Ngoru & another v African Banking Corporation Ltd & another (Civil Appeal E018 & E106 of 2023 (Consolidated)) [2024] KEHC 8589 (KLR) (Civ) (8 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8589 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E018 & E106 OF 2023 (CONSOLIDATED)

DKN MAGARE, J

JULY 8, 2024

[FORMERLY HCCA NO. E617 OF 2022]

BETWEEN

JOHN MALUKI NGORU ..... APPELLANT

AND

AFRICAN BANKING CORPORATION LTD ..... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E106 OF 2023

BETWEEN

AFRICAN BANKING CORPORATION LTD ..... APPELLANT

AND

JOHN MALUKI NGORU ..... RESPONDENT

(Being an appeal from the Judgment of Hon. H. M. Nyaberi (CM) in Milimani CMCC No. 856 of 2017, delivered on 12th July, 2022)

JUDGMENT

1. This is an appeal from the decision of Hon. H. M. Nyaberi delivered on 12/7/2022 in Milimani CMCC 856 of 2017. Both parties filed appeals from the same judgment. The customer complaining that money was too much while the bank complaining that they were given a little. For purpose of this

Appeal, the customer shall be referred to as the Appellant while the Bank as respondent. This does not lessen the Appeal filed by each against the other. The second Appeal shall be treated as cross Appeal.

2. The Appellant raised the following grounds of Appeal:

    a. That the learned trial magistrate erred in law and in fact in holding and finding that the Appellant was indebted to the Respondent for a sum of Ksh.11,184,117.88 as at 24th March, 2016.

    b. That the learned trial magistrate erred in law and in fact in finding that the commercial interest rate of 20% p.a. applied by the Respondent to the personal and mortgage loans was lawful.

    c. That the learned trial magistrate erred in law and in fact in failing to find that the amount of Ksh.11,484,117.88 which he unlawfully arrived at was inclusive of both the commercial interest rates of 20% p.a. and default interest rate of 36% p.a.

    d. That the learned trial magistrate erred in law and in fact in failing to find and hold that the sum of Ksh.11,184,117.88 was inclusive of insurance premiums which the appellant had paid directly to the Respondent and ought not to have been included in the statement of accounts.

    e. That the learned trial magistrate erred in law and in fact in failing to find and hold that there was no evidence on record to support his conclusion that the commercial interest rate of 20% p.a. was the applicable and prevailing rate with effect from 2nd January, 2013 when the Appellant's services were terminated.

    f. That the learned trial magistrate erred in law and in fact in failing to appreciate that the evidence on record adduced by the respondent was that the respondent while calculating the amount due and owing factored in the default interest rate of 36% p.a. in the statement of account thereby enriching the respondent unjustly.

    g. That the learned trial magistrate erred in law and in fact in failing to consider the evidence adduced by the appellant on the issue of the actual amount due and owing.

    h. That the learned trial magistrate erred in law and in fact in coming to the conclusion that he did contrary to the evidence on record.

3. They filed their own Appeal, being E106 of 2023. I will not go into issues of filing separate appeals from the same judgment. The grounds basically revolve around award of Ksh. 11,184,177.88 instead of Kshs. 12,360,888.30.

4. The said grounds are: -

    a. That the Learned Trial Magistrate erred in law and in fact in failing to hold and find that the Respondent was indebted to the Appellant for a sum of Kshs. 12,360,888.30.

    b. That the Learned Trial Magistrate erred in law and in fact in failing to include interest earned on the awarded sum of Ksh. 11,184,177.88 for 11months from 24/03/2016 as captured on the bank statement to 13/02/2017 being the date of filing the claim.

    c. That the Learned Trial Magistrate erred in law and in fact by re-writing the contract between the parties and issuing interest at court rates instead of the applicable commercial rates of 20%, from the date of filing the suit.

Pleadings

5. The Respondent pleaded that the Appellant was an employee of the Respondent. A personal loan of Ksh. 1,500,000/= was given payable in 36 instalments of Ksh. 50,000/= at 13% interest rate.

