



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Suit 367 of 2008

COMMERCIAL BANK OF AFRICA LIMITED PLAINTIFF

VERSUS

PAUL S. IMISON 1ST DEFENDANT

LAND MARQUE LIMITED 2ND DEFENDANT

JUDGMENT

By an Amended Complaint dated 12th February, 2010, the Plaintiff pleaded that by a contract between the 1st Defendant and the Plaintiff, the Plaintiff issued the 1st Defendant the Plaintiff's VISA Classic Card. That the 1st Defendant had agreed to be bound by the conditions of use of the said card whereby as at 15th April, 2008 there was due from the 1st Defendant to the Plaintiff a sum of Kshs.938,180/04 which the Plaintiff claimed from the 1st Defendant. The Plaintiff further contended that by a subsequent agreement between the parties, the 2nd Defendant guaranteed payment of all sums due on the use by the 1st Defendant of a second CBA VISA Card. That there was a sum of Kshs.747,452/79 due on the use of the said card as at 15th April, 2008 which the Plaintiff claimed from the Defendants jointly and severally. The Plaintiff claimed interest of 3.5% per month on the said sums from 15th April, 2008 until payment in full and costs.

In their joint Amended Defence dated 15th February, 2010, the Defendants contended that they terminated the agreements for the use of the said two CBA VISA Cards and returned the same to the Plaintiff on 5th February, 2001. That the amount due on both the said cards as at the date of their return was Kshs.216,035/- only. That upon such termination of the said agreements, the Defendants transferred their Motor vehicle Registration No.KAK 355W valued at Ksh.600,000/- to the Plaintiff for disposal by the Plaintiff to clear the said account in full and final settlement thereof. That the Defendants further paid a sum of Kshs.187,952/07 and they had therefore overpaid the Plaintiff with Kshs.571,917/08. The Defendants contended that the Plaintiff had been negligent, careless or malicious in the handling of the said accounts and that the amount and/or interest claimed was in contravention of Sections 44 and 44A of the Banking Act Chapter 488 of the Laws of Kenya. That the amount claimed was interest which is illegal, unlawful, irrational and unenforceable.

In the premises, the Defendants counterclaimed a sum of Kshs.8,388,025/12 being Kshs.571,917/07 aforesaid plus interest of 4% per month from December, 2001 up to June, 2005 and then 3.5% per month from July, 2005 to 31st July, 2008. The Defendants prayed that the Plaintiff's claim be dismissed and judgment be entered in their favour accordingly.

The Plaintiff called one witness whilst the 1st Defendant testified on behalf of the Defendants.

The evidence in this case is that by an agreement made in November, 1998, the Plaintiff issued the 1st Defendant with its CBA VISA Classic Card No. 4251 -9700-0000-0960 (hereinafter "Card No. 0960"). In November, 1999, the Plaintiff again issued the 1st Defendant with a second credit card CBA Visa Classic Card. No. 4251-9700-0000-9227 (hereinafter "Card No. 9227") whose credit limit was Kshs.120,000/-. The latter card was guaranteed by the 2nd Defendant. The Defendants executed the Plaintiff's standard terms and conditions. The agreed interest on the outstanding amounts on the cards was agreed at the rate of 3.5% per month. There was also interest chargeable for late payment.

The 1st Defendant made use of those cards whereby on 5th February, 2001 he returned the said cards to the Plaintiff in terms of the said agreements. As at the time of the return of the cards, the amount outstanding on the respective cards was Kshs.128,498/- on Card No. 0960 and Kshs.87,537/- on Card No. 9227, respectively.

On 17th December, 2001, the Defendants handed over to the Defendant the original Log Book for Motor Vehicle Reg. No. KAK 355W-Range Rover together with other documents relating to that motor vehicle being a sale contract dated 16/6/1999 in favour of the 1st Defendant, original transfer signed by one Lars Linder to Michael Orworo Wod Awat, an original blank transfer signed by Michael Olworo Wod Awat, and the copies of the respective persons Pin Certificate and Passports. As at the time the said documents were given to the Plaintiff, the amount outstanding on the cards was Ksh.322,746/- on Card No. 0960 and Kshs.260,157/- on Card No. 9227, respectively.

