



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL SUIT NO.89 OF 1991

DANIEL MUNENE KABOGO.....PLAINTIFF
-VERSUS-

APOLLO INSURANCE COMPANY LIMITED.....DEFENDANT

JUDGMENT

The plaintiff filed suit on **8th February, 1991**, its basis being a charge executed by the parties on **3rd July, 1984**. The process of discovery of documents showed the parties to be relying on exactly the same documents, and this led them to agree on a particular format for the conduct of the cause: **case stated**, in accordance with Order XIV, rule 6 and Order XXXIV of the earlier edition of the Civil Procedure Rules.

The agreed issues between the parties, filed on **21st July, 1992** were as follows:

- (i) Was the interest rate of 22% which was chargeable in contravention of the Banking Act (Cap. 488, Laws of Kenya).**
- (ii) If yes, then what interest should the defendant have charged at the material time?**
- (iii) What was the enabling statute authorizing the defendant to engage in the business of lending money to customers?**
- (iv) How is s.2 of the Banking Act to be interpreted, in the circumstances of the instant case?**
- (v) Was the granting of the loan conditional on the taking and maintenance of insurance policies with the defendant?**
- (vi) What is the effect of the cancellation of insurance cover, in view of the plaintiffs' letter to the defendant of 3rd August, 1989?**
- (vii) Was there any contractual obligation (specific or implied) that the premium payable under the policies would form part of, and be additional to the loan under mortgage?**
- (viii) Are premium-arrears recoverable by the realization of securities under the charge?**
- (ix) Does the plaintiff owe the defendant any money; and if so, how much? and, what proportion is recoverable under the charge?**

Learned counsel for the plaintiff urged that the plaintiff was to be regarded as a **financial institution**, defined in the Central Bank of Kenya Act (Cap. 491, Laws of Kenya) as “**a body corporate or other body of persons carrying on, whether on their own behalf or as agent for another, financial business within the meaning of the Banking Act, whether in Kenya or elsewhere.**”

“Financial business” is defined in s.2 of the Banking Act as –

- (a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice; and**
- (b) the employing of money held on deposit or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money.**

On the basis of the foregoing definitions, counsel urged that any company which is not a bank and which carries on, or proposes to carry on financial business, is a **financial institution** – and this includes companies which have been gazetted as such by the Minister.

Counsel urged that the defendant had been involved in a financial business; **“the defendant...proposed to carry on financial business [and] was indeed carrying on financial business.”**

Counsel submitted that the term **“financial institution”** is defined only in the Banking Act; and that even the Insurance Act (Cap.487, Laws of Kenya) under which the defendant operates, has adopted the definition given under the Banking Act: this Act provides that **“financial institution”** has the meaning assigned to it under the Banking Act, and includes a mortgage finance company within the meaning of that Act. Counsel submitted that the scope of the insurance business (as defined in s.2 of the Insurance Act) does not include the business of **lending money**.

Counsel urged that the Banking Act (Cap.488) had come into force on **1st November, 1989** repealing the previous Banking Act, but had saved the licence to transact banking business by financial institutions under the repealed Act (s.56(2) of the Banking Act).

Counsel, on the basis of s.23(2) of the Interpretation and General Provisions Act (Cap.2, Laws of Kenya), submitted that the statute authorizing the defendant to engage in the business of lending money to customers is the Banking Act (Cap.488): and therefore the defendant, when lending money, is operating as a **financial institution**.

On that basis, counsel submitted that the defendant could not exclude itself from the operations of the Central Bank of Kenya Act (Cap.491), **“while it purported to take advantage of the repeal of [certain provisions] and...to raise the interest rate vide its letter to the plaintiff dated 21st December, 1991.”** Counsel submitted that the defendant was **“purportedly increasing the rate on the ground that the interest rates had been de-regulated”**; but if the defendant rightly takes the position that it is not a financial institution, **“then it ought not to have been concerned with the deregulation of interest rates.”** Counsel urged that the defendant, in raising the interest rate to 22%, was only attempting to give a legal appearance to **“the illegality of charging [an] interest rate.”**

Counsel urged that the defendant cannot insist it is not a financial institution, without **“disclosing under which law it was conducting the business of lending money to the general public”**; and that the defendant could only have been carrying on a financial business illegally – and so should not be allowed to benefit from this illegality. Counsel asked the Court to order that **“the defendant is only entitled to Kshs.150,000/= which it lent out to the plaintiff and no more.”**

Learned counsel next submitted that the interest of 22% charged by the defendant, pursuant to the charge dated **3rd July, 1984** was in contravention of the directives by the Central Bank of Kenya: those directives limited the maximum rate of interest which banks may charge on loans or advances to **Kshs.14% p.a.**, and that which **financial institutions** may charge, to **19% p.a.** – both calculated on the reducing-balance method. (These directives are contained in Gazette Notice No. 2351 of **15th June, 1984**, and in the Central Bank of Kenya’s **Quarterly Economic Review**, Vol. XIX No. III (**January – March, 1987**)). Moreover, counsel submitted, by **23rd March, 1989** [Gazette Notice No. 1690 of that date], the maximum interest rates chargeable by financial institutions stood at **18% p.a.**

Counsel submitted that the defendant, in its statement of defence, **“never endeavoured to show**

why the interest rate was 22%, apart from the allegation that it is not a financial institution.”

