



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL AND TAXATION DIVISION**

**CIVIL SUIT NO. 179 OF 2007**

**NAIROBI UJUZI COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**EQUITORIAL COMMERCIAL BANK LIMITED.....DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced this suit against the Defendant by a Plaint dated 10<sup>th</sup> April, 2007 seeking:-
  - a. A declaration that the Plaintiff is not liable to pay any interest, interest on arrears, default charges and cumulative interest thereon or any penalties under whatever label to the Defendant.
  - b. An injunction restraining the Defendant whether by itself, its officers, servants and/or agents from advertising for sale or otherwise purporting to exercise statutory power of sale over the Plaintiff's property L.R. No. 209/9096, Nairobi (*'the property'*).
  - c. An order of account with respect to the Plaintiff's loan account with the Defendant.
  - d. An order requiring the Defendant to credit the Plaintiff's loan account number 1031100478 (*'loan account'*) with the sum of KShs. 6,657,920.10 or such other sum as may be found to have been overcharged by the Defendant against the Plaintiff's loan account.
  - e. General damages for breach of contract.
  - f. Costs of the suit.
  - g. Interest on (d), (e) and (f) above at court rates.
  - h. Such further or other relief that this court may deem fit and just to grant.
  
2. The Plaintiff claimed that the Defendant advanced it a loan of KShs. 10,000,000/= for the construction of a commercial building (hereinafter "the property") on or about 17<sup>th</sup> January, 1996. The Plaintiff agreed to charge the property and a charge dated 10<sup>th</sup> September, 1996 was duly executed and registered in favour of the Defendant. The said loan was advanced at an interest rate of 30% p.a. with monthly instalments of KShs. 250,000/= with effect from 31<sup>st</sup> January, 1997. The balance was to be paid in lump sum at the expiry of the loan period which was stipulated to be 31<sup>st</sup> January, 2000. It was claimed that by a letter dated 2<sup>nd</sup> February, 2000, the Defendant renewed the loan facility by advancing the Plaintiff KShs. 8,000,000/= at an interest of 24% p.a. for four (4) years with monthly instalments of KShs. 250,000/= expiring on 31<sup>st</sup> December, 2003. That the security for the said sum was the legal charge on the property and the Guarantees of the Directors of the Plaintiff, Mr. Joginder Singh Sokhi and Mrs. Jit Kaur Sokhi for KShs. 8,000,000/= each.
  
3. The Plaintiff's gravamen are that; the interest rate of 30% was contrary to the express provisions of the Central Bank of Kenya (Amendment) Act 2000 (*'CBK Act'*) and Legal Notice No. 1458 of 1990; that the

Defendants purported to give a null and void statutory notice of sale of the property claiming an alleged outstanding sum of KShs. 2,629,379/35 as at 31<sup>st</sup> December, 2006.

4. The Plaintiff averred that the statutory notice of sale is null and void because it is not indebted to the Defendant. On a without prejudice basis, it was averred that the Defendant has constantly throughout the loan period debited the loan account with illegal and unjustified interests, interest on arrears and other charges. It was stated that M/s Interest Rates Advisory Centre Limited ('IRAC') was appointed to compare the interests charged by the Defendant and those ought to have been charged, and it emerged that the Plaintiff was overcharged a sum of KShs. 6,657,920/10. Due to the aforesaid, the Plaintiff claimed that the Defendant acted unlawfully and breached its contractual duties and obligations as contained in the letter dated 17<sup>th</sup> January, 1996 and 2<sup>nd</sup> February, 2000 and the charge.