6. He was also given a mortgage of Ksh. 5,948,250/= payable in 120 equal instalments with interest at 13%. They stated that the mortgage was to be serviced vide LR. 8336/37 but it was frustrated as there was a prohibition issue in Milimani CMCC 5318 of 2018.

7. The Respondent terminated the Appellant on 2/1/2013 and as such the rate changed to 20% and the mortgage to 36% default rates. It was their case that a sum of Ksh. 12,360,888.30/= was due as at August 2016, being Ksh. 2,044,279/= in personal loan and Ksh. 10,319,590.45. Interest was claimed at 36% on arrears from 22/8/2016. What was not pleaded is the amount paid and the dates of default.

8. The letter of offer indicated that there was a loan of 509,960/= which was offset with issuance of Ksh. 1,500,000/=. In essence the amount received was 990,040/= at most.

9. A mortgage was given for 5,948,250/=. The said amount was repayable in the following terms:-

    a. Ksh.88,814/= in 120 instalments, totaling to Ksh.10,657,680/=

    b. Ksh.50,540/= in 36 instalments that is, a total of Ksh.1,819,440/=

    c. There were securities to be had. That is:

        i. Credit agreement duly executed by the borrower.

        ii. Demand Promissory Note along with an installment letter duly executed by the borrower.

        iii. Original title deed over LR. No. 8336/37.

        iv. Legal Charge and First Further charge of Ksh.6,500,000/= over LR. No. 8336/37.

10. One of the clauses that the bank relies on is a clause in the offer letter stating as follows: -

> "Your undertaking to pay all your liabilities on termination from the bank otherwise the facility shall attract interest at commercial rates if the Bank agrees to continue with the loan."

11. The Appellant filed defence but denied:

    a. The percentage of interest on termination.

    b. He stated that the loan accrued interest at the rate agreed till payment.

    c. There was no demand notice for Ksh.12,360,888.30/=.

    d. They stated that there was no correct accounts rendered.

    e. They stated that interest rates contravened the Finance Act 2016, the *Banking Act*, Public Policy, was unconscionable and bad in law.

12. The Respondent was of the view that the parties agreed that on termination commercial rates will apply.

13. The issues for determination in this Appeal and cross Appeal are:-

    a. The rate of interest.

b. Amount due.

c. Meaning of commercial rates.

d. Whether the interest rates were unconscionable, illegal and contravened the *Banking Act* or the Finance Act 2016.

Analysis

14. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

15. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

16. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows;-

> ".. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

17. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

18. In the case of Peters vs Sunday Post Limited [1958] EA 424, court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

19. The rates of interest are sacrosanct. Any change thereof must be notified to the parties. There was no notification of change of interest rate. It is therefore taken that interest rate never changed from 13% per annum pursuant to section of the *Banking Act*.

20. I have perused all the documents filed by both parties for evidence that the Respondent informed the Appellant on change of interest rate. However, I have not found circumstances that will allow the bank to apply commercial rates and if so, what the rates are.

21. Change of interest rate cannot be a pendulum run by the bank. Change of interest rate must be notified and the rate thereof. The bank must inform the customer, changes in rates of interest from the current applicable rates to other rates. It is not enough to christen then commercial rates. Without such information, the agreed rate of 13% prevails.

22. The loan was already at 13% interest rate which is above the CBK rates. The second condition is not clear in that; commercial rates were to apply if the bank agrees to continue. The undertaking to pay liability was duly given. There was no clause that the undertaking was to be accompanied by money. In this case therefore, the commercial rates did not apply.

23. The interest rate was to be adjusted to market rates as per policy, not because of termination but because of failure to register the mortgage. This is not in line with the contract in situ. I find that it was not prudent business management to simply issue a bank mortgage without the registration of a charge. I have also perused and not seen the policy and a notice notifying the customer that the policy was now effective and as such 36% interest rate or even 5% interest rate was applicable. The rates quoted are arbitrary and known only to the Respondent.

24. It must be recalled that given the power relations, the banking contracts are highly regulated and supervised. Notices are key to avoid usurious contracts.