The Plaintiff's contention is that the documents for the said motor vehicle were given by the Defendants as security for the debt whilst the Defendants contend that in surrendering the documents of title to the Plaintiff, it was upon the Plaintiff to sell the motor vehicle and that its value then was Kshs.600,000/-. It was however, the common position of the parties that the motor vehicle remained in the possession of the Defendants and that to date, it has never been sold although it was taken off-road in April, 2004. By an agreement between the parties, the interest on the two cards for the period between July, 2002 and 15th August, 2006 was suspended and the Plaintiff once again started levying interest on the amount outstanding on those cards starting the said 15th August, 2006 until the date the suit was filed.

The Defendants contended that the contract between the parties was terminated on 5th February, 2001, that since the consolidated outstanding amount as at the date the title documents for the said motor vehicle was surrendered to the Plaintiff was Kshs. 582,903/- whilst the value of the said motor vehicle then was Ksh.600,000/- and for the reason that the Defendants had paid to the Plaintiff an additional sum of Kshs.187,952/07, the Defendants claimed that they had overpaid the Plaintiff by Kshs.571,917/07. The Defendants therefore counter-claimed the said sum together with interest thereon at the rate of 4% and 3.5% on various dates which amounted to Kshs.8,338,025/12 as at the date of filing the suit. The Defendants therefore claimed the said sum of Kshs.8,338,025/12 with interest thereon at 3.5% interest from 1st August, 2008 until payment in full. In the submissions, however, the Defendants claimed Kshs.507,352/42 from 17th December, 2001.

The Defendants also contended that by virtue of the Central Bank of Kenya (Amendment) Act 2000 "the Donde Act", the interest chargeable on the principal sum was capped, that by virtue of Section 39 of the Central Bank of Kenya (Amendment) Act, 2004, the Duplum Rule had been introduced thereby capping the interest chargeable. To the Defendants, the Plaintiff had acted illegally since the amount claimed had exceeded the principal sum outstanding as at 1st January, 2001. That the amount claimed was irregular and illegal in the circumstances.

To the Plaintiff, Section 39 of the Central Bank of Kenya Act was declared unconstitutional in the case of **Ruturi and Another –vs- Minister of Finance and Another 2001 1 EA 253** wherein also the commencement date of that Act was declared unconstitutional. To the Plaintiff therefore, the Donde Act had not come into force.

Finally, the Defendant contended that the liability of the 2nd Defendant to the Plaintiff was limited to Kshs.120,000/- only that by demanding various sums against the Defendants, the Plaintiff had acted in bad faith and was therefore not entitled to the sum claimed. To the Defendants, the Plaintiff had acted in breach of Sections 44 and 44A of the Banking Act and was therefore not entitled to the claim in the Amended Plaintiff.

The parties filed separate issues. To this court, the issues that arise from the pleadings and evidence for determination are as follows:-

The nature of the contracts between the parties and the terms thereof, what the guarantee by the 2nd Defendant stipulated as to the limit, whether the said contracts were terminated and the effect thereof, whether the surrender of the title documents for motor vehicle registration No. KAK 355W amounted to the settlement of the debt, whether there had been overpayment by the Defendants and if so by how much, whether the amount claimed by the Plaintiff is irregular and illegal, if not, what is the correct sum due, whether the Plaintiff's claim is time barred and finally whether the Defendants are entitled to the counterclaim. What orders as to costs?

