REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT NO. 2198 OF 2000

PROF DAVID MUSYIMI NDETEI.....PLAINTIFF

VERSUS

DAIMA BANK LIMITED.....DEFENDANT

JUDGEMENT

The plaintiff has brought the present action seeking declarations from the court that he is entitled to judgment of Kshs.15,359,072.82; that the statutory notices of sale issued by the defendant were defective and invalid and were improperly served on the plaintiff, that all costs incidental to those notices be met by the defendant; that irregular debits be reversed from plaintiff's account, that is excess fee, facility fee, arrangement fee and transfer of Kshs 2,040 694.65 into plaintiff's account; the method of compounding penalties and interests against plaintiff's account was wrong; that if the correct application of penalty was made the plaintiff's account would be in credit; that defendant breached the term of the various contract by applying both normal and penalty interest; that the plaintiff's account No.105301 is overpaid; that a prohibitory injuction do issue to sustain the defendant from selling the plaintiff's property L.R. NO. 1504/13 Athi River.

The defendant, by its defence denied the plaintiff's claim then counter claimed for money allegedly owed to it by the plaintiff being Kshs 6,888,718.95

The case began by hearing from the plaintiff. He stated that he teaches at the Nairobi University, and has so taught for 21 years. That he also runs on part time basis a psychiatric practise. He therefore made a bold statement that, the defendant is claiming money from him, which he does not owe, and that to the contrary it is the defendant who owes him money. He recounted how the then chairman of the defendant, Mr. Muumbi, approached him and told him that he wanted to help members of his community, and since the plaintiff was a prominent member of his community he said he ought to do business with him. The plaintiff stated, *"at that time I had no financial needs"*. It was thereafter that the defendant offered him a facility for Kshs. 3,000,000 as an overdraft. The offer was contained in a letter of offer dated 19th July 1994. The purpose of the facility was stated in the letter of offer to be two folds; (i) Kshs 1.5 million to be finance working capital of his company Oasis Mineral Water Company Ltd, (ii) Kshs. 1.5 million to guarantee a company called Tasi Exporters. The facility attracted interest at the rate of 33% plus 5% that is 38%, floating calculated monthly and in arrears. In the event the plaintiff exceeded the facility the penalty was 4% per month and this excess penalty would be levied on daily excess and be paid monthly. The other charge subject of this facility was renewal fee 0.5% on yearly basis. The plaintiff stated that he

accepted that offer on 19th July 1994.

The plaintiff further said that the defendant made another offer for another facility by its letter dated 24th July 1995. That by this second facility the cumulative total borrowing was Kshs. 5 million. The second facility attracted interest at the rate of 29%, the penalty on excess was 4% per month and the facility fee was at 0.5% flat. That the time the defendant gave him this second facility it had in its custody plaintiff's title documents, which had been released to them by Housing Finance Company Kenya Ltd. That on those two facilities being granted the plaintiff began to utilize the money due to Oasis Mineral Water Company Ltd and similarly so did Tasi Export & Import Company. The plaintiff said that he serviced his account but a time came and he fell into arrears, about 1997. The defendant began to demand the amount allegedly due. The plaintiff to protect his property filed a case on the basis that the notice given to him had not followed legal requirement. The plaintiff also approached HFCK for a refinancing and indeed obtained the refinance and consequently Kshs. 6,445,080 was paid by HFCK to the defendant to the plaintiff's credit, on 24th September 1999. On 27th September 1999 the defendant wrote to the plaintiff, whereby it confirmed receipt of the refinance and informed the plaintiff that he was still indebted to it for Kshs. 5,381,757.65. The plaintiff emphatically stated, that he disputed the amount claimed by the defendant and also stated that he often complained about the defendant's rates of interest. The plaintiff also stated that he had been informed by defendants then chairman, Mr. Muumbi and the defendant's then general manager Mr. Warrant Stanley that on receipt of the refinancing, from HFCK, the plaintiff's indebtedness with the defendant would be cleared. The plaintiff informed the defendant that he was not happy with their accounting and also that any debt due was because the defendant delayed in charging the security he had given.

The plaintiff referred to the defendant's letter dated 27th March 2000, which was a statutory notice, and demanded Kshs. 10,494,975.35 as at 11th March 2000 and the interest applicable was 3.75% per month. He thereafter referred to another of the defendant's statutory notice dated 31st March 2000, that was three days later after the previous one, which now corrected the amount being demanded from the plaintiff as Kshs. 6,888,718.95 as at 29th February 2000 interest at 3.75% per month. He denied that this second letter was ever served on him. The auctioneer's notification of sale dated 6th November 2000 and which was sent to someone else, the plaintiff, demanded Kshs. 8,450,455.05 plus interest at 36% per annum. The plaintiff said he had not been advised about the charge and in view of his complaints about interest he instructed the company called, Interest Rates Advisory Centre (IRAC) to look at his account with the defendant. The said IRAC found many irregularities and concluded that the plaintiff went into credit in his account after the crediting of the refinancing by HFCK.