5. In support of its case, the Plaintiff called two witnesses. According to Baljit Sokhi (PW1) who is the Manager of the Plaintiff by a letter dated 5<sup>th</sup> January, 1997, the Defendant demanded payment of KShs. 2,629,379/35 which money was not paid because a forensic audit was on-going but that KShs. 2.5 Million was paid to the Defendant at the time this suit was filed. He confirmed the engagement of IRAC which determined that the Defendant had overcharged the Plaintiff by KShs. 6,657,920/10. On cross-examination, he stated that the interest rate of 30% was agreed upon by the Plaintiff but was later found to have been overrated. On reference to clause 6 of the agreement (P. Exhibit 1), he confirmed that it read that the bank had a right to vary the interest and that the Plaintiff would accept the record of the bank. He stated that at some point, the Defendant agreed that they were overcharging more than the normal interest on the pretext that the loan was unsecured. He stated that the Defendant debited the Plaintiff's current account. That at that time, the Plaintiff was going through financial difficulty. That after complaining about the overcharge, the rate was reduced to 14%. On re-examination, PW1 stated that while both parties were bound to the terms and conditions of their agreement, they were to observe the law. He admitted default of instalment payment on the part of the Plaintiff but stated that it was realised that the Plaintiff was being overcharged.

6. Wilfred Abincha Onono (PW2) who is a Certified Public Accountant working with IRAC at the time explained that in recalculating the interest, the entries in the statements were captured. That the contractual interest was then applied as varied where necessary. Where it was found that there was a legal maximum applicable, substitution was done with what rate the bank had used. He stated that the legal maximum rate of 19% was applied for the period of 1996 to April, 1997. That prior to 1997, there was a legal control regime of interest in the country. That in Gazette Notice No. 4939 of 1989, up to 15% was applicable for loans and advances of less than 3 years. That Gazette Notice No. 1458 of 1990 published on 27<sup>th</sup> August, 1990 revoked Gazette Notice No. 4939 and placed interest at 19%, Gazette Notice No. 1617 of 1990 had the same provision as 1458 and Gazette Notice No. 3348 of 1991 revoked Gazette Notice No. 1617. He stated that Section 39(1) of the CBK Act remained in force until 17<sup>th</sup> April, 1997 but was later revoked by the passing of Section 17 of Act No. 9 of 1996. That he therefore used the rate as was applied by the bank until 31<sup>st</sup> December, 2000 then thereafter from 1<sup>st</sup> January, 2001, used the rate by CBK being the 91 day Treasury Bill rate plus 4%. He stated that the effect of his recalculation was that by April, 2003, the loan had been fully repaid. That by 30<sup>th</sup> April, 2008, the Plaintiff had made an overpayment of KShs. 4,041,040/75. On cross-examination PW2 admitted that he did not factor in certain credits that were not availed to him but that if he did, the situation would have been worse than it was.

7. In its defence, the Defendant contended that the rate of 30% was not contrary to the CBK Act or Legal Notice No. 1458 of 1990 and that in any event the same was repealed on 17<sup>th</sup> April, 1997. The Defendant also contended that the interest rate of 24% was rightly applied for the second loan of KShs. 8 Million.

8. According to Jokoniah Achieng' Anjoro (DW1) who was at the material time employed by the Defendant as the Recovery Manager, in the year 1991, the interest rate was decontrolled and each bank started charging negotiated rates. Referred to The Replying Affidavit of Khadija Mohamed who was the Defendant's Credit Services Manager, he confirmed that Khadija admitted that the interest rate between 17<sup>th</sup> January, 1996 to 17<sup>th</sup> April, 1997 was 19%. He however stated that the Defendant did not charge any interest during that period. Referring to the defence, he confirmed that it stated that Legal Notice No.

1458 of 1990 was repealed on 17<sup>th</sup> April, 1997 and that it had no relevance to the facility advanced and acknowledged the variance between his testimony and what was stated in the defence. He confirmed that the interest rate in Legal Notice 1458 of 1990 was 19% p.a. and that between 17<sup>th</sup> January, 1996 and 1997, the maximum interest rate was 19% and that the Defendant charged the Plaintiff 30% between the period.

9. DW1 confirmed that the interest rate charged between May, 1996 to April, 1997 was way above the 19% set by the CBK. He further confirmed that in his statement, he said that the Defendant did not charge any interest between that period. It was his testimony that if the monthly rate of 2% was applied in February, 2000 by which time the balance outstanding was KShs. 7,979,994/00, the amount payable would be KShs. 152,630/= but that the Defendant charged KShs. 164,669/=. For the month of March, 2001, he stated that the amount chargeable was KShs. 126,424/= but that the Plaintiff was charged KShs. 124,696/= thus the bank must have applied a lesser interest rate. He testified that he could not tell the specific service for which the payment of KShs. 29,000/= was made to Kipkorir, Titoo and Kiara advocates and that if the said figure was deducted, the outstanding balance as at 21<sup>st</sup> January, 2008 would be KShs. 100,379/35. He confirmed that the only security document prepared was the charge and that if the debit of KShs. 273,425/= being legal fees is deducted, the balance as at 1<sup>st</sup> April, 2008 would be KShs. 173,046/35. That the account should have been credited. He stated that although the Plaintiff raised concerns with the Defendant, the Defendant did not act on the Plaintiff's concerns. After the close of the testimonies, the parties filed written submission on their respective cases.

10. I have considered the pleadings, the testimony of witnesses and the written submissions of Learned Counsel. In my view, the issues that fall for determination in this matter are:-

- a. Was there an interest rate control regime during the pendency of the facilities in question?
- b. Was the rate of interest charged by the Defendant lawful?
- c. Whether the Plaintiff is indebted to the Defendant or at all.
- d. Is the Plaintiff entitled to the reliefs sought?

11. Section 39 of the Central Bank of Kenya Act, CAP 291 Laws of Kenya, provided as at January, 1996 as follows:-

***“39. 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. ....”***

12. My understanding of the above provision, which was the law applicable at the time the subject matter of these facilities, is that it gave power to the Central Bank of Kenya, with consultation with the then finance minister, to fix the minimum and maximum rates of interest chargeable or payable for deposits and loans.

13. Pursuant to that power, prior to the date of the first facility by the Plaintiff of 17<sup>th</sup> January, 1996, there were in force several Gazette Notices. First there was Gazette Notice No. 4939 of 16/10/89. Then came Gazette Notice No. 1458 of 27/3/90 which came into effect on 1/4/90. According to the latter Notice, the maximum rate of interest chargeable was 19% per annum. Barely a day after Gazette Notice No. 1458 of 1990 came into force, Gazette Notice No. 1617 of 1990 was published on 2/4/90 and came into force on 1/4/1990. This latter Gazette Notice superseded both Gazette Notice Nos. 4939 of 1989 and 1458 of 1990. Then on 23/7/91, the Bank published Gazette Notice No. 3348 of 1991 which revoked Gazette Notice No. 1617 of 1990. There was no other Gazette Notice that was subsequently published.

14. It is the Plaintiff's contention that by revoking Gazette Notice No. 1617 of 1990, Gazette Notice No. 1458 of 1990 was revived thereby returning to interest rate control regime with a maximum of 19% per annum. **BLACKS LAW DICTIONARY NINTH EDN, 2009 Thompson Reuters** at pg 1576 defines the term supersede to be:-

***“To annul, make void, or repeal by taking the place of .....*”**

While the **CONCISE ENGLISH DICTIONARY 12<sup>TH</sup> EDN OXFORD UNIVERSITY PRESS** at page 1232 define the term revoke to mean:-

***“.....end the validity or operation of ( a decree, decision or promise).....”***

15. In view of the foregoing, I am of the view and hold that once Gazette Notice No. 1617 of 1990 superseded Gazette Notice Nos. 4939 of 1989 and 1458 of 1990, Gazette Notice No. 1617 of 1990 annulled voided or repealed the said Gazette Notices. Gazette Notice No. 1617/90 took the place of Gazette Notice No.1458 of 1990. Then when Gazette Notice No. 3348 of 1991 revoked Gazette Notice No. 1617 of 1990, it ended the validity of that notice. In this regard, I will apply this scenario to the interpretation given to the legal position when a law or subsidiary legislation is repealed whereby; the previous law is never revived unless clear words are used. Section 20 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya provides:-

***“20. Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provision before repealed unless words are added reviving the written law or provisions.”***

16. In my view therefore, there having been no express words in the Gazette Notice of 3348 of 1991 specifically reviving Gazette Notice of 1458 of 1990, the latter notice having been earlier on annulled or repealed, remained repealed as such and was never revived by the revocation of Gazette Notice No. 1617 of 1990. Since Section 39 of the Act was only permissive and not mandatory, that an interest control regime be maintained, I hold that after 23<sup>rd</sup> July, 1991 until 1<sup>st</sup> January, 2001 there was no interest rate control regime. I make this finding from the evidence on record notwithstanding the averment in paragraph 8 of the Replying Affidavit of Khadijah Ibrahim sworn on 16<sup>th</sup> April, 2007 to the contrary.

