



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Suit 35 of 1994**

**NATIONAL BANK OF KENYA.....PLAINTIFF**

**VERSUS**

**BARRACK DEYA OKUL.....DEFENDANT**

**JUDGMENT**

By a plaint filed on 13/1/1994 the plaintiff claimed from the defendant a sum of **Kshs.6,290,592.50** as the amount that was due and owing by the defendant to the plaintiff as at 31/12/1993 being the balance of money and/or overdraft it allowed and paid to the use of the defendant as bankers for the defendant at the defendant's request and instance at Nakuru and interest thereon at the rate of 40% per annum.

The defendant filed a statement of defence and admitted having been granted overdraft facilities by the plaintiff but denied that the amount owing was Kshs.6,290.592.50 as claimed by the plaintiff. The plaintiff denied that the agreed rate of interest was 40% per annum.

The plaintiff adduced its evidence through one **Mr. Richard Rotich** who was working at the plaintiff's Recoveries Department at Nakuru. He said that the defendant opened an account with the plaintiff on 3/1/1987. This was current account no. 301017522. On 10<sup>th</sup> of September 1987 he applied for a temporary overdraft facility of Kshs.100,000/- and the application letter was produced in court as P. Exh.1. The bank gave him a letter of offer vide a letter dated 17<sup>th</sup> September 1987 (P. Exh.2) and the defendant accepted the said offer. As per the said letter of offer, interest on the said facility was stated to be **14% per annum** on monthly rests calculated on daily balances. The Bank however reserved the right to give notice and thereafter vary the rate of interest charged. The security for the said facility was a guarantee for Kshs.100,000/- by one Mr. Geoffrey Makana Asanyo supported by a legal charge of Kshs.350,000/- over Mr. Asanyo's property known as **NAKURU/MUNICIPALIY BLOCK3/548** valued at Kshs.580,000/-.

On 12<sup>th</sup> of November 1987 the defendant requested for another facility of Kshs.300,000/- and the plaintiff gave him a letter of offer on the same date. As per the letter of offer, the agreed rate of interest was 14% per annum Just as in the first facility which had been granted to the defendant, the plaintiff reserved the right to vary the same upon notice. However, the security was a legal charge for Kshs.300,000/- over the defendant's property know as **NAKURU MUNICIPALIY BLOCK 17/46** which was valued at Kshs.450,000/-. Thereafter the defendant drew 45 cheques for a total amount for Kshs.2,500,000/-. despite the fact that the overdraft facilities which had been granted by the plaintiff amounted to an aggregate Kshs.400,000/- only. The bundle of the said cheques which were drawn by the defendant and paid by the plaintiff were produced as P. Exh.5. It appears that the defendant did not make much effort in repayment of the advanced sum and the plaintiff began to write to the defendant asking him to effect payments.

By June 1998 the outstanding sum that the plaintiff was demanding from the defendant was Kshs.8,322,342.45 and that sum was largely due to interest which had accrued on the amounts which the plaintiff had paid on behalf of the defendant. The plaintiff was calculating interest at the rate of 40% per annum but by its letter dated 16/6/1998 the plaintiff agreed to reduce the same to 32%. However, the defendant disputed the amount that was being claimed and wrote to the plaintiff on the 28/6/1998. The plaintiff in return wrote to the defendant and withdrew the offer of reduction of interest which it had made as aforesaid. As at 22<sup>nd</sup> September 1999 the plaintiff was demanding from the defendant a sum of Kshs.17,144,807.45. The plaintiff had in 1996 sold the security which had been offered to it by the defendant and a sum of Kshs.600,000/- was realised. The amount was utilised towards reduction of the defendant's indebtedness to the plaintiff. Since then no other amount was paid or credited to the defendant's overdraft account and Mr. Rotich told the court that the outstanding debt was now Kshs.18,260,741.95 and the bank was claiming that sum from the defendant.