The plaintiff said he paid IRAC Kshs. 129,120 and additionally signed in their favour a promissory note for Kshs. 1,421,368.

PW2 was Wilfred Ambicha Onono, a managing consultant at the Interest Rates Advisory Centre (IRAC). He said that IRAC is a financial consultant specializing in interest recalculation of bank loans. That it had been in existence for 3 years. He said that he was a certified public accountant, and that in the recalculation of bank loans; their intention or objection was to give independent audit of borrowing. That the plaintiff instructed IRAC to look at two accounts; namely current account No.105301 and loan account 125859. To this end the plaintiff availed the bank statements and the letter dated 3rd June 1989. PW2 stated that IRAC reads the contractual documents when considering recalculation. That IRAC consults advocates in its office in consideration of these contractual documents.

PW2 referred to the first letter of offer dated 19th July 1994 whereby the defendant offered the plaintiff an overdraft of Kshs. 3 million, on the plaintiff's current account. This loan provided that the rate interest would be 33%+5% = 38%. That, the rate was reduced in April 1997 to 29% and by February 1999 it increased to 30%. That in the re-calculation of the account, IRAC used that rate of 30% from 2nd February 1999. That between 15th March 1994 to July 1995 they applied the rate of interest of 16.5 %. P W 2 said that the reason of so applying that rate was because of the provisions of section 39 of the Central Bank of Kenya Act (Cap 491). That before liberalization the Central Bank by virtue of this section

controlled the financial institutions and bank's interest rate.

The witness referred to the gazette notice of 23rd July 1991, which showed the rate of interest. The witness said that rate and the control was in place until 1977 when it was removed. The witness further stated that the ledger fees debited in the plaintiff's accounts were forbidden by section 44 of The Banking Act (Cap 488). That by taking the aforesaid rate of interest and by disallowing the ledger fees and other charges debited in the plaintiff's accounts and by recalculating the plaintiff's account IRAC concluded that the plaintiff's debt to the defendant was far reduced. That the defendant was demanding Kshs. 2,040,964.05 and after re-calculation the plaintiff was found to only owe Kshs.1, 355,113.79. That after the credit into the plaintiff's account of the amount from HFCK, on 24th September 1999 the plaintiff's account went into credit to the tune of Kshs. 4,385,163.01. That thereon, IRAC applied interest to that amount at the rate of base rate that is 30%, plus 6%. That as a result of this recalculation IRAC found that as at 30th September 2001, where as the bank was demanding from the plaintiff, Kshs. 12,460,918.33, IRAC found that the plaintiff's account was in credit of Kshs. 7,462,852.69. The witness further said that over and above that finding, IRAC found that, where as the letter of offer dated 24th July 1995, provided that the rate of interest was 29%, the defendant was found, after analysis of the plaintiff's account, to have applied interest at the rate of 36% from the first day of the loan. That from June to August 1998 the defendant was found to have applied 50% interest. That according to the provisions of section 44 the defendant was required to show proof of the approval of the Minister allowing them to increase interest rates, commissions appraisal fees and other charges.

On being cross-examined P W 2 accepted that ordinarily current accounts do not normally earn interest if they are in credit. That the plaintiff did not supply to IRAC the charge documents nor a letter dated 14th October 1998.

PW3, Gerald Nyaoma Avita, said that he works as a director of financial institution provision a department at the Central Bank of Kenya. He confirmed that the defendant is licensed by the Central Bank of Kenya. That in his day to day activities he is involved in licensing commercial banks, conducting inspection of banks and licensing foreign currency bureaus. He stated that under section 44 of the Banking Act, no financial institution is allowed to increase its rate without prior approval from the governor of Central Bank. That his investigations revealed that the defended had not remitted any requests to increase its rates. He said that any financial institution licensed was required at the commencement of its business to inform the Central Bank the rates it was adopting as its charges; once that notification is given that institution was prevented by section 44 from changing that rate without the Central Bank's approval. PW3 did state that he could not say or did not know the amount that was being charged by the defendant in respect of; clearing cheques, in respect of dishonoured cheques, charges for cheque books or the arrangement fees.

