REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 53 OF 2004

KENYA COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

RUPA (K) LIMITED

DAVID KARANJA KAMAU

CYRUS BUIMWE KAMAU.....DEFENDANTS

J U D G M E N T

1. By a Plaint dated 23rd January 2004 the Plaintiff, a banking institution, sued the Defendants claiming judgement as follows:-

a. ***Judgement against the 1st Defendant for Kshs.3,197,396.96 together with interest thereon at the rate of 23% per annum, from 30th September 2003 until payment in full.***
b. ***Judgement against the 2nd Defendant for Kshs.450,000 together with interest thereon at the rate of 21 % per annum from 23rd September 2003.***
c. ***Judgement against the 3rd Defendant for Kshs.450,000 together with interest thereon at the rate of 21% per annum from 23rd September 2003.***

But so that the total amount recoverable herein from the 2nd and 3rd Defendants shall not exceed the indebtedness of the 1st Defendants.

d. ***Costs of the suit and interest therein at court rates***

2. The suit is premised on continuing guarantees and indemnities dated 29th February 1996 signed by the 2nd and 3rd Defendants in consideration of the Plaintiff affording to the 1st Defendant certain banking facilities as therein set out and wherein the 2nd and 3rd Defendants guaranteed and bound themselves for the payment to the Plaintiff on demand any sums due under the said guarantees and indemnities. On 25th February 1997 the 1st Defendant is alleged to have been indebted to the Plaintiff in respect of the said guarantees and indemnity, loans paid and interests in the sum of Kshs.906,086.25. The total amount recoverable from the 2nd and 3rd Defendant under the said continuing guarantees was not to exceed against each of them, the sum of Kshs.450,000 together with interest thereon at the rate applicable to the facilities from the date of demand until payment in full. It is alleged that when the above sum of Kshs.906,086.25 together with interests at 46.25% per annum was demanded first from the 1st Defendant, and subsequently from the 2nd and 3rd Defendants the Defendants refused, neglected and failed to pay the same hence the necessity for this suit.

3. The Defendants filed a joint amended defence and counter-claim, in court on 23rd February 2007. In the defence and counter-claim the Defendants denial virtually every aspect of the claim, but added that indeed there was overdraft facilities granted to the 1st Defendant by the Plaintiff and which were secured by the 2nd and 3rd Defendants through the said indemnities and guarantees. In addition the 2nd Defendant charged L.R. No. KWALE/MAJORENI/1499, KWALE/WASINI ISLAND/356 and KAJIADO/NTASHART/250 with the Plaintiff as additional security for the said facilities, and those securities are still held by the Plaintiff to date. While admitting that certain advances were made to the 1st Defendant upto 1994, the 1st Defendant denied that it owed the Plaintiff Kshs.906,086.25 as at 25th February 1997 as claimed in paragraph 7 of the Plaint.

4. The 1st Defendant in its defence alleged that its relationship with the bank flourished upto 30th April 1995 when the Plaintiff refused to review the said facility and started levying unlawful rates of interest, levies and other penalties and charges to the account. There was a disagreement when the 1st Defendant found out that the rate of interest charged on the facilities by 26th March 1996 amounted to 129.5% per annum. This fact, the 1st Defendant alleges, was accomplished in contravention of the applicable statutes namely Section 39 of Central Bank of Kenya under which prevailing interest rates were set at 16.5% per annum and Section 44 of the Banking Act which barred all changes in banking rates without prior ministerial approval. The 1st Defendant, upon securing professional services of M/s Interest Rates Advisory Centre Limited, who are alleged to be experts in bank loan reconciliation, recalculated and affirmed, *inter-a-alia*, that contrary to the Plaintiff's claim as at 25th July 1995, the recalculated debit balance was Kshs.42,227.92 and not Kshs.394,676.00 claimed by the Plaintiff, and that indeed the 1st Defendant's account had been overcharged by Kshs.3,122,054.37 as at July 2002 on account of illegal interest and penalties. On that basis the Defendants filed a counter-claim praying for the following orders, namely:-

a. ***Declarations that:-***
    i. ***The Plaintiff charged the 1st Defendant's overdraft account number 240751571 and loan account number 31396951025 illegal and unconscionable interest between 25th July 1995 to 31st July.***
    ii. ***The legal maximum rate of interest permitted by Section 39 Cetnral Bank of Kenya Act between 25th July 1995 and 17th April 1997 was 16.50% per annum and not 129.5% per annum.***
    iii. ***Subsequent thereto, vide the amendments introduced by Central Bank of Kenya (Amendment) Act, 2000, the legal maximum rate of interest permitted was the monthly 91 day TB rate plus a margin of 4%.***
    iv. ***Contrary to Section 44, Banking Act, the Plaintiff herein charged the 1st Defendant's overdraft account illegal charges amounting to Kshs.171,573.000 upto 25th July 1995 without the required prior ministerial approval.***
    v. ***There is a recalculation difference in the outstanding balance on account as at 31st July 2002 between the Plaintiffs claimed balance of Kshs.3,197,396.96 and the Defendants admitted balance of Kshs.189,466.20 DR of Kshs.3,386,863.10 in favour of the 1st Defendant.***
    vi. ***The Plaintiff failed, neglected or refused to credit the 1st Defendant's account with deposits of Kshs.299,154.00 between 25th July 1995 and 15th September 1999 which would have liquidated the outstanding debit balance of Kshs.75,342,59 as at 31st July 2002 leaving a credit balance of Kshs.223,811.41 on account.***
    vii. ***Due to the Plaintiff's several variations of the balances on account without prior notification to the guarantors, the 2nd and 3rd Defendant liability under the said guarantees had been discharged.***
b. ***A permanent injunction order to issue to restrain the Plaintiff herein its servants and/or agents from moving to sell the securities herein namely L.R. No.s KWALE/MAJORENI/1499; KWALE/WASINI ISLAND/356 and KAJIADO/NTASHART/250 or otherwise howsoever moving to enforce the guarantees herein against the 2nd and 3rd Defendants herein.***
c. ***Costs***
d. ***Interest***