The next point of contest was as to whether the plaintiff had an obligation to take a plurality of policies with the defendant simultaneously. Counsel urged that the subject charge carried no consensus that the loan to the defendant would be advanced on **“the condition-precedent that the plaintiff took out two...policies”** at the same time; and the nearest clause to such an interpretation was:

“that during the continuance of this security I will place with the chargee my other general insurance business on [such] terms and conditions as may be agreed with the chargee from time to time.”

Counsel submitted that the two life policies which were cancelled by the defendant, **“were contracted...on different terms and conditions, and their cancellation...was not governed and/or controlled by the subject charge.”** Counsel urged that the cancellation of the said policies (defendant’s letter of 3rd August, 1989) merely terminated the relevant contracts; but the defendant **“could not purport to continue serving the said loan...”**

Counsel submitted that the plaintiff had no premiums owing: but, even were something, in that regard, be found owing, this would not be recoverable **“by the realization of securities under charge, since the subject policies were separate and distinct transactions, with their unique terms and conditions.”**

Learned counsel submitted that, as at 27th November, 1989, the plaintiff had made an overpayment (on the basis of the unauthorized interest rate of 22% p.a.) on the loan account by Kshs.42,801.

The plaintiff, in his plaint dated and filed on 8th February, 1991 made the following prayers:

- (i) **a declaration that the rate of interest charged by the defendant is excessive;**
- (ii) **a declaration that the “application fee” and “miscellaneous interest” charged by the defendant are not payable and should be refunded to the plaintiff;**
- (iii) **a declaration that upon a proper construction of the rate of interest payable on the loan, the plaintiff has discharged the same, and/or any excess payment should be refunded;**
- (iv) **an injunction to restrain the defendant from auctioning the suit properties: KWALE/KIDIANI/199; KWALE/MCHINGIRINI/750; KWALE/MCHINGIRINI/764; KWALE/MCHINGIRINI/836; KWALE/MCHINGIRINI/848; and KWALE/MCHINGIRINI/889 – because the interest rate of 22% p.a. applied by the defendant “exceeded the rate permitted by the Central Bank of Kenya ...and ought not to have been charged to the defendant”;**
- (v) **costs and interest.**

The defendant, in his defence of 7th August, 1991 had pleaded that **“it was expressly agreed between the parties that the loan would be advanced on the condition-precedent that the plaintiff took out the two policies,”** but that **“immediately after the receipt of the loan advances the plaintiff purported unilaterally to revoke the policies”;** and he denied that the rate of interest exceeded that permitted by the Central Bank of Kenya; he contended that **“the Central Bank rates do not apply to the mortgage in this suit.”** The defendant further pleaded that **“the plaintiff was most irregular in repayments and that he was a persistent defaulter;”** and that it was due to such defaulting that the amount of the unpaid balance escalated. The defendant pleaded that the calculation of interest has always been **“in full conformity with the agreement embodied in the mortgage deed.”**

Apparently conceding to the plaintiff’s position that the Central Bank of Kenya Act (Cap.491) has defined the term **“financial institution”**, the defendant nonetheless urges that since his name is not included in the attendant subsidiary legislation, that Act “has no application to the defendant”. The defendant also acknowledges that the Banking Act (Cap.488) defines the term **“financial institution”**, but urges that such an entity is to accept **“deposits”** from the public; the defendant’s counsel submits that the term **“financial institution”**, in this regard, excludes the defendant, for it **“excludes a transaction of a private nature such as the one entered into here.”** Counsel urged: **“If a company has private funds to lend then ipso facto it does not fall to be considered as a financial institution.”** Counsel submitted that

“the defendant was and is a private company with its own funds and is governed by its Memorandum and Articles of Association insofar as lending is concerned.” From this position, counsel urged that **“if the defendant is not a financial institution then the Central Bank of Kenya rates set out in the Gazette notices do not apply to the charge herein.”**

Learned counsel contested the submission made for the plaintiff, that advancing monies to members of the public does not fall within the category of **“general insurance business”**, as contemplated in the Insurance Act (Cap.487); in his view, **“nothing in either [the] Banking Act or [the] Insurance Act forbids advances by an insurance company in its private capacity.”** Counsel urged that the mortgage in this case **“was not a bank mortgage but a private one”**, and so it was not open to the plaintiff to contend that the defendant bore an obligation to declare **“which statute governs the interest rates on the subject transaction”**. Counsel submitted that while the suit properties are governed by the Registered Land Act (Cap.300, Laws of Kenya), that Act defines a chargee to mean the proprietor of a charge (ss.3,65); but the Act carries no provision that **“[a] chargee shall only be a bank and be subject to the provisions of the Banking Act”**; and so, **“private mortgages are not excluded under the law.”** Counsel submitted that there are no statutory fetters to the making of financial advances, by reason of the defendant not being a financial institution.

