

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT 383 OF 2005

MECHANISED CARGO SYSTEMS LIMITEDPLAINTIFF

VERSUS

FINA BANK LIMITED.....DEFENDANT

RULING

The plaintiff and defendant have had a customer banker relationship since 1996.

The plaintiff during that time has obtained from the defendant various banking facilities such as; on 23rd October 1996 an overdraft facility of kshs 60, 000, 000; 3rd April 1997 the overdraft facility was increased to kshs 65, 000, 000; in June 2000, the plaintiff negotiated for a loan account with the defendant for kshs 15, 000, 000.

The defendant has from time to time informed the plaintiff of changes in the lending rate of interest. In June 2000 the plaintiff discovered that the defendant was levying unlawful interest rates and penalties and requested for a complete statement, which the defendant failed to give. The plaintiff by its letter dated 11th July 2001, letter dated 11th July 2001, complained to the defendant about the excessive rate of interest, which the defendant failed to acquiesce. The plaintiff in an attempt to redeem the facilities arranged for sale of property L.R. No. 209/1006/9 for kshs 42, 000, 000 further to secure the facilities deposited 5 log books of five motor vehicles. The debentures created on the additional security was not registered immediately and it was contended on behalf of the plaintiff that those debentures are null and void.

The plaintiff accounts with the defendant were re-calculated by 'Interest Rates Advisory Centre' (IRAC), which revealed that the plaintiff should have a credit of kshs 3, 773, 986. 05 in its favour.

The defendant, in calculation of interest, breached section 44 Banking Act. The defendant has attempted to force the plaintiff to admit indebtedness to the defendant and failure to so admit the defendant has threatened to place the plaintiff under receivership. Such an action of appointing a receiver manager would prejudice the plaintiff and would enable debenture, held by others, to crystallize.

The plaintiff argued these points in support of an application dated 12th July 2003, which seeks an order of injunction to stop the defendant appointing a receiver manager. The application is brought under Order XXXIX Rules 1,2,3,7 and 9 of the Civil Procedure Rules.

The application was served on defendant's risk manager, Mr. Stephen Wachira and although he acknowledged receipt there was no appearance, at the hearing of this application, on behalf of the defendant. The plaintiff's submissions, therefore, and the averments in the affidavit in support were uncontradicted.

I find that the plaintiff has on a balance of probability proved that it is entitled to the prayers sought in the application. The orders of the court are: -

- 1) That an injunction to issue restraining the defendant, its agent or servants, from appointing a Receiver/Manager over the business and assets of the plaintiff and from interfering in any way whatsoever in the management or operations of the plaintiff, pending determination of this suit.**

2) That the defendant shall pay the plaintiff's costs of the application dated 12th July 2005.

Dated and delivered this 15th July 2005.

MARY KASANGO

JUDGE