The agreements between the Plaintiff and the Defendants were clear. They were properly executed and they provided for the Plaintiff to issue and actually issued two CBA VISA Classic Cards which were credit cards for the use by the 1st Defendant in November, 1998 and 1999, respectively. The cards so issued and put to use were card Nos. 0960 and 9227, respectively. Whilst the 1st Defendant was personally liable for the use of the said cards, the 2nd Defendant did guarantee the use of card No. 9227. The rate of interest chargeable on the outstanding sum was agreed to oscillate as from 5% per month. It was also agreed that there would be 3% charge on the late payment per month. From the terms and conditions of the contract between the Plaintiff and the Defendants, it is clear that the limit claimable as against the 2nd Defendant on the guarantee was never expressly set out in the said agreement of November, 1999. However, the Plaintiff informed the Defendants, upon inquiry, that the limit on the said Card No. 9227 was Kshs. 120,000/- which is at page 16 of D Exhibit 1. I do not accept the Plaintiff's contention that that letter was an innocent reply to an inquiry. It must have been meant to be acted upon. The Plaintiff in my view cannot rescind from that position. That being the case, my view is the liability of the 2nd Defendant is the said Ksh.120,000/- together with interest thereon from the date of demand on the 2nd Defendant by the Plaintiff.

Under Clause 7 of the Agreements, the 1st Defendant could terminate the agreements by written notice to the Plaintiff and such termination was to be effective on the return of all the cards issued and payment of the liabilities of the principal card holder. By a letter dated 2nd February, 2001 received by the Plaintiff on 5th February, 2001, the 1st Defendant returned the said cards to the Plaintiff but it would seem that the liabilities thereon were not settled on that date. It would be expected therefore that henceforth, what was chargeable would be the agreed interest and the late payment charges only.

I now turn to the issue of the surrender to the Plaintiff of the title documents of the 1st Defendant's motor vehicle registration No. KAK 355W, Range Rover on 17th December, 2001. The Defendants' contention was that the delivery to the Plaintiff of the original log book and original transfer forms which would have enabled the Plaintiff to dispose off the motor vehicle amounted to a settlement of the debt then outstanding. The Plaintiff took a different view. The Plaintiff maintained that it only held the said documents as security for the payment of the debt.

At page 30 of DExhibit 1, is a letter by the Defendants to the Plaintiff written sometime in January, 2003 referring to a meeting that took place between a Mr. Nelson Mainnah and PW 1 for the Plaintiff and

the Defendants whereby one of the items agreed was that:-

“ the Range Rover, registration No. KAK 355W whose log book the bank is holding be sold, the proceeds of the sale to be paid to the bank for the release of the log book.”

It is clear from the said letter that there was consensus that the said motor vehicle should be sold. However, the letter did not disclose who was charged with the task of selling the motor vehicle. As earlier indicated, the motor vehicle continued to be in the possession and use of the 1st Defendant, no chattels mortgage was ever created over the said motor vehicle. Indeed, at one time the Defendants were hiring out the said motor vehicle for Ksh.30,000/- per month (page 31 D Exh. 1). It is therefore clear that throughout the motor vehicle remained in the custody and control of the Defendants. There being no evidence of an agreement to the effect that the Plaintiff was to dispose off the motor vehicle, in my view, the delivery of the Original Log Book and other title documents for the said vehicle to the Plaintiff in December, 2001 as security remained as such, security for the payment of the outstanding debt. It never amounted to payment of Ksh.600,000/- as contended by the Defendants. Had they surrendered the documents together with the possession of the motor vehicle, the proprietary interest and control of the motor vehicle would then be said to have effectively passed over to the plaintiff. In my view, only then could the Plaintiff be blamed for not having sold the motor vehicle and passed over the proceeds therefrom to offset the debt.