    Oooooo

25. So, having found that the terms on variation of the interest rates were unconscionable, what should I do? There is lots of case law in Kenya on the point. In Kenya Commercial Bank Finance Company Ltd vs. Ngeny & Another [2002] 1 KLR 106 , the court said:

> " The court will not interfere where parties have contracted on arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional term upon the other party. Equity can intervene to relieve that party of such condition."

26. The same court said, in Shah vs. Guilders International Bank Ltd [2002] 1 EA 264:

> " ... where the rate of interest (has been agreed upon by parties) the court was obliged to enforce the agreed rate unless it was illegal, unconscionable or fraudulent."

27. I find that the interest rate charged after variation was manifestly excessive and was effected without proper notice to the appellant. For those reasons, I hereby allow the appeal, set aside the judgement of the Chief Magistrate's court, and substitute the same with a declaration that the loan advanced to the appellant by the respondent had been fully settled, and issue an injunction to restrain the respondent from demanding the amounts based on the varied interest rates from the appellant.

28. In the case of David Wafula Nyongesa v National Bank of Kenya [2020] eKLR, W Musyoka J, stated as follows: -

> " 23. So, having found that the terms on variation of the interest rates were unconscionable, what should I do? There is lots of case law in Kenya on

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29. In the case of Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR, the Court of Appeal stated as doth: -

> " 26. ...While we agree that the clause does appear to give the respondent discretion to vary the rate of interest, we do not accept that this discretion was absolute. Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest.
>
> 27. Consider the English decision of Paragon Finance plc vs. Staunton; Paragon Finance plc vs. Nash [2002] EWCA Civ 146All ER 248. In this case a mortgage company (Paragon Finance) had claimed possession from the two defendants on the grounds that the defendants were in arears with the mortgage interest repayments. It was not in dispute that the repayments were owing. The defendants however took issue with the rate of interest charged and argued that the mortgage company had failed to adjust the interest rate chargeable in line with the prevailing market rates. The legal charges held by the mortgage company gave it the power to vary a portion of the interest rate from time to time. On appeal, among the issues that the court was to determine was whether the discretion given to the mortgage company to vary interest rate was subject to an implied term that it was bound to 'exercise that discretion fairly, as between both parties to the contract, and not arbitrarily, capriciously or unreasonably.' The court then held that 'the power given to the claimant by the mortgage agreements to set interest rates from time to time was not completely unfettered. A construction to the contrary would mean that the

claimant would be completely free, in theory at least, to specify interest rates at the most exorbitant level.'

28. we are in agreement with the sentiments of the English Court that the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self-evident that at the time the interest was being changed, it was brought to the attention of the borrower.

29. We find it particularly unfortunate that in the present appeal, the respondent varied the interest and seemed not to provide this knowledge to the appellant or to the borrower. We think this was wrong. If that information was readily availed to the borrower, the borrower would make an informed decision based on his or her circumstances and the consequences that are likely to arise due to the variation undertaken. The borrower may choose to opt out of the contract through full liquidation or look at other institution that would accommodate his or her interest. Information supplied to a borrower before any adverse variation of interest rate is made affords him an opportunity to assess this relationship with his lender, and the right to terminate the contract may even be exercised."

30. There were no notices notifying the Appellant of change of interest rate pursuant to Section 44 of the *Banking Act*. Consequently, the court erred in awarding 20% and 36% interest. It is usurious interest meant to drive the Appellant down, despite being terminated.

31. How does a borrower know that his financial burden has increased and adjust accordingly, instead of insisting on opaqueness?

32. From the accounts, a total of Ksh. 6,532,914/= by 24/8/2013. Termination was done on 2/1/2013. No reasons were given and no reference was made to undertakings regarding to the loan. Consequently, the Respondent had no right to change the interest rates unilaterally due to their own actions.

33. In the case of Francis Frazier Ochami v National Bank of Kenya Limited & another [2020] eKLR, the court stated as follows regarding the duty to notify on interest rates: -

"46. The applicant was an employee of the 1st respondent when he took the loan which was to attract interest of 3%. There is no denial that he left the 1st respondent's employment shortly after the loan was advanced to him and joined Kenya Commercial Bank Ltd. According to the applicant, his new employer was to take up the loan from the 1st respondent. That, however, is an issue between him and his new employer and cannot be thrown at the 1st respondent.