In cross examination, Mr. Rotich said that although the agreed rate of interest on the overdraft facilities was 14% per annum the bank reserved the right to vary the same on notice to the defendant. However, he admitted that no such notice of variation of interest had ever been given to the defendant. He further stated that the charge document and the letter of offer had provided that the rate of interest could be varied if there was any default on the part of the defendant. Mr. Rotich defended the rate of interest, 40% per annum, which the plaintiff was charging the defendant saying that it was the prevailing rate of interest on all accounts which were not being serviced appropriately. He further admitted that the bank had also debited the defendant's account with legal fees which it had paid to its lawyers who were pursuing the said debt from the defendant.

In his defence, the defendant told the court that he used to operate a petrol station in Nakuru Town and was also a distributor for Coca-Cola Company Limited and Kenya breweries Ltd. He further said that he applied for the said overdraft facilities to assist him in running his businesses and the agreed rate of interest of the same was 14% per annum. If the bank was to vary that rate of interest they were obliged to give him an advance notice but he was never given any such notice, he stated. He said that there was only one letter of 16<sup>th</sup> of October 1990 by which the plaintiff informed him that the rate of interest was increased to 17% per annum. He learned much later that the plaintiff was charging him interest at the rate of 40% per annum. By 16<sup>th</sup> October 1990 when the plaintiff wrote to the defendant they were demanding a sum of Kshs.809683.60. The defendant stated that he started having problems with the bank in 1992 and he was called for a meeting with the bank's branch manager in Nakuru and when they met, he raised a dispute regarding the rate of interest which was being applied by the bank. He also disputed lawyers' fees and other penalties which had been debited to his account. The plaintiff's advocate's fees that had been debited to his account was Kshs.204,000/-. The defendant further lamented that he had agreed with the plaintiff that he would sell the charged property by private treaty but the bank sold it in a public auction at Kshs.600,000/-. As a result of that sale the plaintiff debited his account in a sum of Kshs.51,312.10 which it paid to its advocates. The defendant said that the interest that was charged on the amount that had been paid to the plaintiff's advocate amounted to Kshs.684,284.50 and the total sum inclusive of the advocate's fees was Kshs.889,069.50 and when he complained about that figure the plaintiff agreed to reduce the same by Kshs.721,659.90 and his account was credited by that sum as per D.Exh.C which he produced as evidence. The plaintiff also agreed that the penalties that they were charging were excessive and they gave the defendant a credit of Kshs.88,655 as evidenced by D.Exh.D which was tendered in evidence. The defendant produced several other letters which he had written to the plaintiff disputing the high rate of interest which was being charged by the plaintiff. In his view, the plaintiff's claim was unrealistic and unfounded. He said that the sum of Kshs.600,000/- that was realised out of the sale of his property was sufficient to settle his indebtedness to the bank.

In cross examination, the defendant admitted that although his overdraft limit was Kshs.400,000/- the plaintiff had paid out a sum of Kshs.2,500,000/- on his behalf but he said that the amount of money that he had paid to the plaintiff plus the sum of Kshs.600,000/- which had been realised from the sale of his property exceeded Kshs.2,500,000/- which the plaintiff had paid on his behalf. However, he admitted that all the deposits which he had made into his account had been duly credited and the statements in evidence thereof had been posted to him.

The parties drew a list of agreed issues and filed the same on 19.6.1995. **Order XX rule 5** of the **Civil Procedure Rules** states as follows:-

*“In suits in which issues have been framed, the court shall state its finding or decision, with the reasons therefor, upon each separate issue”*

The agreed issues were as follows:-

1. With reference to paragraph 3 of the plaint and paragraphs 2 and 3 of the defence what is the amount due and owing by the defendant to the plaintiff?
2. With reference to paragraph 3 of the plaint and paragraph 4 of the defence was there an agreement for overdraft facilities and/or whether the overdraft was allowed and money paid to the use of the defendant. What were the terms of the payment?
3. Was the interest rate agreed and if not, what rate of interest applies to the account?
4. Are bank charges payable by the defendant?
5. With reference to paragraph 6 of the defence did the defendant call on the plaintiff as alleged?
6. Who will pay the costs of the suits, interest thereon and the value added tax thereon?