Counsel submitted that the insurance policies in question were taken out a couple of months before the execution of the charge: because it was a condition-precedent agreed under Clause 15.

The said Clause 15 of the charge signed by the chargor on **3rd July, 1984** thus provides:

“15. That during the continuance of this security I will place with the chargee my other general insurance business on the terms and conditions as may be agreed with the chargee from time to time.”

Against the background of the said agreement, there is the plaintiff’s letter of cancellation of the insurance policies dated **3rd August, 1984** – but which letter had a unilateral origin, and was not accepted by the defendant. Counsel submitted that the plaintiff had taken out the policies **“only to get the advances from the defendant”**; **“it was a premeditated act on his part to renege on the policies once the money was in his pocket.”** In those circumstances, counsel urged, **“the defendant is...entitled to unpaid premiums for the remainder of the term.”**

Counsel submitted that, in consequence of the plaintiff abandoning the scheme of payment, the arrears of interest became compounded: and this is the main component of the defendant’s stake in this matter.

Counsel contended that the plaintiff had known the nature of the contract he was getting into when he borrowed money from the defendant; he did understand that as a collateral agreement, he had to take out insurance policies with the defendant; he knew he had to pay premiums on such policies; he knew he had to repay the agreed monthly instalments, including interest; and he knew he would have to pay compounded rates on arrears. Counsel submitted that the defendant’s position, in this regard, found support in a decision of the Court of Appeal, ***J.L. Lavuna & Others v. Civil Servants Housing Co. Ltd.***, Civ. Appl. No. Nai 14 of 1995 which upheld the sanctity of an agreement, such as the instant one, in which well-informed persons voluntarily struck a bargain and so they must be held to the terms of that bargain. Counsel submitted: **“the deal was at arm’s length and the plaintiff could have declined to enter [into] it. Now, by reason of having consummated the deal, he has to bear [the] consequences of the breach.”**

The plaintiff sued the defendant contesting the claims being made on him, both in respect of a charge negotiated and agreed upon by the parties, on **3rd July, 1984**; and in respect of policies of insurance taken out with the defendant. It has not been contended that the said charge is non-existent, nor was, for any cause, a nullity; but the plaintiff contests the status of the insurance policies as an integral element in the charge contract, whereunder certain sums of money were advanced to him. While it is not disputed that the defendant did, under the charge agreement, advance the monies to the plaintiff, the plaintiff has introduced the terminology of the Banking Act (Cap.488) to describe the operation, in the

relevant case, of the defendant as an incident of a **financial institution** – and then contended that the charge-loan advanced under the contract was not repayable for having been made contrary to the requirements of the Banking Act. This argument seeks also to rule out the defendant’s claim of **insurance premiums**: because the scope of business under the Insurance Act (Cap.487) does not include a **leading of money**. On the basis that the defendant, by lending money had operated as a financial institution, the plaintiff takes the position that the defendant had no right in law to charge interest rates different from those specified under the Banking Act and the Central Bank of Kenya Act (Cap.491): in the result, the plaintiff contends that he is owed monies by the defendant who should not have been paid any in the first place.

The defendant, by contrast, has relied on the terms of the charge document, and has urged that it was a private agency who, on the basis of contract, advanced private monies to the plaintiff as part of an exchange of considerations – and so this transaction falls outside the terms of the Banking Act, and the Central Bank of Kenya Act.

The plaintiff, who moved this Court, while admitting that there was a charge agreement between himself and the defendant, and that under this charge he had received loan-monies, made no straightforward case demonstrating that such monies were non-repayable. The burden of the plaintiffs’ case was that the defendant was bound by the Insurance Act to limit itself to **insurance business**; and that the provisions of the Banking Act did not allow the defendant to lend money, nor, much less, to lend at interest rates which had not been approved by the Central Bank of Kenya.

This argument misses the real relationship, of immediate legal relevance, that held the parties together: there was a *consensus ad idem*, under which a charge document was prepared, and duly signed by the plaintiff; under this charge, certain monies were advanced to the plaintiff, on specified terms; part of the charge contract related to premium payments on certain policies taken out by the plaintiff; in the normal play of these transactions, the plaintiff was under duty to make periodic payments to the defendant; the plaintiff, after some time, became reluctant to make the said payments; the effect was that the plaintiff was in default, in performing the terms of the original contract. These fundamentals are, in my opinion, not qualified by rather peripheral questions now raised by the plaintiff: such as, the defendant having advanced the loan contrary to some law; the defendant failing to conduct its mortgage arrangement as a financial institution as defined in the Banking Act; the defendant failing to charge the interest rates stipulated under the Central Bank of Kenya Act. In my opinion, the defendant was only conducting its normal business of insurance, and at the same time rendering related services to its customers.

Consequently, I hold that the plaintiff has not shown the merits of his case, which, consequently, must be dismissed. I dismiss the suit, and award costs to the defendant.

Decree accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 29th day of September, 2011.

H.M. OKWENGU

JUDGE