5. The hearing of the matter commenced before me on 21st June 2012. The Plaintiff called one witness **FRANCIS ROTICH (PW 1)**, whose testimony was based on his witness statement dated 24th January 2012. In the Statement, which he took the Court through during his evidence in Chief, he affirms that the Plaintiff did advance monies to the 1st Defendant as particularly captured in the renewal of overdraft facility letter dated 22nd January 1996. The said letter is to be found at page 1 of the Plaintiff's Supplementary Bundle of documents dated 24th January 2012. He referred to instruments of continuing guarantee and indemnity dated 29th February 1996 where in consideration of the Plaintiff affording the 1st Defendant certain banking facilities, the 2nd and 3rd Defendants bound themselves to pay on demand to the Plaintiff every sum that might be demanded from them, provided that the total amount recoverable from them would not exceed KES 450,000 each, plus interest thereon. The said instruments of continuing guarantee and indemnity are to be found at page 82 to 93 of the Defendant's list of documents dated 14th April 2008. Mr. Rotich went on to state that as at 1st September 1997, the debt from the 1st Plaintiff stood at Kshs.770,000 which went up, due to non payment, to Kshs.3,197,396.96 as at 30th September 2003, on which sum interest continued to accrue. These balances are found in Statements exhibited by the Defendants, at page 157 and 160 respectively, of the Defendant's list of documents dated 14th April 2008. The witness emphasized that demand letters issued to the Defendants to settle the sum outstanding, have not been successful. He referred to numerous letters of admission and requests for indulgence made by the Defendants and their Advocates. These letters are captured in detail in the Plaintiff's list of documents dated 18th April 2008.

In particular, the 1st Defendant in a letter dated 26th October 1999, written on its behalf by the 2nd Defendant, wrote to the Plaintiff Bank as follows:

"But given time, it is likely that we can get another purchaser willing to pay something higher than *Kshs.****750,000. It is in this connection that we write to you and it is our prayer that you stand over the auction for some ninety days within which we can try to get a better price and too, try to get the matter of the debt of*** *Kshs.****720,000 referred to in earlier communication finalized with the settlement of this amount. In consideration of your acceding to our request, we undertake to pay some*** *Kshs.****150,000 in the 90 days commencing with*** *Kshs.****50,000 later this week or early next week,*** *Kshs.****50,000 45 days thereafter and*** *Kshs.****50,000 on day 90."***

This letter appears at page 15 of the Plaintiff's list of documents dated 18th April 2008. Mr. Rotich testified that the 2nd Defendant who authored all correspondence on behalf of the Defendants, describes himself in his Witness Statement dated 19th June 2012 as "***the Managing Director and Majority Shareholder of the 1st Defendant***".

Mr. Rotich also referred to at least three attempts made by the Plaintiff to auction the charged properties, but the Plaintiff suspended the same, by way of indulging the Plaintiff's requests for him to privately obtain better prices. Documents confirming the previous attempts to sell the charged properties have been exhibited at page 41 to 67 of the Plaintiff's list of documents dated 18th April 2008.

Mr. Rotich went to on to refer to a fourth attempt to auction the charged properties by Garam Investments. In this letter dated 7th March 2006, the 2nd Defendant writes to Garam Auctioneers, copied to the Bank, in the following terms:

"I would like to update you so that you are in the know. Rupa Kenya Limited (the 1st Defendant ceased all operations well before the year 2000, and for that reason the company has neither any property nor an office. It has no bank account even. The vehicles you proclaim have all been disposed off…..This notwithstanding, I have had several meetings with the Bank and I have offered to sell two properties the Bank holds as security under private treaty. Please see attached. So the Bank is aware that something is going on towards finalization of the matter amicably. With this knowledge, I would like to request that you withdraw the proclamation as in any case you are likely to get no money out of this effort".

This letter is to be found at page 3 of the Plaintiff's supplementary bundle of documents dated 24th January 2012.

In order to put the certainty of the Defendant's admissions to rest, the the Defendants was so willing to have the charged properties disposed off to clear the debt, that on 20th March 2006, the 2nd Defendant on behalf of the Defendants, wrote to Mr John Ombuor of the Plaintiff in the following terms:

"In a meeting held in your offices, you introduced the undersigned to Mr Macharia of Watts Enterprises, who was also in your office, with a request that I add them to the list of the persons selling my properties by private treaty, so that this matter can be expedited. I have agreed with Mr Macharia that he will do that, and I enclose an authority to sell on my behalf. And a copy is attached".

The said letter is to be found at page 4 of the Plaintiff's supplementary bundle dated 24th January 2012.

The Authority to sell, issued by the 2nd Defendant on behalf of the Defendants, is to be found at page 5 of of the Plaintiff's supplementary bundle dated 24th January 2012. The authority authorized Watts enterprises to sell the charged properties "at a consideration of Kshs.2,000,000 or more." He undertook to pay Watts Enterprises "a commission of 5% of the sale price". He was also authorized to "make a contract of sale on our behalf which incorporate Law Society of Kenya conditions of Sale". Finally, the authority was said to be "valid and remain in force for N/A days".

The witness testified that the said authority to sell continues to be valid, even today, as it has never been revoked by the Defendants.

Mr. Rotich went on to testify on behalf of the Plaintiff bank, that since 1st September 1997, the 1st Defendant had only paid KES 79,068 Cents 50 with no payment made after that.

Mr. Rotich concluded by urging the Court to allow the prayers in its Plaint, and to dismiss the Defendant's counterclaim.

6. The Defendants called two witnesses **DAVID KARANJA KAMAU DW 1** testified that he is the 2nd Defendant and a Director in the 1st Defendant's Company with majority shareholding while the 3rd Defendant is the minority shareholder thereof. The witness adopted his witness statement filed in court on 19th February 2013. He testified that his relationship with the Plaintiff started in 1987 when the 1st Defendant sought a financial facilty of kshs.200,000 which was given subject to renewal. Between 1990 – 1994 the Plaintiff introduced daily charges of commissions and interests which had the net effect of increasing interest rates to 51% per annum. This, according to him was a contravention of Section 44 of Banking Act. In 1996 the Plaintiff served him with a Statutory Notice of kshs.906,086/= being debt and interest at 46.25%. (***see page 132 of Defendant's bundle***). They rejected this Notice as they did not incur the debt. On 21st August 1995 the 1st Defendant applied for an overdraft facility of kshs.400,000/= which was approved on 16th February 1996 and soon thereafter allegedly a further overdraft facility of kshs.500,000/= without a Notice to them or a request from them but they noted it on the Statutory Notice. The Plaintiff then purported to convert the outstanding overdraft into a loan of Kshs.770,000/= without any explanation as to how the figure was arrived at. The witness, then denied that the 1st Defendant was offered any loan by the Plaintiff. If there was any such loan, where were the terms thereof? He asked. The witness testified that the said overdraft and/or loan account was so poorly managed, that even money paid into it by the Defendants were reflected as debit entries instead of being credit entries. He gave the following examples. At page 157 of the Defendant's bundle is a copy of the account statement. On 1st September 1997 there is an entry of Kshs.770,000/= referred to as initial loan granted. On 2nd September 1997 the Defendant deposited a cheque for Kshs.13,475. This cheque, instead of reducing the Defendant's indebtedness by a similar amount, instead increased the 1st Defendant's indebtedness to Kshs.783,475 debit. The same is true of a cheque deposit for Kshs.20,286.70 on 3rd September 1998 which also increased rather than reduce the 1st Defendant's indebtedness. This is found at page 158 of the Defendant's bundle. The same position is true for Kshs.31,816.30 cheque deposited on 30th September 1999 (***see page 159***), and lastly a cheque deposit of kshs.52,675.95 made on 2nd September

2000 (***see page 160***) also did not reduce the Defendant's debt as expected. In total, the witness testified that a sum of kshs.118,254 deposited to reduce the loan actually increased the indebtedness of the 1st Defendant, and the increased indebtedness also meant that interest levied was done on a higher, incorrect figure and so, it was his testimony, that the interest charged were illegal and levies usurious.

7. On the issue of interest, the witness testified that interest levied was haphazard, irregular and illegal. Initially they were being charged at 36% per annum. On 30th September 1999 the interest rate hightened to 130% per annum. On 31st October 1999 interest went down to 49.2% per annum, while the following month it came to 48% per annum. In December 1999 interest was 62.4% (see page 159-160 of the Defendant's Bundle). Interest on penalties was also inconsistent. This state of affairs made them employ the services of Tax experts, M/s Interest Rates Advisory Centre (IRAC) who after going through the accounts informed them that they had overpaid the loan by Kshs.339,466/= which they claimed as part of the counter-claim herein. The witness testified that the bank did not consult them before converting the overdraft security into a term loan. The witness also denied allegations by the Plaintiff that the Defendants had admitted the claim herein. The bank was merely a dominant partner throwing its weight around. It however, cannot be allowed to break the law by charging illegal interests and levies and by converting an overdraft facility into a term loan with no known terms. He however, on cross-examination, agreed that as per the letter of offer displayed at page 1 of the Plaintiff's Bundle, the bank was at liberty to change interest rate. The witness then concluded by saying that all apparent admissions of the Plaintiff's loan and indebtedness which are documented in the Plaintiff's bundle were the result of duress and that the Defendants cannot be held liable therefore. He also testified that the 1st Defendant ceased operations more than 10 years ago. He finally submitted the Defendants bundle and his witness statement, as evidence before the court.

8. The 2nd Defence Witness was **WILFRED ABINCHA ONONO (PW1)** who testified that he is a consultant with M/s Interest Rates Advisory Centre (IPAC), which is a financial consulting company based in Nairobi. It undertakes objective and independent audits of borrowing contracts and interest recalculation with the aim of reverting any interest overcharges. He has done this business since 2001. Before that, he had worked as an accountant in many companies in Kenya. In this matter, he was retained by the Defendant to check and confirm whether the interest charged into the relevant account was correct. To do this the Defendants gave him statement of account number 240751571 which later changed to account number 313096951025. Upon examination of those statements of accounts and the legal charge dated 5th February 1991 and variation of charge dated 30th October 1992 and other correspondences exchanged between the Defendant and the bank, he established that there was an overdraft facility of Kshs.400,000/- renewed several times. It was in relation to a charge dated 5th February 1991. His examination covered the banking period between 30th December 1989 to 31st July 2002. During that time, there was in application the Central Bank (Amendment) Act 2000 – the so called Donde Act, which had capped the interest rates on loan to a maximum of 91 days Treasury Bills rates published on the last day of the month plus 4%. This meant the rate of interest that was given to Treasury Bill plus 4%. PW 2 testified that the bank did not comply with the Donde Act. If it had applied the Act then the account would have been in credit. In his Report at pages, 181 – 184 of the Defendant Bundle the witness showed in detail the applicable interest rates as per the said Donde Act. The witness concluded that the Defendant's account was always in credit from 30th September 9196 and that by 31st July 2002 the credit had grown to Kshs.189,466.20. He testified that the claim by the Plaintiff that as at the date above the 1st Defendant owed the Plaintiff over Kshs.3,197,396.96 is not correct, and that the bank had applied inapplicable rates of interest. For example, in 1989 to 31/03/1990 the applicable rate was 14.5%; 1st April 1990 to 17th April 1997 it was 16.5%. He based the assessment on the fact that between 1989 and 1997 there was interest rates control regime by the Central Bank. By a Gazette Notice Number 1617 dated 2nd April 1990 the Governor of Central Bank had specified the maximum rate of interest at 16.5% per annum. In 1991 the Governor issued Gazette Notice Number 3348 revoking Gazette Notice Number 1617. This according to him, purportedly decontrolled the interest rates, but the witness believed that the Governor's action was not correct in law and so the witness proceeded to calculate interest at the controlled rate of 16.5%. The witness also noted the anomalies which PW 1 had noted where cheques were deposited into the account but instead of reducing the debts they instead increased the 1st Defendant's debts. This, according to the witness showed that the Plaintiff was not maintaining the said account properly. There was a haphazard way of debiting and crediting the account. At

