action before the resident magistrate's court at Milimani Commercial courts vide the plaint dated 23<sup>rd</sup> May 2003 in which it sought for *inter alia* judgment in the sum of ksh.170,476/70 plus interest at the rate of 23% p.a. from 20.9.2009 until full payment against Bart Masila Mbuvi, the respondent herein. The respondent filed a defence and a counter-claim to deny the appellant's claim. When the case came up for hearing the respondent did not attend court hence the case proceeded to hearing *ex parte*. In the end Hon. L. W. Kabria, learned resident magistrate, entered judgment in the sum of ksh.3,611/08 with costs in favour of the appellant and against the respondent. Being aggrieved, the appellant filed this appeal to challenge the decision.

2. On appeal, the appellant put forward the following grounds:

***1. The learned magistrate erred in law and fact in finding that the balance due to the appellant in respect of account number 4544 9000 0005 7972 as at March 2000 was ksh.3,611 and not ksh.126,722.40/= (after disregarding account number 4273 5000 00005 7997 to which the sum of kssh.126,722.40 was transferred to.***

***2. The learned magistrate erred in law and fact in finding that the appellant was not entitled to the interest rate of 23% pleaded or any interest on the sums owed by the respondent even after the appellant witness un-contradicted evidence to the effect that the appellant lowered the interest charged on the outstanding sum from 60% p.a. 5% p.m to 23% p.a as part of restructuring the debt and to the benefit of the respondent.***

***3. The learned magistrate erred in law and fact in finding that the restructuring and assignment of new account numbers by the appellant in the course management of the original account number (4544 9000 0005 79720 having not been disputed by the respondent when the statements of account were sent to him, was well within the contract between the appellant and the respondent.***

***4. The learned magistrate erred in law and fact in finding that the appellant was not entitled to charge further interest on the sums reflected at the end of the statement over and above the 5% monthly interest.***

***5. The learned magistrate erred in law and fact in finding that there was a consolidation of***

***accounts number 4273 5000 0005 7972, 4544 9000 0005 7972 and 4700 0900 0005 7972 when what happened was the transfer of the sums owed in the course of managing the original account, at no point was the sum owed settled.***

3. When the appeal came up for hearing this court gave directions to have the appeal disposed of by written submissions. At the time of writing this judgement, the appellant was the only party which had filed its submissions.

4. I have re-evaluated the case that was before the trial court. The appellant's claim is said to have arisen from the respondent's use of a credit card provided by the appellant. In the trial court, the appellant tendered the evidence of a single witness, Samuel Gichohi Kiura (PW1). It is the evidence of this witness that the respondent successfully applied to the appellant for a credit facility and was granted credit card no. 4544 9000 0005 7972. It was also the evidence of PW1 that the aforesaid credit card was subject to terms and conditions which specified the mode of payment for use of the credit card and how the billing was to be done. There was also the rate of interest chargeable. PW1 stated that the respondent used the credit card to obtain goods and services on credit from various establishments which expenses were settled by the appellant and the statements of accounts sent to the respondent on monthly basis for settlement. PW1 tendered documentary evidence showing that the first monthly statement was issued to the respondent in September 1996 with an opening balance of ksh.8,820.36 with an explanation for the opening balance as balance from Ken Card which was transferred from Kenya finance Bank Ltd (KenCard) to the appellant pursuant to a deed of assignment of September 2002 following the liquidation of Kenya Finance Bank Ltd. The appellant's witness further tendered documentary evidence in form of statements showing that the respondent had an outstanding balance of kshs.170,476/70 as at 20<sup>th</sup> September 2002. On the basis of the above evidence the trial magistrate gave judgment in favour of the appellant as stated hereinabove.

5. In the first ground of appeal, the appellant is of the view that the trial magistrate erred when she found that the balance due was ksh.3,611/08 and not ksh.126,722/40 in account no. 4544 9000 0005 7972 after disregarding account no. 4273 5000 0005 7997 to which a sum of kshs.126,772/40 was transferred. I have carefully examined the judgement of the trial magistrate and it is apparent in page 5 of the judgment that the trial magistrate expressly stated that the total balance due on account no. 4544 9000 0005 7972 is kshs.3,611/08. The learned Resident magistrate proceeded to hold that the Respondent was indebted to the appellant in the sum of kshs.3,611.08 without any further claim for interest. I have carefully looked at the page stated in the aforesaid judgment and it is apparent that three figures are shown in as the balance due on account no. 4544 9000 0005 7972. First is the previous balance of ksh.126,722.39. This appears to suggest that the respondent had not settled the above amount which was adjusted and transferred to account 4273 5000 0005 7997 as ksh.126,772.40.

6. Secondly, is the sum of kshs.3,611.08 which the trial court deemed as the balance due on account no. 4544 9000 0005 7972 and owed by the respondent to the appellant. Had the trial court acknowledged that the sum of ksh.126,722.40 was outstanding too she would have made an award in favour of the appellant for ksh.131,333.47 calculated as follows  $126,722.34 + 3,611 = 131,333.47$  and not ksh.3,611.08.

7. The second ground of appeal is to the effect that the trial resident magistrate erred when she held that the appellant was not entitled to the interest rate of 23% as pleaded. What is not in dispute is that the appellant sought for interest in prayer 5 of its plaint. It is also clear that as of 20<sup>th</sup> September 2002 the closing balance was ksh.170,676/70 for the credit facility. The appellant tendered evidence showing that in clause 5 of the conditions of the contract the rate of interest was 5% per month which translates to 60% p.a. PW1 stated that the appellant bank reduced the rate of interest from 60% to 23% p.a. PW1 averred that the reduction of interest rate was to the benefit of the respondent which assertion was not contested by the respondent. I am convinced that the appellant was entitled to charge interest.

8. In the 3<sup>rd</sup> and 5<sup>th</sup> grounds of appeal the appellant argued that the trial resident erred when she made a finding to the effect that there was a consolidation of accounts yet there was a transfer of the sums owed in the course of managing the original account. A critical look at the judgment will reveal that the trial resident magistrate disregarded substantial part of the appellant's claim on the basis that the appellant's

claim was based on consolidated accounts as against the contract between the appellant and the respondent. With respect, the appellant did not consolidate the accounts but it merely transferred the funds from the original account when it became bad and transferred to a fresh account for managing bad debts in line with Clause 10 of the conditions of use of the credit card. I am satisfied that the respondents were furnished with statements of account on a monthly basis and the figures were not adjusted.

9. In the end and on the basis of the above reasons this appeal is allowed with the consequential order that the award of kshs.3,611.30 is set aside and is substituted with an order entering judgment in favour of the appellant in the sum of ksh.131,333.45 with interest at the rate of 23% p.a from 20.9.2002 until payment in full.

10. The appellant to have costs of the appeal and that of the suit.

**Dated, Signed and Delivered in open court this 29<sup>th</sup> day of September, 2016.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent