



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NYERI**  
**HIGH COURT**  
**CIVIL CASE NO. 158 'B' OF 2000**

**SAMWEL MWANGI KINGORI & ANOTHER.....PLAINTIFF**

**VS**

**STANDARD CHARTED BANK (K) LTD.....DEFENDANT**

**RULING**

The application herein is dated 21/3/2012 and filed on 22/3/2012 wherein plaintiff's application seek orders that independent joint auditors be nominated by the parties and appointed by Court to take accounts and determine which party owes the other. Moreover that upon conclusion of the taking accounts the court do issue directions as to payment of the due amounts and the fate of the security documents of the charge.

The application is based on grounds that this suit can be disposed off through taking accounts acceptable to both parties by joint independent auditors to be nominated by the parties and appointed by the court. That M/s IRAC consultants have advised the plaintiff/applicant that the defendant/respondent owes him Kshs.1,948,270.51 as loan overpayment. However the defendant had refused to release the security documents claiming that it is owed money by the plaintiff/Applicant. When the plaintiff produced accounts which showed that the defendant owes the plaintiff some money it changed goal posts and pleaded for withdrawal of the case.

The application is supported by the affidavit of Mwangi King'ori who depones that he sued the defendants to release his security titles upon payment of his loan with the defendant. The defendant had refused to release his security documents claiming that that plaintiff owed them some money thus Kshs.359,020/=.The plaintiff commissioned an auditor who advised him that he had over paid the loan with Kshs.1,589,250.41 upon which the plaintiff amended the plaint to claim refund of the overpayment. On 20th January 2012 the defendants lawyers wrote a letter to the plaintiff's Lawyers proposing to settle the matter by the bank releasing his titles on condition that he withdraws this suit. The Plaintiff's lawyers wrote a letter dated 25th January 2012 to the defendants Lawyers proposing that the parties nominate joint independent auditors to take accounts in respect to this loan account The plaintiff now prays that the court does appoint joint independent auditors to take accounts with the defendant bank to enable the court give directions on the way forward in regard to release of security titles and on payment of due amount if any.

The application is opposed by the defendant who has filed a replying affidavit deponed by Jared Osoro the defendants manager who states that the defendant computerized its systems in the 1997. Prior to that,

the defendant used to keep manual records which were destroyed after seven years in accordance with Central Bank of Kenya guidelines. The statement by Wilfred Abincha Onono of the Interest Rates Advisory Center Ltd has purported to refer to accounts dating back to 1995 which statements cannot be availed by the defendant for the reasons stated above. That the amended plaint herein dated 10/11/2009 is very clear at paragraph 5 (a) that the bank facility in dispute herein was granted on or about 23/3/1999. He believes that parties are bound by their pleadings and the plaintiffs are estopped from attempting to bring in additional claims through the back door as such action is dishonest and made in bad faith.

The defendant believes that the statement by Wilfred Abincha Onono on which the Plaintiffs base their application for taking accounts is unreliable as it goes beyond the scope of issues in this matter. In any event, accounts cannot be taken without statements and the plaintiffs having slept on their rights for so many years are not entitled to the orders sought which would place the plaintiffs at an unfair advantage over the defendant who has not contravened any law as the taking of accounts can only be in respect of the period after 23/3/99 and not before which is unnecessary in any event because the plaintiffs are at liberty to provide whatever statements of account it has to support their claim. That the amount owed to the defendant by the plaintiffs stood at Kshs.919 826.35 as at 30/06/2008 accruing interest at variable rates. The defendant's willingness to settle this very old matter is based on the principle that the time, effort and money being spent on this litigation would be better spent on something more productive and therefore the offer made by the Defendant should not be construed as proof that the defendant has no defence. That in view of the foregoing, the plaintiffs' application dated 21/03/2012 is without merit and the defendant prays that the same be dismissed with costs.

In a further affidavit filed on 15/5/2013, he states that he has managed to trace offer letters relating to this matter thus making it necessary to swear this affidavit further to his replying Affidavit sworn on 18/10/2012 in opposition to the Plaintiff's application dated 21/03/2012. The import of the affidavit is that the plaintiff applied for and was offered an overdraft facility with the defendant in 1997 which he accepted with the terms and conditions that came with it as to interest, legal fees and charges. That the aforesaid facility was then converted to a long term loan on 23/3/1999 and the 1st plaintiff duly signed an offer letter from the defendant accepting the terms and conditions in the agreement. That 1st Plaintiff therefore freely bound himself to abide by the terms and conditions of the banking facilities as to the interest rate applicable and other charges. He duly executed the aforesaid offer letters and he can now not purport to claim through a report of a third party that the said interest rates and charges were illegal.

In his submissions, which is a recapitulation of the facts of the matter with no point of law. Mr. V.E. Muguku prays for orders in the notice of motion to be granted as this is not a matter the court is able to reconcile and write a judgment without the assistance and advise of professional accountants and auditors.

Mr. Mucheru Oyatta & Associates filed submissions whose *gravamen* is that that a court cannot re-write contracts between parties and such attempt should be declined. They further argue that the application are relying on communication marked "without prejudice" to pursue this application contrary to the law.

I have considered the application, supporting affidavits, replying and further affidavits and do find that the application herein is based on the provision of ***Order 5 rule 1 and 20 rules 1 and 2 of the Civil Procedure Rules***.

This rules provides that where a plaint prays for an account or where the relief sought or plaintiff involves the taking of an account, if the defendant fails to appear or does not after appearance by affidavit or otherwise satisfy the court that there is a preliminary question to be tried an order for proper accounts with all necessary inquiries and directions usual in similar cases shall forthwith be made.

In the suit before me, the defendant appeared and filed defence on 21/9/2000. The statement of defence was amended on the 16/2/2011 and filed on 17/2/2011.

***Does this application satisfy the requirements of Order 20 rules 1 and 2?***

To begin with the plaintiff has not prayed for an account in the plaint, but has prayed for a refund of

Kshs.1,948,270.51 plus interest and costs which might require the taking of an account. However, the defendant has appeared and filed the defence that raises preliminary questions that can only be determined by hearing the suit. The application herein is therefore dismissed with costs.

**DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER 2014**

**ANTONY OMBWAYO**

**JUDGE**