paragraph 165 to 171 the witness identified cases where in his view the Plaintiff Bank violated Section 44 of the Banking Act, where financial institutions are required to get the authority of the Central Bank before making changes in financial charges.

On cross-examination, the witness however agreed that the 2nd and 3rd Defendants were obligated to meet their obligations under the guarantees and indemnities except that there was no debt due to the Plaintiff.

9. With the leave of the court parties filed written submissions to the suit. The Plaintiff filed its submissions on 20th January 2014 while the Defendants did the same on 20th December 2013.

10. I have considered the issues to be determined as filed by the parties. I have also carefully considered the evidence and the pleadings. In my view, the following are the issues that I need to determine in order to reach a conclusion herein.

1. ***Whether the claim was admitted by the Defendants as alleged by the Plaintiff.***
2. ***If the answer to above is yes, whether the said admission was unequivocal and binding upon the Defendants.***
3. ***Whether the Plaintiff had a duty to the Defendant to charge properly and lawful interest rates, levies and penalties.***
4. ***Whether the Plaintiff could lawfully convert the overdraft facility into a term loan with no known terms and without notice to the Defendant.***
5. ***The place of the evidence of IRAC expert in this matter.***
6. ***Whether the Plaintiff bank violated the law under Section 39 of Central Bank of Kenya Act and Section 44 of the Banking Act***
7. ***Whether the suit or the counter-claim succeeds.***
8. ***Who pays the costs of the suit.***

11. In answer to issue **number 1** herein as to whether the claim herein was admitted by the Defendants, I have carefully looked at the Plaintiff's Bundle of documents. There is a consistent correspondence, starting with the 1st Defendant's letter of 2nd June 1998 at page 1 of the Bundle where the 1st Defendant does not deny owing the money – although the amount is not stated - to the Plaintiff. The Defendant simply asks for time to enable it pay. The 1st Defendant's letter dated 24th April 1998, found at page 2 of the bundle and addressed directly to the Plaintiff also merely pleads for time and does not dispute the claim. So also is the letter dated 9th September 1998 by the 1st Defendant to the Plaintiff, which is found at page 3 of the bundle. These correspondences go upto page 16 of the bundle. In some of them, the 1st Defendant, having failed to meet earlier promises, now pleads for time to sell some of the charged properties to enable it repay the sums due. At page 16 is a proposed sale agreement of LR No. Kwale/Wasini 136. The proposed sales never materialised, and by its Advocate's letter dated 5th June 2003, found at page 35 of the bundle, the 1st Defendant requested for a further period of 90 to enable it secure a buyer for the property to enable it pay the debt. By 10th June 2003, the debt was Kshs.3,100,000 and there was no attempt by the 1st Defendant to repay the same or part thereof. Formal demands were made for Kshs.3,197,396.96 as at 31st October 2002, with notices to the 2nd and 3rd Respondents but still there was no response. This state of affair finally led to the advertisement for sale in public auction of the charged properties. In response to the proposed public auction, the 2nd Defendant herein on 7th March 2006 wrote to the auctioneer Mr. Gikonyo, advising him that the 1st Defendant Company herein had ceased operations and had no property or office or even bank account and that the proclaimed goods had all been disposed off. He concluded the letter by saying:-

"This notwithstanding, I have had several meetings with the bank and I have offered to sell two properties the bank hold as security – under private treaty . . . So the bank is aware that something is going on towards the finalisation of this matter amicably. With this knowledge, I would like to request that you withdraw the proclamation as in any case you are likely to get no money out of this effort."

12. My understanding of these many correspondences show that the Defendants at all times admitted owing the claims herein to the Plaintiff. The amount owed has never been questioned, neither was there a

question on the interests charged.

13. The second issues is whether the Defendants are bound with the said admissions. My answer is that if the Defendants admitted the above sums as due, and went ahead and paid the same, they cannot be heard to come back and claim what they had already paid. However, in the present circumstances, the Defendants simply admitted that they had secured certain financial facilities which were in arrears, and they bound themselves to pay the same as soon as they were able. The account, as long as it was not paid, remained active, and the Defendants were always at liberty to change their minds if they chanced upon information which brought into doubt the legality of the claim, or which materially questioned the way their account was being managed, or the interests levies and charges being posted into the account. The admission of the claim by the Defendants was always based on the good faith and trust that the Plaintiff was doing the right thing, was honest in its dealings and that the Plaintiff levied correct and lawful interests, charges and penalties. In fact the Defendants, based on this faith and trust, initially never questioned the way and manner in which their account was managed by the Plaintiff. It is my finding that once the Defendants doubted the honesty of the Plaintiff, once they doubted the faith they had placed on the Plaintiff, and once they found that the management by the Plaintiff of their account was haphazard, irregular and illegal, and suspected that illegal interests and levies and penalties were being charged into their account, and as long as they had not paid the sum admitted, the Defendants were free to repudiate any consent or admission. In this matter, the Defendants sought the view of the experts in interest rates, and arising from that the Defendants alleged that the account was mismanaged and illegal interests levied, and that their alleged admission of the claim was always based on admitting the right thing, and not admitting illegalities. I agree. Once the Defendants sought expert advice and found that their account was mismanaged, the Defendants cannot be held to their admission because that admission was based on a wrong understanding, or even on unlawful account. Without making a conclusive finding of fact on this issue at this stage, evidence show that the Defendants' account was mismanaged, irregular interests were levied, cheque deposits paid by the 1st Defendant to reduce the loan ended up being debited to increase the loan. There are also periods when it is not clear which interest rates were applied. Once the Defendants established these facts, or even one of them, they became at liberty to repudiate any admissions which preceded before these discovery, and I so hold.