Since the Defendants counterclaim is based on the ‘overpayment’ arising out of the surrender of the original documents for the motor vehicle KAK 355W, to the Plaintiff, it follows therefore that the counterclaim must fail for the reason that I have already found that the motor vehicle or the value thereof never passed over to the Plaintiff at anytime whatsoever. In any event, whilst the motor vehicle was purchased by the 1st Defendant on 16th June, 1999 for Ksh.380,000/-, how would the value of same vehicle nearly double two years later in December, 2001? DW1 admitted in cross-examination that most of the items that the defendants contended had increased the value of the motor vehicle at pages 285 and 286 of D Exhibit 1 were the usual items used during normal service of a motor vehicle. These include tuning, balancing, brake fluid, wheel balancing etc. To my mind, the counter claim is farfetched and in so far as it is based on the purported ‘surrender’ of motor vehicle Registration No. KAK 355W which to-date has never left the Defendants’ possession, the same is for dismissal and I hereby dismiss the same with costs.

In the Amended Defence and Counterclaim the amount claimed was Ksh.8,338,025/12, however at the trial and in the submissions, the Defendants claimed Ksh.455,376/11 plus interest from 17th December, 2001. I will award the Plaintiff costs of the Counterclaim at this sum of Ksh.455,376/11 and not what was originally counterclaimed by the Defendants.

On the issue of limitation, there was evidence in DExh1 pages 90 to 92 that the final payments on both cards was on the 31st July, 2006. I believe that in making payments as such, whatever limitation that may have caught up with the claim was negated. Time started to run thereafter from 1st August, 2007. This suit, was filed on 3rd July, 2008, barely two years later and therefore within the statutory period of six (6) years. The advances to the 1st Defendant were not secured by any mortgage. Had it been so secured, then the applicable principles would be different as the applicable provision would have been Section 19 of the Limitation of Actions Act. Accordingly, I am of the view and I so hold that the Plaintiff’s claim is not time barred.

The issue that now remains to be determined is whether the amount claimed by the Plaintiff is illegal or irregular as contended by the Defendants.

In his statement that was adopted as part of his evidence in chief, DW I indicated that the amount claimed by the Plaintiff included interest of as high as 170% p.a, 245% p.a., 302%, 731%, 740% etc. He however did not clarify how he arrived at these figures. During cross-examination, he admitted that the rate of interest charged by the plaintiff was 10% per month being 5% interest and 6% late payment charges. A proper calculation will show that the annual interest was approximately 132%. The Defendants also

contended that by dint of sections 39 of the Banking Act (now repealed) and Sections 44 and 44A of the Banking Act, the Plaintiff's claim is illegal and unrecoverable. The Plaintiff on its part contended that the interest charged was in terms of the agreement, that no charges were levied on the accounts and that Section 39 of the Central Bank of Kenya (Amendment) was declared unconstitutional and never came to effect.

I should point out here that courts are not there to redraft contracts entered into by parties howsoever unfavorable such contracts may look to any of the parties. Once parties enter into a contract, the role of the courts is to give effect to such contracts. Of course there are instances when the courts will intervene but such instances are limited and are well known. The Defendants complained that the rates of interest applied by the Plaintiff were exorbitant and illegal. I have already found that the rate of interest applied was 132% per annum. That rate may look not only exorbitant but out of the ordinary. But that is the rate the parties put their paper and pen on, it was contracted by the parties. It has not been challenged on the basis that it was not the agreed rate, but on the basis of being exorbitant. I am afraid the Defendants having agreed to such rate of interest when they executed the agreements, this court cannot redraw those agreements at the instance of one party only.

On the application of Section 39 of the Banking Act, I am satisfied that the court in the case of **Ruturi & Another Vs Minister of Finance and Another EALR (2001) 1EA 210** made various declarations which had the effect of declaring the said law unconstitutional thereby totally nullifying the same. I have read the case of **Mohamed Gulamhussein Farzal Karmal & Another Vs C.F.C Bank Ltd & Another (2006) EKLR** cited by the Defendants and I notice that the Hon. Ochieng J was never referred to the decision in **Ruturi Case**. I am of the view that had he been referred to that case, he would not have made the findings he made in respect of Section 39 of the Central Bank of Kenya Amendment Act, Act No. 4 of 2001. Accordingly, the said Act having been declared unconstitutional, the same cannot be said to be part of our laws. I reject the Defendants contention and reliance on that Section.

