REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 191 of 1997

NATIONAL BANK OF KENYA……..…….PLAINTIFF

VERSUS

WILSON OGOLLA OLENDO……..……...DEFENDANT

JUDGMENT

The Plaintiff Bank filed this suit on the 30th January 1997 seeking payment of a composite sum of Kshs.887,906.45 with compound interest at 32% per annum with effect from November, 1st 1996 being loan, advance and or over draft owed to the Plaintiff by the Defendant. The Plaintiff also avers that the Defendant admitted indebtedness. The Defendant filed a defence and counter claim on 22nd April 1997. In the defence, the Defendant denies applying for any loan, advance or over draft facility from the Plaintiff bank and denies admitting indebtness. In the alternative the Defendant challenges interest rate charged on the alleged outstanding amount as being in breach of the contract entered between the parties. In counter claim the Defendant seeks an interpretation of the contract between the parties relating to interest and a declaration that the compound interest charged was harsh and uncautionable the Defendant further prays for an order telling him of payment of any sum found to be in excess of sum court may adjudge to be fairly due and such further and other relief the court may deem just and fitting to grant when the suit came up for hearing, the Defendant did not appear despite being served with a hearing notice. The Plaintiff called one witness, Miriam Nderitu who gave evidence on its behalf. In summary that evidence was follows.

Miriam told the court that the Defendant wrote to the Plaintiff asking for an overdraft facility on November, 1st 1991. Based on that application, the Bank sent him a letter of offer dated February 3rd, 1992. It was Pexh.1. It offered the Defendant an overdraft facility upto a limit of Ksh.300,000/= for a period of 12 months. On the issue of interest, the Bank was to charge interest at the rate of 20% interest per annum on monthly rests. The letter of offer further provided thus:-

"The Bank however reserves the right to give notice and thereafter vary the rate of interest charged as may be required."

The Defendant accepted the offer signified by the Defendant's signature on the letter of offer dated February, 4th 1992. Miriam testified that the Defendant utilized the facility but failed to pay and that as a result, the bank wrote a demand letter to him on February, 18th 1993. The letter was Pexh.2 and it demanded Kshs.506,379.65. When no response was received, the Plaintiff handed over the matter to their lawyer Mereka & Co. Advocates who wrote a demand letter to the Defendant on May, 18th 1993. There followed an exchange of correspondences between the Plaintiff bank and the Defendant produced as Pexh.4,5,6,8,9,10,11,12 and 13. The Plaintiff also produced a statement of the Defendant's account with

it for period between January 31st 1995 to November, 1996.

Miriam testified that when the Defendant did not pay the bank the amount owing the bank instructed an Auctioneer who attempted to realize the security over L.R No. South Teso/Angoromo/1047 to no avail. The Auctioneers letter and invoice was Pexh.14. The charge over the above property was not exhibited in court neither was the title part of the documents adduced in evidence by the Plaintiff. However, since the Defendant signed the letter of offer in which reference of the charge over property is made and further, given the fact that both the charge and the attempt to realize it is not denied in the statement of defence, it will be deemed that such a charge existed.

I have carefully considered the pleadings of both parties which I have also summarized in this judgment together with the evidence adduced by the Plaintiff, the documents relied upon and submissions by the Plaintiff's Advocates.

In my understanding the Defendant in his defence denies that any overdraft or advance facility was provided to him by the Plaintiff as explained in paragraph 3 of the plaint. The Plaintiff has by documentary proof demonstrated that not only did the bank offer the Defendant overdraft facility to a maximum of Kshs.300,000 , but that the Defendant accepted the offer by signing it. The letter of offer is Pexh.1. It refers to the Defendants letter of 1st November 1991 and states thus:-

"***We refer to your letter of 1st November, 1991 wherein you applied for banking facilities, we are pleased (sic) to confirm having agreed to grant the under mentioned facilities on the following terms and conditions:'***

There is a note signed by the Defendant at the end of the letter of offer and it states:-

"***I have read and understood the terms and conditions set out above and append my signature in acceptance thereof.***

Signature…..Date 4-2-1992''

The Plaintiff's evidence that the Defendant applied for a banking facility in the form of an over draft and that the Defendant subsequently accepted the offer of Kshs.300,000/= is therefore unchallenged.

The Plaintiff has annexed a statement of the Defendant's overdraft account showing that the Defendant enjoyed the facility by over drawing the account but failed to make the requisite payments. As at the time the suit was filed, the Defendant owed the Plaintiff Kshs.887,906.45/= as per the statement of account. I will get to this matter later.

The Plaintiff has shown that through various correspondences between it and the Defendant demand to pay the outstanding amount was made to the latter and that the latter made proposals of how he intended to clear the outstanding amount. The Defendant however defaulted even on his proposals.

The Plaintiff has also demonstrated that there was an attempt to realize the security charged to secure the loan to no avail. The only issue which I see from this suit touches on interest. As already stated the Defendant challenged the 30% per annum interest charged on the overdraft on grounds it was in contravention of the contract between the parties. He counterclaimed seeking for an interpretation of the agreement between the parties as far as the interest rate is concerned. I have already set out the terms of the agreement between the parties on the question of interest rate chargeable but I will reflect it here for ease of reference. On page 1 and 2 of P.Exh.1 the terms and conditions under which the overdraft facility was offered to the Plaintiff is provided. Under **Interest,** it was provided thus:-

"*Interest*

To be at the rate of 20% per annum on monthly rests for the time being, calculated on daily balances. The Bank however reserves the right to give notice and thereafter vary the rate of interest charged as

may be required.''