14. The third issue is whether the Plaintiff had a duty to the Defendants to properly manage the Defendants' account, to charge proper and lawful interest rates, levies and penalties. The answer to this issue is always in the affirmative. Parties to a transaction are bound by their terms, and if no terms exist, then reasonable terms will be inferred. It is noted for record that the overdraft facility the subject matter of this suit was properly secured, not only by the guarantees and indemnities signed by the 2nd and 3rd Defendants, but also by:-

i. ***Legal charge for Kshs.300,000/= over property LR. No. Kwale/Wasiani/356.***
ii. ***Legal charge for Kshs.400,000/= over LR. No. Kajiado/Ntashart/250.***
iii. ***Legal charge for kshs.135,000 over LR. No. Msa/MS Block 1/847 Kajiado/Ntashart/258.***
iv. ***Debenture for Kshs.1,282,000/- over the entire assets of the company.***

The above securities were as per the letter of offer dated 22nd January 1996. In the said letter of offer it was agreed that interest would be charged at the rate of 46.25% per annum . The letter of offer does not state any other applicable rate of interest, or penalty rates. The documents provided to court by the parties do not show what interest rate the Plaintiff applied during the duration of the facility. To begin with the 1st Defendants account appears to have been kept very haphazardly. As I have noted earlier there were cheque deposit on 3rd September 1998 of kshs.20,286.70, deposit on 2nd September 1999 of Kshs.31,816.30, deposit on 2nd September 2000 of Kshs.52,675.95. All these deposits did not reduce the debt, but, curiously, increased the same. When the Plaintiff witness was asked to explain this anomaly, he was unable to give any meaning explanation but he agreed that the deposits meant to reduce debts actually increased it. In all, these deposits amounted to Kshs.118,254/=. The account statements at pages 158 to 160 of the Defendant's Bundle show that these deposits increased the loan rather than reduce the same. If that is correct, as I think it is, then there was a serious mismanagement of the account by the Plaintiff. It also means that the inflated sum due, which is still subject to interest and penalty interest, does not only make it impossible to know the sum due, but it also shows that the said sum due subject to

the interest and penalties could increase beyond imagination of mathematics. The Plaintiff did not provide a rational accounts through which the Defendants deposits could be accounted for. The result is that any amount which the Plaintiff demanded from the Defendants through the accounting processes of the account statements availed to the court was always a guesswork. That being so it is my finding that the Defendants' account was managed unprofessionally, unaccountably, haphazardly and in disregard of all the safeguards required under applicable banking practice guides and regulations, whether in actual existence or whether implied.

15. The fourth issue is whether the Plaintiff could lawfully convert the overdraft facility into a term loan with no known terms and without notice to the Defendant. To answer this I go to page 134 of the Defendant's Bundle, at which there is a letter dated 15th April 1996. In that letter the 1st Defendant addressed the Plaintiff in part as follows:-

". . . we propose that you convert the hardcore portion of the overdraft into a loan and retain the rest as an overdraft. We would request you to convert Kshs.300,000/= into loan and Kshs.300,000/= remain as an overdraft . . ."

The above shows that the Defendant had contemplated the possibility of the overdraft facility being converted into a term loan. It could also be inferred that since this offer was made by the Defendants, the Defendants also knew the possible terms of the term loan and if they did not, they could have asked for the same. I therefore find that he Plaintiff did not err by converting the overdraft facility into a term loan.

16. The fifth issue is the place of the evidence of PW 2 Mr. Wilfred Abinche Onono, the expert witness from IRAC. It is important to note that Mr. Onono is an expert witness who came to court paid to testify for the Defendant. The first issue with his evidence will always be his neutrality as a witness. It is noted that he comes to court fully paid by the Defendants to testify. His testimony is partly based on documents and narratives given to him by the Defendants. He testified that he did not have the input of the Plaintiff while he prepared his Report, and that he did not have enough time to get more records from the Plaintiff for verification of those document provided to him by the Defendant. This kind of evidence is one which a court must take very cautiously. The evidence must be capable of objective verification because the witness arrives in court satisfied that he is correct and his account statements and findings are beyond reproach.

It is with that caution in mind that I approach the testimony of PW 2. PW 2 impressed me with his knowledge in recalculation of interests using applicable laws and regulations. The witness stated that Section 39 of the Central Bank of Kenya Act applied as well as Section 44 of the Banking Act. He stated that during the relevant period, Section 39 of the Central Bank of Kenya (Amendment) Act 2000 applied and the interest rates applicable was monthly 91 day Treasury Bill rate plus a margin of 4% applicable from 01/01/2001 to 31/07/2005 and this was 16.50% per annum, as opposed to what the Plaintiff charged which went as high as over 100% per annum. He also testified that interests of Section 44 of the Banking Act charges amounting to Kshs.171,573.30 were not sanctioned in advance by the Minister for Finance and so this amount must be deducted. The witness then stated that he did not have all the account statements when he carried out his work. In fact he did not have the statements for the period 25/07/1990 to 16/08/1990 to 01/07/1991, 24/12/1991 to 06/01/1992, 09/11/1992 and 23/04/1993 to 18/05/1993. He did not seek to get the said statements from the bank. Instead, he decided to infer the interest charged by the bank thereby omitting it and included the miscellaneous debits and/or credits as appropriate. In my view, the Witness Report, without the relevant statements, remains incomplete. His final finding on the interest rate applicable is therefore a guesswork in the same way the Plaintiff's entries into the account amounted to guesswork. There was no reason why the witness did not seek the statements from the bank. There was no evidence that he tried to secure the said statements and failed. A person who comes to court to testify as an expert witness must be prepared to go to the full length to get evidence to prove that expertise. I find that on the basis of the IRAC Report displayed at page 172 – 184 it is not possible to accept that the proposed interest rates were the ones applicable when the author of the said Report admits that he failed to secure all the material statements to authenticate his report. This court finds that report unreliable.