As regards the issue of the interest applied and Section 44 of the Banking Act, I have had a lot of agony on these two. The parties filed voluminous documents running into hundreds of pages. The Defendant alleged that the Plaintiff applied unconscionable and illegal rates of interest as well as charges. The Plaintiff contended that it did not. However, what is quite clear is that as at the time the defendants partially terminated the contract on 5th February, 2001, the amounts outstanding on the two cards was Ksh.128,498/- on card No. 0960 and Ksh.87,537/- on card No. 9227. To my mind, a rate of interest will be illegal or unlawful if it is not contractual or if it is against statute.

Section 44 of the Banking Act, Cap 488 provides: -

“ 44. No Institution shall increase its rate of Banking or other charges except with the prior approval of the minister.”

I believe this provision does not apply to the rate of interest as that is usually regulated by the individual contracts between the banks and their customers. This section refers to commissions, penalties fees and other bank charges levied on customers' accounts. Before a bank can vary such charges upwards, there must be approval of such variation by the Minister under that section. PW1 I testified at paragraphs 73, 74 and 75 of his statement that as at August, 2006 the amounts outstanding on the two cards and as claimed in the Amended Plaint were Ksh.471,497/22 on card No. 0960 and Ksh.375,644/- in card No. 9227, that the rate of interest applied was 3.5% only and there were no bank charges or fees. PW I was emphatic that these figures had been accepted by the Defendants and were as contained in the Defendants' documents of discovery at pages 82, 116 and 282 of D Exhibit 1.

That may be so, but the Defendants have challenged the figures in their Amended Defence and Counterclaim, evidence and submissions. What the Defendants do not seem to dispute is the figures outstanding as at 5th February, 2001 on both cards and the rate of interest of the 3.5% per month. Whilst the accounts prepared by PW1 at pages 72 through 75 of PEXh1 may probably be correct, he however did not address the issue on how the said amount of Kshs.471,497/22 and Kshs.375,644/-, respectively was arrived at as at August, 2006. The question that arises is, were there any charges (especially late payment

charges) levied upon the accounts/cards in the period 5/2/2001 and August, 2006 and if so what rate of interest was applied? This prompted the court to recall PW1 who testified and gave clarifications on the interest and penalty charges levied to the accounts.

I have read Section 1 Clause 3(vii) of the Agreements. It provides as follows:-

“(vii) If the principal Cardholder shall not have made any payment due by the due date in addition to (iv) above, a late payment charge equal to 3% of the amount payable shall be charged daily to the Card Account by way of agreed liquidated damages for nonpayment of the amount due.”

This clause provided for a late payment charge of 3% per month of the outstanding sum chargeable daily. This is a charge and not interest. It is covered by Section 44A of the Banking Act. The evidence on record shows that this amount or rate did change at some stage. Page 18 PExh1 will show that as at 21st May, 2001 (3 months after the cards were returned), the Plaintiff was levying the amount then outstanding of Kshs. 305,362.83 interest and late payment charges at the rate of 7% per month. The figure had increased from a total of Kshs.216,035/- on both cards as at 5/2/01 to a figure of 304,362/83 a difference of Kshs.88,327/83, an increase of approximately 40.8% in three (3) months!

At pages 171, 172 and 173 of the DExh1 are bank statements dated 15th June, 2001, 15th July, 2001 and 15th August, 2001, respectively. They have a Notice to the effect that:-

“kindly note that late payment fees will increase to 6% per month with effect from 1st July, 2001. All other fees remain the same.”