The defence called only one witness, Solomon Kitavi Musimba. He said he had worked in the banking industry for 32 years before joining the defendant bank between the years 1998 and 2003. He was the defendant's credit controller and manager. That his day-to-day duties were to ensure that bad debts and existing accounts were monitored.

He stated that the plaintiff's transaction started with the letter dated 19th July 1994 and another dated 24th July 1995. That the facilities were to assist plaintiff in running his company Oasis Mineral Water Ltd and his wife's business namely Tasi Export & Import Company. That as per instructions of the plaintiff by his letter dated 23rd May 1995 the debit balance in the account of Tasi was transferred into the plaintiff's account that is Kshs. 2,040,694.65 was transferred to plaintiff's account on 21st May 1998. That the facilities extended to the plaintiff were secured by the plaintiff's property. On being asked whether the defendant delayed in registration of the charge over the plaintiff's property, DW1 stated that the defendant did not delay but that the instructions to register the same had been given to the firm of Waki & Co. Advocates who on the appointment as a judge of Mr. Waki (as he then was) the defendant had to instruct another counsel. That in any case the plaintiff was kept advised of this. The plaintiff wanted to access the facility even before the registration of the charge. He accepted that the defendant charged excess interest and that was because when the plaintiff pleaded the defendant charged '*normal*' interest

but if he failed to honor his promise the defendant reverted to charging excess interest. DW1 said that prior to the period of default the plaintiff was a valued customer of the defendants. That when the plaintiff needed refinancing the defendant extended some money to him to enable him get that refinance. That related to that refinancing transaction; the legal fees of Kibuchi & Company Advocates being kshs 201,277/- were due and payable and the defendant accordingly proceeded to pay the same. This amount was debited from the plaintiff's account on 26th June 1999. That after the credit into plaintiff's account of the amount from HFCK, on 24th September 1999, the balance left outstanding in the plaintiff's account was Kshs. 5,381,757.65. That even though the plaintiff was advised he took no action but that he questioned the rate of interest being charged by the defendant. That thereafter the plaintiff wrote several letters complaining about the rate of interest being charged by the defendant. The witness stated that after some negotiations the defendant had agreed to grant the plaintiff rebate of Kshs 1 million but that, that was on condition that the plaintiff pays off his indebtness with the plaintiff. That the amounts in Tasi's account were transferred into plaintiff's current account on 11th August 1995 and the amount outstanding in the plaintiff's loan account No. 125859 was transferred into the plaintiff's current account in May 1998. That action left the plaintiff with one account namely No. 10530 current account; which account because of some computer changes was changed to account No. 1323008. The witness then selected some debits in that account and tried to explain them as follows; that the debit on 12th August 1995 of kshs 24,000 was an arrangement fee for the facility to the plaintiff; kshs 225/- was the cost of a cheque book; kshs 100 debited on 18th March 1994 represented cheque sold to the plaintiff or that it could have represented the clearing of an upcountry cheque or a foreign cheque; debit of kshs 64,100 on 25th June 1999 represented legal fees and the debit on 11th November 1995 of kshs 101,4000, although stated in the statement to be legal fees, was infact an arrangement fee plus kshs 100/- commission. DW1 then stated that all plaintiff's facilities were at interest rate of 29% per annum which was calculated as follows; that interest was accumulated on a daily basis and off loaded to the plaintiff's account at the end of the month. That that interest was payable immediately and if by the following month, on the first day it was not paid, it was added to the principal. DW1 said that the defendant did not go over and above what was agreed. He also said if the plaintiff exceeded the facility allowed the amount in excess was charged interest at 4% per month. That when the defendant eventually realized that the plaintiff was not clearing his indebtness the defendant, through their advocate instructed an auctioneer to realise their security. That the auctioneer's fees being kshs 19,621.98 were debited in the plaintiff's account. DW1 concluded his examination in chief by stating that as at 30th April 2004, the plaintiff was indebted to the defendant kshs 50,109,484.03. He refuted that the current account accrue interest when in credit and concluded the defendant was not obligated to refund the plaintiff the fees paid to IRAC to recalculate the plaintiff's account.

When cross-examined DW1 stated that all the charges debited in the plaintiff's account were in accordance with the agreements. That delay of preparing the first charge which was registered in June 1996 was exactly one year. That the delay was caused by the appointment of Waki advocate (as he was then) on the bench. That the debit of arrangement fee was calculated on basis of a facility of kshs 1.5 million whereas it ought to have been calculated on facility of ksh 3 million. He said that that was obviously an error on the defendant's part. On suggestion by plaintiff's counsel, DW1 accepted that there may have been other errors in calculating the amount due on the plaintiff's account. He also accepted that the plaintiff's interest rate was varied between the year 1999 and 2000 but he added that the plaintiff was notified of these variation, but he confirmed that those notifications of variations of the rate of interest were not before court. He also accepted that it was reasonable for the plaintiff to have sought the assistance of IRAC to recalculate his account.