17. In view of the foregoing, the rate of interest of 30% and later on 24% agreed between the parties was valid and contractual. Accordingly, I will at this stage reiterate what the court stated in the case of **National Bank of Kenya Ltd Vs PipePlastic Smakaloti (K) Ltd and Anor (2001) eKLR** that:-

***“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, framed or undue influence are pleaded and proved.”***

In the present case, neither fraud, coercion or undue influence was pleaded nor proved. The Plaintiff's contention of being charged unlawful interest by the Defendant therefore fails.

18. As regards the evidence of PW2, I am not prepared to say that he same was biased and unreliable as urged by Counsel for the Defendant. There was no evidence to make such a conclusion. What is clear however is that, the evidence of PW2 was based on wrongful interpretation of the law.

19. The next issue is whether the Plaintiff owes the Defendant and if so, how much. I am aware that the Plaintiff has prayed for an order of accounts. I am aware that DW1 made several admissions that the account as kept by the Defendant, even applying the contractual rate of interest of 30% and 24%, was not entirely accurate. Indeed, there was ample evidence that other charges that were levied, which were not part of the interest at the rate aforesaid, were in contravention of Section 44 of the Central Bank of Kenya Act, Cap 491 Laws of Kenya. Mr. Onono PW2 was able to capture these charges at page 132 of PExh1. Of course these charges continued to increase the Plaintiff's repayment burden. To the extent that the Defendant did not produce any evidence of having obtained the Minister's consent, those charges were illegal.

20. I have considered the amount involved. It is insignificant as it amounts to only Ksh.12,500/=. I have also considered the amount that was alleged to have been due as at the date of this suit. This suit was filed on 10<sup>th</sup> April, 2007. According to the statement of account at pages 59 to 64 of DExh1 (the

Defendant's Bundle), the amount due as at 30/3/07 was Kshs.2,721,195/-. By a ruling of this court made on 18/7/07, the Defendant was ordered to pay to the Defendant a sum of Kshs.2,500,000/- which it paid on 18/12/07. On the said payment, the Defendant proceeded to reverse the suspended interest of Kshs.357,175/=. Accordingly, the amount due as at that date is shown to be Kshs.129,379/35. There are other debits made which increased the amount due to stand at Kshs.458,053/35 as at 1/04/08. These include lawyer's fees of Kshs.273,426/= suspended interest totalling Kshs.26,249/- and other payments to Kipkorir Titoo & Kiara. These are shown in the statements by the Defendant produced as pages 41-43 of PExh2.

21. Although the Plaintiff was bound to pay costs and expenses of the Defendant in the latter trying to recover its outlay or enforce its security, that in my view was only applicable to costs incurred before the suit was filed. Any legal costs after the suit was filed have to abide the outcome of the suit. The Defendant contended that the said payments being legal costs/fees are cost and other expenses under the charge which were properly debited. There was no evidence to show that these were expenses incurred in the process of enforcing the security. Accordingly, there was no basis of charging the same and debiting the account with the same.

22. In view of the foregoing, I see no basis of ordering any accounts. I find that there was an amount due from the Plaintiff to the Defendant as at 18/12/07. The said sum was Kshs.129,397/25. That is the sum due to the Defendant together with the contractual interest from the said date until payment in full. Upon payment, the Plaintiffs title may be released to it by the Defendant.

23. Accordingly, I find that the Plaintiff has not proved its case to the required standard. The suit is therefore dismissed with costs to the Defendant

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**A. MABEYA**

**JUDGE**

Signed, Dated and Delivered at Nairobi on 17<sup>th</sup> day of September, 2015.

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**JUDGE**