17. On the issue of Section 44 of the Banking Act PW 2 stated that a sum of Kshs.171,573.30 was levied into the Defendant's account without approval of the Minister. The assertion that charges were levied without approval of the Minister could as well be correct. However, based on the accounting system mentioned by the Plaintiff, and that provided by PW 2 both of which I have found to have been guesswork, it is impossible to know exactly how much was unlawfully levied. The exercise herein has no mathematical, or near mathematical precision, and remains a guesswork on which this court cannot rely.

18. The next issue is whether the suit or the counter-claim, if any, will succeed. What then under the circumstances, can this court do? I have established that the Plaintiff so unprofessionally maintained the said account that it is impossible to know its current status or its status at the time the suit was filed. I have also established that the IRAC Report by the Defendant is incomplete and unreliable. What then will I do to settle this matter? I will go back to the loan which was granted, and consider whether any payments were made in respect thereto. I will then establish the balance due then, if any, and subject the same to an applicable rate of interest.

19. The Plaintiff claims judgement against the 1st Defendant of Kshs.3,197,396.96 with interest at 23% per annum from 30th September 2003 until Judgement. The Plaintiff is also claiming against 2nd and 3rd Defendants each kshs.450,000/= with interest at 21% per annum from 23rd September 2003. It is important for the Plaintiff to show, without any ambiguity, how an overdraft of Kshs.400,000/= rose to become Kshs.3,197,396.96 and still rising, besides the claim of a total of Kshs.900,000/= being the guarantee from the 2nd and 3rd Defendants. For the reason that I have stated concerning the keeping of the Defendant's account, I am not satisfied that the Plaintiff kept proper records to enable it determine how much is due to it in terms of interests and penalties from the Defendant. Cheques were shown to have been deposited by the 1st Defendant into the account. Instead of reducing the loan, the accounts show the loan increased instead. The Plaintiff unilaterally on 1st September 1997 converted the overdraft facility into a term loan of Kshs.770,000/= under a loan account number 313096951025. The Plaintiff did not tell the Defendants the interest rate chargeable, although I have found herein that the Defendants could have made inquiry. What is important to note however is that the statement balance of account on 25th July 1995 of Kshs.394,675.00 (which was not admitted by the Plaintiff) shot upto Kshs.906,086.25 by 26th March 1996 recording a phenomenal growth rate of over 125% per annum. The Plaintiff has not provided a rational explanation of this growth. Neither does this court find that growth to be rational. Curiously this debit balance remained uncharged over a period of 6 months as is confirmed at paragraphs 7 and 8 of the Plaint which states that the outstanding balance on account on 25th February 1997 was still the same amount of Kshs.906,086.2. By 1st September 1997, the outstanding balance on account dropped down to Kshs.770,000/= without any apparent cause. These few examples show that the said account was carelessly and irregularly maintained. With these kinds of irregularities, it is easy to believe the 1st Defendant's allegations that Kshs.149,154/= paid by it between July 1995 to 30th August 1997 was not acknowledged; that Kshs.100,00/= paid on or about 15th September 1999 by M/s Crop Care Limited on behalf of the 1st Defendant was not acknowledged; and that a further sum of Kshs.50,000/= around the same time by the 2nd Defendant was not acknowledged. With these kind of records kept by the Plaintiff it would require an expertise which this court does not have to know how the original sum of Kshs.400,000/= escalated to the level of the present claim. In this regard, I take the view that the court must determine one date when the amounts herein could be determined by some sense of accountability, even if not acceptance, from all the parties. In this regard, I consider the 1st September 1997, when the overdraft facilty was converted into a term loan under a loan account number 31309695025. On that date the loan stood at Kshs.770,000/=. This brings us to the bank statements starting from 1st September 1997 when the overdraft was converted to term loan and stood at Kshs.770,000/= to 31st July 2002 when the outstanding balance was 3,197,396.96 – the amount being claimed herein. Those statements are found at pages 157 to 160 of the Defendant's Bundle. The Plaintiff also relied on them. One clear thread connecting all these statements is that they narrate mainly interests charges, penalties, interest capitalised and ledger fees. There were only three deposits by the 1st Defendant of cheques with Kshs.13,475; Kshs.20,286.70; Kshs.31,816.30; and kshs.52,675.95. However, as I have already noted, these deposits did not reduce the loan balance, but rather, and curiously increased it. These deposits amounted to Kshs.118,253.95. These are confirmed deposits by the Defendant. The Defendant also claimed that Kshs.100,000/= was paid on its behalf by M/s Crop Care Limited on or about 15th September 1998, and a further Kshs.50,000/=. These two latter deposits are not revealed in these account statements.

20. I am persuaded to believe the 1st Defendant that these deposits were made. The basis of this persuasion are that the correspondences at pages 2 to 4 of the Plaintiff's bundle in which the 1st Defendant severally informed the Plaintiff that money would be paid to it directly by M/s Crop Care Limited. I believe those moneys were paid, but due to poor records kept by the Plaintiff they were not reflected in the account statements.