On being re-examined DW1 stated that the plaintiff's facility for overdraft, since it expired and was not renewed that amount is treated as excess for the purpose of calculating interest.

The plaintiff serviced his facilities up to the year 1997 and as a consequence of those arrears the plaintiff began to complain about the rate of interest applied by the defendant. Indeed DW1 accepted that the plaintiff wrote to the defendant severally complaining about the rate of interest. Perhaps because his complains did not get a hearing from the defendant the plaintiff instructed IRAC to carry out a re-calculation of his account. I only have one criticism of the report by IRAC. PW2 stated that to carry out the re-calculation the plaintiff supplied the letter of offer and account statements. IRAC did not get the

other security documents. Having criticized that report I find that it has value for indeed it unearthed many charges which were debited into the plaintiff's account and which it is not clear whether the defendant had authority to so debit. To begin with perhaps I would wish to start with the rate of interest rate. The defendant varied the plaintiff's interest rate, and although DW1 stated that the plaintiff was informed, there was no evidence that each time there was variation the plaintiff was informed. Indeed DW1 did accept that those notices had not been produced in court. To my finding the defendant having been confronted with the provisions of section 39 cap 491 failed to sufficiently rebut the evidence thereof. The defendant simply insisted that the rate charged even before the charge document was prepared, was in accordance with the parties agreement. The question then that arises is, was it legal. The defendant failed to rebut the evidence of PW2 that even despite the offer letters the defendant charges 36% interest which was above the amount allowed by the letter of offer that is 29%.

The plaintiff also blamed his woes on high interest rate on the defendant's failure to register the charge document in time. Indeed the offer letter of 1995 provided that if there was a draw down before perfection of security the defendant would charge a penalty for amounts drawn. The defendant on the plaintiff's request allowed the plaintiff to draw the facility before the charge was perfected. Having done so the defendant delayed the registration of the charge for one year. The defendant simply explained this away by saying that the delay was due to the defendant having to charge its advocates then the question that arises from that is, who should bear the burden of the penalty charges which were incurred through no fault of the plaintiff. The defendant was heard to respond that it was the plaintiff's burden because he requested to draw the facility before the charge. In considering that proposition one ought to recall that the plaintiff stated that it was the chairman of the defendant who sought him out as a prominent member of the chairman's community and it can be said proceeded to entice the plaintiff into financial burdens, which as he said he did not need. Having that in mind I find that it was unjust for the defendant to delay the perfection of the security knowing that the plaintiff would be called upon to pay penalty during the period of delay,

Apart from the charges which are debited in the plaintiff's account and which the defendant failed to rebut, I also find the defendant was not entitled to debit legal fees of the firm Kibuchi & Company Advocates since there was no privity between the defendant and the plaintiff's agreement with HFCK. Such debit should only have been done with plaintiff's consent.

The defendant stated that the plaintiff requested to take over the facility of Tasi Company, but what I did not understand is at what terms was the facility consolidated, with the plaintiff's current account. I ask that question because even in the plaintiff's request dated 23rd May 1995, the plaintiff in requesting to so take over stated "*As suggested to you, I would like Oasis Mineral Water to take over the liabilities of Tasi on loan basis at a bearable interest."* From that quote it is clear the party that was taken over that loan was Oasis Mineral Water and not the plaintiff. Further it was to be at "bearable" interest. The amount debit balance in Tasi's account was however on 11th August 1995 debited in the plaintiff current account contrary to his, the plaintiff's clear instructions.

The account No. 125859 stated to be loan account did not feature prominently in evidence of both parties. However the statements of the same were produced by the plaintiff and it is clear from the statement that an amount of kshs 2,040,694.05 was debited in the plaintiff's current account. The plaintiff does in his plaint seek the refund of this money. What is not understandable about this account is that the loan was granted of kshs 1.6 million on 11th August 1995. There was not a single drawn down from his account. As a matter of fact the amount debited in the plaintiff's current account coming that loan is made up of interest, only, that accrued on that account after the loan was granted. The defendant did not show a letter of offer relating to this loan and one is left to wonder whether indeed the plaintiff had requested this loan. If indeed he had why did he not use it. The other question that arises when the amount in that loan was debited in the plaintiff's current account what rate of interest were those amounts to attract.