Then the late payment fees was Kshs.4,097/31 per month compared to the interest of Kshs.5,645/14 per month. After that increase, the statement for 15th September, 2001 shows that late payment fee had increased to Kshs.10,635/66 per month and by December, 2001, it was Kshs.14,190/40 per month compared to interest which stood at Kshs.9,460/26 per month. Accordingly, late payment fees per month was far much higher than the interest charged. Indeed PW1 after being recalled confirmed that the said charge was increased from 3% to 6% per month from 1st July, 2001 for both accounts i.e. Card Nos. 0960 and 9227.

At page 52 DExh1, there is a letter dated 26th February, 2004 by DW1 to the 1st Defendant. The said letter gave details of the outstandings in the said cards for various dates including “current balances as of 25th February, 2004.” These were shown to be Kshs. 512,684/- for Card no.9227 and Kshs. 586,029/- for card No. 0960, respectively. DW1 indicated in that letter that **“This balance includes February 2004 interest and late payment.”**

What I have tried to show is that whilst the late payment charge was initially agreed at 3% per month (See Clause 3(viii) of the agreements), it increased to 6% per month as from 1st July, 2001. The Plaintiff has not shown that there was any ministerial approval to his increment. I do not agree with the submissions of the Plaintiff that the Defendants should have showed that the charges had been increased without authority. My view is that, once the Defendants alleged that the charges were illegal and irregular and had pointed out these charges (as I have done above), the evidentiary burden shifted to the Plaintiff to justify those charges. It was the Plaintiff to show that it had obtained the minister’s approval to increase the late payment charge from a low of 3% to a high of 6% per month. Indeed one would see how the outstanding amount skyrocketed immediately after that late payment charge was increased.

Accordingly, although interest may have been suspended between 2002 and 2006, for whatever reasons as agreed between the parties, the amounts presented as the opening balances in August, 2006 of Kshs.375,644/27 for Card No. 9227 and Kshs.471,497/22 for Card No. 0960, respectively, which forms the basis of the Plaintiff’s claim included the illegal late payment charges levied right from 2001 through 2002. It therefore follows that applying the interest of 3.5% per month on the amount outstanding as from August, 2006 would be wrong.

One issue that raises concern is that whilst ordinarily in claims such as these one, banks are expected to prove their claim by exhibiting the usual bank statements for the period in question to show the amounts that may have been debited and credited thereby disclosing whatever charges that may have been levied on the customer's account, the Plaintiff in this case was contented to base its claim on some opening balances as at August, 2006. It did not produce any bank statements to show how such balances were arrived at. As I have already stated, there was an element of an illegal charge, the late payment fee, which had been increased from the original 3% to 6% as at July, 2001. I am not prepared to accept the accounts appearing at pages 61 to 66 of PExh1 since they are only extracts and they do not reflect the admitted payments made by the Defendants in the period between February, 2001 and 2006. It was not disputed that between February, 2001 when the cards were returned and July, 2006, the Defendants paid Kshs. 187,952/07. These amounts must be taken into consideration when inquiring whether there are any monies due to the Plaintiff from the Defendants.

Although I have found that the Plaintiff did levy the Defendants accounts with illegal charges, I am not prepared to declare the Plaintiff's entire claim to be illegal. That would be unconscionable and unjust. What will be illegal will be the increased late payment charge of 6% per month from 1st July, 2001 to 1st July, 2002.

My view therefore is that the amount outstanding as at 30th June, 2001 under Card No. 9227 was Kshs.146,319/40 as it appears from DExh1 page 171. The Plaintiff will be entitled to that sum plus interest of 3.5% per month plus late payment charges of 3% per month until 1st July, 2002 when interest was suspended. Thereafter the said sum is to attract interest at the rate of 3.5% per month from 6th August, 2006 until 30th April, 2007. The amount outstanding as at 30th April, 2007 should be subjected to the necessary deductions to take care of the payments made by the Defendants between February, 2001 and 2006 totaling Kshs.86,356/27 as per PExh1 page 69. The Balance outstanding as at 30th April, 2007 shall be the non-performing loan and in terms of Section 44A of the Banking Act. Accordingly, the Plaintiff shall be entitled to the double the amount outstanding as at 30th April, 2007.