This provision was subject to a further provision in the same agreement under title on **Charge Terms** at page 1 of P.Exh.1. It provides thus-

"***Charge Terms***

It is hereby expressly agreed that upon execution of the charge referred to herein, the terms and conditions stated in the charge will form the basis of the contract and where any terms of conditions in this letter of offer conflict with any covenant in the charge, the latter shall prevail."

Mrs. Ojiambo for the Plaintiff in submissions on this point stated thus:-

"***The correspondence between the parties and the statements of account reveal the interest charged at any given time and the Defendant acquiesced to the rates applied. The Defendant admitted the debt fully aware of the interest rate applied and has not come to court do deny knowledge of interest rate applied to the account".***

There are two points that the counsel brings out in the submissions:-

1) That the Defendant through the various correspondences acquiesced the interest rates applied by the Plaintiff and has not come to court to deny knowledge of the rate applied.

2) **The regime regulating interest rates was repelled by G. N. No. 3348 of 23rd July 1991 and therefore the Plaintiff was free to levy interest rates according to the market forces.**

To begin with the latter point first, the Defendant in his defence did not challenge the Plaintiff's right to charge interest and that was never the issue. The repealing of the Gazette notice No. 3348 of 23rd July 1991 is therefore not material. That point is immaterial to the issue raised by the Defendant. Just to clarify this point, paragraph 5 and 6 of the statement of defence avers thus:-

5. The Defendant further avers that the interest charged on the alleged outstanding amount is a total breach of the contract entered into between the Plaintiff and the Defendant.

6. Further still and/or in the alternative and without prejudice to the foregoing the Defendant shall aver that the rate of interest charged by the Plaintiff is excessive and the said transaction was harsh and unconscionable or otherwise such that a court of law would not give relief.

On the first issue of acquisting by the Defendant, the point is not whether the Defendant acquised the variation of the interest rate but whether the variation was carried our as provided for in the agreement between the parties.

The Plaintiff has produced Exh.1 the letter of offer dated 3rd February 1992 which provided for the interest rate of 20% with right to vary. As shown earlier, the same letter of offer provided that the terms under the charge would prevail over those under the letter of offer. In that regard, the Plaintiff needed to show either:-

1) That the rate of interest charged was in accordance with the letter of offer; and or

2) The rate of interest was varied in accordance to the letter of offer or charge agreement.

The Plaintiff did not produce the charge agreement and therefore the court cannot assume what was agreed under the charge. The court has to go by the material placed before it. In that regard therefore the provision relevant to the right to charge interest is the one provided in the letter of offer under item on **Interest** as already set out herein. That brings me to the cardinal issue which is the Plaintiff bound itself

to vary the interest rate from 20% per annum on monthly rests on following terms:-

"***The Bank reserves the right to <u>give notice</u> and <u>thereafter</u> vary the rate of interest charged as may be required."***

(emphasis mine)

The court cross-examined the Plaintiffs witness on this issue and she had this to say:-

"***As per Exh.1 interest was at 20% per annum at monthly rests.***

Yes it says the Bank reserved right to give notice and thereafter vary the rate of interest.

Yes we did change the interest to 30%.

I do not have any notice we gave to the Defendant varying the interest rate."

In re-examination by the Plaintiff's Advocate, the same witness stated thus:-

"***No we never wrote any letter informing the Defendant of change of interest rates.***

The only notice we gave the Defendant is when making the demand letter."

Having considered the provision of the agreement between the Plaintiff and the Defendant herein, and the evidence by the Plaintiff's witness it is quite clear that the Plaintiff varied the interest rate charged on the overdraft facility advanced to the Defendant. It is also quite clear that the variation was made without notice to the Defendant as provided in the letter of offer. Parties are bound by their contract and therefore the Plaintiff could not vary the interest rate chargeable before giving the Defendant notice to that effect. Since the Plaintiff varied the interest rate without notice to the Defendant such variation was illegal, null and void. The learned counsel's submission that following the repealing of G. N. No. 3348 of 23rd July, 1991 the Plaintiff could charge whatever interest it wanted did not give the Plaintiff power to re-write the agreement between the Plaintiff and the Defendant as provided in the letter of offer and whether did it give the Plaintiff the right to vary the interest rate otherwise than in accordance to those terms. The evidential burden of rate applied was in accordance to the agreement between the parties lay with the Plaintiff and it did not discharge the burden.

The Defendant did not come to court to challenge the amount claimed in the Plaint. The evidence before court is that Kshs.887,906.45 was owed by the Defendant to the Plaintiff as at 29th January 1997 when the suit was filed. Since no evidence has been adduced to challenge the amount I will accept the sum claimed in the Plaint as the one due.

The upshot of this Judgment is as follows.

1. Prayer (a) (c) and (d) of the Defendants Defence and counter claim is allowed to the extent shown in this judgment.

2. Prayers (b) is dismissed.

3. (i) The Plaintiff prayer (a) in the Plaint is allowed and judgment is hereby entered in the sum of Kshs.887,906.45 as claimed.

(ii) Prayer (b) of the Plaint is dismissed.

(iii) The Plaintiff is awarded interest on the judgment in 3(1) above with interest at 20% per annum from the date of judgment until payment in full.

(iv) The Plaintiff also gets the costs of this suit.

Dated at Nairobi this 21st day of September 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:-

Ojiambo for Plaintiff

N/A for Defendant

LESIIT, J.

JUDGE