To the credit of the plaintiff he produced witnesses to support his contention. PW3 stated that section 44 of the Banking Act (Cap 488) did not allow an institution to increase its banking charges. Indeed that section provides:-

"No institution shall increase its rate of banking or other charges except with the prior approval of the minister."

The evidence of that witness was that once an institution set its charges at the beginning of its business it can then only, thereafter increase those charges with approval of the central bank. The defendant then ought to have provided evidence of the approval by central bank of its charges. Its failure to so prove draws an inference against it, that obviously there wasn't an approval from the central bank and accordingly the charges debited in the plaintiff's account were not approved. In addition to this inference there is the evidence of the defendant's own witness who accepted that there could have been errors in calculating the plaintiff's account by the defendant and when asked about certain of kshs 100/- he was heard to say that it could either be the charge for a cheque sold to the plaintiff, or it could be the charge for clearance of an upcountry cheque or clearance of a foreign cheque. The defence witness could not with certainty state what that debit was. Although he was questioned about all the debits in the plaintiff's account his reply was only on one debit which is very telling.

I have considered all the evidence presented before court including exhibits and if I have not reproduced all of that evidence it is because this case began to be heard before me in June 2004 and was concluded in February 2005. Suffice it therefore, to state that as I conclude this judgement I have all the evidence in mind.

The issues that I believe need the consideration of this court are as follows:-

(i) Whether the defendant was entitled to debit the various charges and varying interest in the plaintiff's account.

The answer to that I believe is in the negative. The evidential burden of disproving that the charges were not contrary to the requirements of the Central Bank of Kenya Act and the Banking Act were squarely on the defendant. It is only the defendant who could prove that the interest rate complied with section 39 Cap 491, when the restrictions were there, and it is only the defendant who could have proved that the Central Bank approved the increased charges according to section 44 Cap 488.

Instead the defendant "*threw*" its hand in the air and stated, that it was the plaintiff who alleges and therefore he has to prove it. To my understanding on such an issue it was not enough for the defendant to simply deny that the charges did not contravene the law.

(ii) The second issue is whether the plaintiff is entitled to any refund of the debits in his account

The answer to this is that the plaintiff is entitled to refund of some specific debits. As earlier stated I faulted the IRAC report for not having considered all the correspondence exchanged between the parties and all the security documents. Had they done so I would have readily accepted their report as drawn. I do however find that the plaintiff is entitled to refund of the following sums, which were debited in his account without his approval;

(a) Legal fees to Kibuchi & Company advocates of kshs 201,277;

(b) The amount debited in plaintiff's account coming from the loan account No. 125859, namely kshs 2,040,694.05;

(c) The amount brought from Tasi account and debited in plaintiff's account kshs 1,421,368.70.

(iii) The third issue is whether the defendant is entitled to judgement for its counter claim

The answer to that is in the negative.

The defendant having failed to prove the legality of the charges debited in the plaintiff's account, having

debited amounts not authorized by the plaintiff and delaying in the registration of the charge to the detriment of the plaintiff is not entitled to the amount counter claimed.

I find that the plaintiff has on a balance of probability proved his case to the extent stated herein above. Denning J. in MILLER- V MINISTER OF PENSIONS (1947) 2 ALLER 372 stated as follows in explaining the degree or standard of proof in civil cases.

> **"That degree as well settled. It must carry reasonable degree of probability, but no so high as is required in criminal case. If the evidence is such that the tribunal can say: '*we think it more probable than not,*' the burden is discharged, but, if the probability is equal, it is not".**

Having found that the plaintiff has satisfied that burden, it then would follow that the plaintiff is entitled to the injunction he seeks, this is so particularly since the defendant failed to prove its counter claim. The plaintiff would also be entitled to have his property discharged. The judgment of this court is as follows: -

(1) That the plaintiff is granted judgment with interest at court rate as against the defendant for

(i) Kshs. 201,277

(ii) Kshs 2,040,694.65

(iii) Kshs. 1,765,105.85

(iv) Kshs. 1,421,368.70

(2) That the defendants counter claim is dismissed with costs to the plaintiff.

(3) That an injunction is granted to the plaintiff restraining the defendant, its servants or agents from selling property L.R. 1504/13 Athi River.

(4) That the charge registered in favour of the defendant over the property L.R. No.1504/13 be and his hereby discharged.

(5) That the plaintiff will also have the costs of this suit

Dated and delivered this 11th day of October 2005.

MARY KASANGO

JUDGE