As regards Card No. 0960, there was no evidence tendered to show what amount was outstanding as at 1st July, 2001 when the late payment charge was increased from 3% to 6%. Accordingly, I would take the Plaintiff's lawful claim to be the amount outstanding as at 5th February, 2001, Kshs.128,498/- subject the same to 3.5% and 3% interest and late payment charge per month until 30th June, 2001. After deducting the payments made by the Defendants on various dates totaling Ksh.101,595/80 as per PExh1 page 68, the balance thereof should be the opening balance as at 6th August, 2006. That sum should be subjected to interest of 3.5% per month until 30th April, 2007. The amount outstanding as at that date would be the non-performing loan in terms of Section 44A of the Banking Act. The double amount of the said sum shall be the amount due to the Plaintiff.

This will add up as follows:-

(a) Card No. 0960

(i) Principal sum as at 5/2/01 – Kshs.128,498.00/-

Add Interest 3.5.% and
Late payment Charge 3% pm
between Feb, 2001 and 30/6/02 – Kshs.245,631.63

Total – **Kshs.374,130.27**

(ii) Less paid by Defendants – Kshs.101,595.80

(iii) Principal as at August, 2006 – Kshs.272,584.47

Add interest 3.5% between
August 2006 and 30/04/07 - Kshs. 86,341.26
Amount of non-performing
Loan as at 30/4/07 - Kshs.358,875/86

By virtue of Section 44A of the Banking Act Cap 488 – the double the non-performing loan as at 30/4/2007 would therefore be Kshs. 717,751/72

(b) Card No. 9227

(i) Principal sum as at 30/6/01 - Kshs.146,319.40

Add interest 3.5% and late
Payment charge of 3% p.m.
Between July, 2001 and 30/6/02 - Kshs.146,195/02
Kshs.292,514/34

(ii) Less paid by Defendants for

the period - Kshs.86,356.27

(iii) Principal as at August, 2006 - Kshs.206,158.07

Add interest 3.5% between
August 2006 and 30/4/07 - Kshs. 65,574.92
Amount of non-performing

Loan as at 30/4/07 - Kshs.271,733.10

By virtue of Section 44A of the Banking Act, Cap 488 the double the non-performing loan as at 30/4/2007 would therefore be Kshs.543,466/20.

Accordingly, there will be judgment in favour of the Plaintiff as follows:-

(a) Kshs.717,751/72 against the 1st Defendant.

(b) Kshs.543,466/20 against the Defendants jointly and severally.

As regards the interest applicable, my understanding of Section 44A of the Banking Act is that notwithstanding what may have been the contract between the parties once the amount equals the double the amount of the principal sum, there shall be no more contractual interest thereon. The amount becomes an ordinary debt recoverable in the ordinary way. In view thereof, I do not agree with the Plaintiff that the rate of interest to be applied to the judgment sum is the contractual rate of 3.5% per month. Doing so will be to oust the very intention of Section 44A of the Banking Act which is to ensure that the lender gets no more than the double the principal sum advanced. Accordingly, the rate of interest to be applied to the Judgment is the court rate of 12% per annum on simple interest from the date of the judgment until

payment in full. The Plaintiff will also have the costs of the suit.

I am aware that I had held that the amount that could be claimed as against the 2nd Defendant was Kshs.120,000/- plus interest. Nevertheless, I have entered judgment for Kshs. 543,466/20 jointly and severally for the reason that as at the 5th February, 2001 when the contracts were partially terminated, the amount due on the Card No. 9227 was Kshs.87,537/- which was well within the limit.

One other thing, although the Defendants failed in their counterclaim, I believe that with the judgment the Plaintiff has no further right to retain the Defendants original documents for motor vehicle registration No. KAK 355W. The same should be returned to the Defendants forthwith.

DATED and DELIVERED at Nairobi this 5th day of June, 2012.

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A. MABEYA
JUDGE