21. The Plaintiff's witness Mr. Rotich testified that since the loan facility was given the 1st Defendant has only paid a total of Kshs.79,068.50 on 1st September 1997. However, he does not show how this payment was reflected in the statement of account. In fact on 1st September 1997 the amount brought forward in the statement of account is kshs0.000 DR, and on the same day the initial loan of Kshs.770,000/= is granted. This further shows how irregularly and negligently the said account was maintained. It was Mr. Rotich's testimony that by 1st September 1997 the 1st Defendant owed Kshs.770,000/= and that at the time of granting the overdraft of the Kshs.400,000 in January 1996, the 1st Defendant was already in debit of Kshs.397,000. However, the witness did not produce any earlier account statement to prove that the account was already in debit before the said overdraft was granted. Throughout the hearing there emerges a clear indication that the Plaintiff did not know exactly how its claim matured to what is now being claimed.

22. I however, do believe that an overdraft facility of kshs.400,000/= was given to the 1st Defendant by the Plaintiff and the 2nd and 3rd Defendant guaranteed the same and agreed to pay each Kshs.450,000/= if the 1st Defendant failed to honour the agreement.

23. So, to move forward, I will take it as a proven fact that on 1st September 1997, the overdraft was converted into a term loan and kshs.770,000/= was due to the Plaintiff from the 1st Defendant. I will also take it as a proven fact that the 1st Defendant made payments as follows which must have reduced the debts; Kshs.118,253.95; Kshs.100,000/= (through M/s Crop Care Limited) and kshs.50,000/= by the 2nd Defendant. These payments, amounting to Kshs.268,253.95 were paid between September 1997 and 31st July 2002. Due to lack of accounts I cannot tell how these payments impacted on the interest, and what amount went towards interest and what amount went towards the principal loan. Assuming that part of it paid interest at 16.5% per annum, (I will explain how I arrive at this rate later on) and the rest paid the principal loan balance, then, the entire deposit of kshs.268,253.95 would pay the principal loan balance while Kshs.44,262/= would pay the interest. This is, of course, an imperfect calculation, but these are the figures I have before me. The result is that the sum due of kshs.770,000/= would be reduced by Kshs.223,992/- hence the sum due to the Plaintiff would be Kshs.546,008/= as at 31st July 2002. This is the amount the Plaintiff can claim, of course, with applicable interest.

24. However, Section 44 A of the Banking Act Cap 488 of the Laws of Kenya necessarily comes into play to limit the amount that the Plaintiff can recover with respect to a non-performing loan. Section 44 A states:-

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under Subsection 2.

(2) The maximum amount referred to in subsection (1) is the sum of the following:-

a. ***the principal owing when the loan becomes non-performing.***
b. ***interests in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and***
c. ***expenses incurred in the recovery of any amount owed by the debtor.***

(6) This Section shall apply with respect to loans made before this Section comes into operation, including loans that have become non-performing before this Section comes into operation:-

Provided that where loans become non-performing before this Section comes into operation, the maximum amount referred to in subsection (1) shall be the following:-

a. ***the principal and interest owing on the day the Section comes into operation; and***
b. ***interest in accordance with the contract between the debtor and the institution, accruing after the day this Section comes into operation, not exceeding the principal and interests owing on the day, this Section comes into operation.***
c. ***expenses incurred in the recovery of any amount owed by the debtor***

25. From the above, it is firstly important to determine whether or not the current loan had become non-performing, and if so, when. From the testimony of PW 1, the overdraft facility was renewed in 1996, but it became non-performing, causing the Plaintiff to convert it into a term loan on 1st September 1997. From that date, there were feable attempts by the 1st Defendant to repay the loan, as we have seen upto 31st July 2002 after which there appears to be no further account statements, meaning that the Plaintiff had declared the account non-performing. Indeed on 11th December 2002, the Plaintiff demanded a sum of Kshs.3,197,396.96 from the Defendants after arguably, having closed that account. So, yes the account is non-performing since 31st July 2002.

26. Secondly, it is important to establish if the loan referred to under Section 44 A include the facilities under determination. Section 44 A (4) (b) defines "**loan**" as follows:-

44 A (4) (b) "Loan includes any advance, credit facility, financial guarantee or any other liability incurred on behalf of any person."

From above definition it is clear that the overdraft facility herein which was converted to term loan is a "loan" under Section 44 A of the Banking Act. What now remains to be determined are the operational dates. This is because the current loan became non-performing before Section 44 A of the Banking Act became operational. In this case, we have to establish:-

a. ***The principal and interest owing on the day this Section came into operation.***
b. ***Interests not exceeding the principal and interest owing on the day this Section comes into operation.***

27. The next issue is what rate of interest shall apply. The guarantees and indemnities were to operate under a rate of interest of 46% per annum. Although this rate of interest was inserted into the said documents, PW 1 stated in evidence that the same was applied as a result of default. This testimony is not convincing. DW 2 Mr. Onono testified that the bank had applied illegal and oppressive rates of interest. He showed the court that the applicable interest rates between 1989 to 31st March 1990 was 14.5 % per annum; 1st April 1990 to 17th April 1997 it was 16.5%. However, the Defendant provided copies of the Kenya Gazette at pages 57 to 63 of Defendant's submissions that indicate that a period during which there was control in interest rates was between 1989 and 1991 through Gazette Notice Number 1617. This notice was revoked by Gazette Notice Number No. 3348, in 1990, but Mr. Onono testified that the said revocation was illegal and in his view the applicable interest continued to be a maximum of 16.5% per annum, and that this is the rate that should apply.