In answer to issues numbers one and two, the amount that the defendant applied for by way of an overdraft was Kshs.400,000/- or thereabout. The agreed rate of interest on the same was 14% per annum. The security which had been provided by the defendant was valued at Kshs.600,000/- but that notwithstanding, the plaintiff kept on paying the defendant's cheques upto Kshs.2,500,000/- and that was not denied by the defendant. No good reason was advanced by the plaintiff as to why it kept on honouring the defendant's cheques when he had exceeded his authorised limit by far. The defendant, having admitted that the plaintiff paid his cheques to the tune of Kshs.2,500,000/- cannot deny his obligation to pay the aforesaid sum or turn around and blame the plaintiff for having honoured his cheques. In ***KENYA COMMERCIAL FINANCE COMPANY LTD VS NGENY & ANOTHER*** [2002] 1KLR 106 at Pg.127 it was held as follows:-

***“it is well established as a matter of banking law and practice that where a customer opens a current account with no express agreement with the bank and the customer draws a cheque on the account which causes the account to go into overdraft, the customer has by necessary implication requested the bank to grant an overdraft of the necessary amount on its usual terms as to interest and other charges and in deciding to honour the cheque, the bank has by implication accepted the offer”***

From the foregoing, the defendant was liable to pay to the plaintiff a sum of Kshs.2,500,000/- plus interest and other charges thereon.

In answer to issues numbers 3 and 4 on the rate of interest that was to apply, the parties agreed at a rate of 14% per annum. The bank however, reserved ***“the right to give notice and thereafter vary the rate of interest charged as may be required”***. The plaintiff did not produce any letter showing that it had given any notice to the defendant that it was increasing the rate of interest on the overdraft facilities and other charges upto 40% per annum as it is stated in its plaint. While the defendant's default in servicing the facilities and other prevailing economic circumstances may have permitted the plaintiff to apply that rate of interest, it was under an obligation to give notice to the defendant before it effected the change. In ***SHAH VS GUILDERS INTERNATIONAL BANK LTD*** [2003] KLR 8 it was held that if by their agreement the parties have fixed the rate of interest payable then the court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent. Similarly I would say that since the agreement between the plaintiff and the defendant clearly provided that the rate of interest was not going to be increased beyond 14% per annum without advance notice to the defendant, it would be illegal for the plaintiff to charge any higher

rate than the agreed one without such a notice.

I therefore hold that the rate of interest that is rightly payable on the sum of Kshs.2,500,000/- and other reasonable bank charges like legal fees that was paid by the plaintiff to its lawyers is 14% per annum and not 40% per annum. Apart from the overdrawn sum of Kshs.2,500,000/- the only other charge that was shown to have been made by the plaintiff was on account of legal fees which amounted to Kshs.204,185/-. If there was any other bank charge then the same was not disclosed.

Turning now to issue number 5, it is not in dispute that the plaintiff and the defendant held several meetings but were unable to agree on the rate of interest. In one of those meetings the plaintiff offered to reduce the rate from 40% per annum to 32% per annum but it would appear that the defendant was still not satisfied with that reduction or was simply unable to pay his debt. In any event, in view of my finding as hereinabove, this issue is not of much importance. But one thing which is discernable from the said meetings is that the plaintiff was also of the view that the rates of interest which it was charging were not totally justifiable and I believe that is why it was able to give hefty credits to the defendant.

In conclusion I find that the defendant is liable to pay a sum of Kshs.2,500,000/- being the amount overdrawn on his account plus Kshs.204,185/- being legal fees plus interest on both sums at the rate of 14% per annum from the dates when the aforesaid sums were paid. The defendant will also pay the costs of the suit and interest thereon at court rates.

DATED, SIGNED AND DELIVERED at Nakuru this 6<sup>th</sup> day of February, 2006.

**D. MUSINGA**

JUDGE

**6/2/2006**

Judgment delivered in open court in the presence of Mr. Kiburi for the plaintiff and N/A for the defendant.

**D. MUSINGA**

JUDGE

**6/2/2006**