28. I have carefully considered this proposition. As I have stated earlier, it is not clear which rate of interest the Plaintiff was applying to calculate the sums due. The rate of 46% per annum in the documents contradict the PW 1 testimony that the same was a punitive rate, rather than the rate applicable. I am, however, satisfied that interest rate applicable upto 1990 was controlled to a maximum of 16.5% per annum. After 1991, it was decontrolled. In any event, the renewed facility herein took place in 1996 long after the said control or interest rate was revoked. However, an interest rate of 46% per annum is oppressive, and I am not prepared to adopt it as an operative interest rate. For the purpose of interest rate herein, I will adopt the maximum rate applicable during the controlled interest regime of 16.5% per annum. In this regard I find that the sum due to the Plaintiff as at 31st July 2002 was Kshs.546,008/= plus interest on the same at 16.5% per annum from that date.

Now, Section 44 A of the Banking Act came into operation on 1st May 2007. This means that in terms of Section 44 A (6) (a) the principal sum and interest calculated on simple terms owing on the day this Section came into operation was Kshs.546,008 x 16.5 x 7/100 which gives Kshs.630,639.24 in terms of

interest alone, making a total sum of Kshs.1,176,647.24. This sum then becomes the Principal Sum for purposes of Section 44 A (6) (b) on "***interests not exceeding the principal and interest owing on the day this Section comes into operation***."

So, the principal sum with interest on 1st May 2007 is Kshs.1,176,647.24. With interest at 16.5% per annum from 1st May 2007 to date, calculated on simple basis (Kshs.1,359,628/=) the sum now due as at 25th June 2014 the date of this Judgement is Kshs.2,535,675/=. This then leads us to Section 44A (6) (c) which deals with the "***cost incurred in the recovery of any amounts owed by the debtor***." These, essentially, are costs of this suit, which I give to the Plaintiff.

29. I must now comment on the Defence and Counterclaim filed herein. When the Defendants appointed the interest rate calculation experts, and found that they had indeed "**overpaid**" the account, the Defendants amended their defence and brought in a counter-claim claiming various declarations, including a declaration that the Defendants have overpaid the debt leaving a debit balance of Kshs.3,386,863.16 in favour of the 1st Defendant. I have carefully considered these counter-claim and declarations. It is clear that most of them have been addressed in the body of this Judgement, and that indeed those declarations have been considered by this court and have played a big role in reducing the claim herein from about Kshs.9,000,000/= (including claim and interest) to less than 30% of the claim. What I have not agreed with, however, is the recalculation by the IRAC witness which stated that the 1st Defendant had overpaid the bank by Kshs.339,466/= and which led to their claim of the Kshs.3,386,863.16 in the counterclaim. There was absolutely no proof that the Defendant had overpaid the claim. Indeed, the only evidence of clear payment by the Defendant were three cheques which were deposited and never reduced the account. These cheques amounted to Kshs.118,253.95. The other payments which were not expressly determinable on the statement of accounts but which I inferred on account of evidence were payment of Kshs.100,000/= by M/s Crop Care Limited and a further Kshs.50,000/= by the 2nd Defendant. All these payments, after giving the Plaintiff the benefit of the doubt in the above two later payments, amounted to a maximum sum of Kshs.268,253.95. This was the maximum amount ever paid by the Defendants, against a claim of Kshs.770,000/- as at 1st September 1997. Where, then, is the evidence that the Defendants had overpaid the claim? The testimony and the Report by Mr. Onono of IRAC, apart from shedding light in relation to applicable Gazette Notices on interest rates during the relevant period was very unrealistic. Regardless of what mathematical accounts may suggest, they must conform to reason. No one can reap from where they have not sowed. For the Defendants to claim that they overpaid the account, without providing the actual entries or evidence of payment, and without showing at what period in time the account balanced and then tilted into over payment, is acting in bad faith. The Defendants were obligated to prove a series or systematic record, of payments, leading to overpayment, leading to a claim of Kshs.3,386,863.16. The IRAC witness cannot treat the court to calculation of interest rates alone, without showing the actual deposits in cash or in cheque which the Defendants made during that period. If the Defendants themselves cannot show any proof of actual payments – save the said three cheque deposits, and the persuasion that some money, which was not reflected in the accounts amounting to Kshs.150,000/= was paid on their behalf - from where then will the IRAC witness manufacture deposit entries to reach the conclusion in their Report? It is clear to me that the Defendants have taken advantage of the fact that the Plaintiff did not keep proper records of the account, and they have exploited this to the maximum. But to go beyond, and make a counter-claim as stated above is quite simply unreasonable. Even for experts in accounts, it looks a proposition out of this universe. I totally reject it, except to acknowledge that the Defendants mounted a good defence and counter claim which has made an enormous difference in the outcome of this case, as I have understood it.

30. In the upshot, I enter Judgement in favour of the Plaintiff against the Defendants as follows:-

a. ***Kshs.2,535,675/= against the 1st Defendant.***
b. ***Interest on above at 14% per annum from the date of this Judgement till payment in full.***
c. ***Kshs.450,000/= together with interest thereon at 16.5% per annum from 30th September 2003 until payment in full against the 2nd Defendant.***
d. ***Kshs.450,000/= together with interest therein at 16.5 % per annum from 30th September 2003 until payment in full against the 3rd Defendant.***

But so that the total amount recoverable herein from the 2nd and 3rd Defendants shall not exceed the indebtedness of the 1st Defendant.

e. ***Costs of the suit and interest therein at court rates.***
f. ***I direct that the Kshs.450,000/= deposited in an interest earning joint account of M/s Walker Kontos Advocates and M/s Malonza & Company Advocates at NIC Bank, Mesaba Road, Nairobi, by the 2nd and 3rd Defendants pursuant to an order of this court made on 14th mach 2006 shall henceforth be released to the Plaintiff, and the said amount plus accrued interest shall be used towards the payment of the eventual decree herein.***

That is the Judgement of the court.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF JUNE 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Karungo for Plaintiff

M/s Kanini for Defendant

Jason – Court Clerk