47. Section 84 (1) of the Act provides that;

"(1) Where it was contractually agreed upon that the rate of interest is variable, the rate of interest payable under a charge may be reduced or increased by a written notice served on the chargor by the chargee,—

(a) giving the chargor at least thirty days notice of the reduction or increase in the rate of interest; and

(b) stating clearly and in a manner that can be readily understood, the new rate of interest to be paid in respect of the charge." (emphasis)

48. The law is clear that where interest is variable, the chargee must give notice to the chargor before varying the interest. The question that arises is whether the interest rate was variable and if so, whether the relevant notice was served. The applicant states that there was no notice. The 1st respondent has not been categorical on whether the applicant was notified or whether such notice was not required.

49. I have perused the documents filed by parties in support of their respective positions. The letter of offer dated 21st April 2015, states that interest rate to be applied on the loan is 3% but the 1st respondent reserves the right to change the rate of interest upon giving thirty (30) days notice in writing to the applicant. The charge instrument which formed the basis of the loan agreement between the parties, also states at paragraph 3.1.1, that interest payable is 3%. Under Paragraph 3.1.2, the 1st respondent reserved the right to change interest rate and under paragraph 3.1.4, it undertook to serve a thirty (30) days notice as required by section 84(1) prior to varying the interest rate.

50. From both the letter of offer and the charge instrument, the 1st respondent was under obligation to serve the applicant with notice on change of interest rate which the applicant argues the 1st respondent did not do. The applicant therefore raises a valid issue of the interest rate charged on his loan and whether a notice was served as required by both the charge and the law.

51. Variation of interest rate must have had a bearing on the repayment of the applicant's loan and the amount outstanding. On that basis, the applicant raises a prima facie case that calls on the 1st respondent to rebut the applicant's contention that the 1st respondent did not comply with the law and breached his right to know the interest to be applied on his loan."

34. I therefore find that there was never any notification of application of 36% and 20% interest rate. I set aside the finding that the said interest was lawful. It is not to say that penalty interest cannot be applied. It is only to state that notification of change and application must be made. It is also seen that other than elevated interest, there are other charges that are not in the contract and letter of offer. They have not been justified.

35. On the issue of the actual amount due, the court did not consider rival submissions. This is more so, when the contract was entered to last for 10 years. Default occurred way back in 2010. Was there a justification in applying interest after the contractual period just to increase the dues? Where do banks get authority to change interest outside the contractual period? It is clear that 56% interest rate, that is

36% and 20% interest were responsible for the skyrocketing of the amounts due. The amount borrowed was Ksh.1,500,000/= and Ksh.5,948,250/=. Imbedded within the instalment was the interest rate of 13%.

36. In their pleadings the Respondent did not show how the sum of Ksh.12,360,888.30/= arose. There is no admission that the sum of Ksh.6,532,914/= was paid. The said sum was proved to have been paid by the Appellant. Unfortunately though the Appellant pleaded for account, it was not dealt with. In the end I agree with the Appellant that there is no clear view of how much is due in view of the un-contractual interest applied.

37. It is therefore my finding that the Appeal is merited. However, I cannot dismiss the suit in the court below since there is an admission that some money is due. The only question is how much. Given that I have declared 20% and 36% interest rate illegal, the court has to determine the same.

38. The interest rates applied are illegal and have no basis in fact and in law. They were never notified and as such cannot be applied. It is therefore clear that there was no basis for award of the prayer for application of interest rates at 20% per annum and 36% default interest. Prayer (b) in the suit below therefore is dismissed.

39. From the evidence it is succinct that 20% commercial rate and 36% default interest was applied and is imbedded within the sum of Ksh.12,360,888.30/=. There are also charges that are not explained and not in the letter of offer. This is excluding ordinary bank charges that are expected.

40. The prayer for a sum of Ksh.12,360,888.30/= was not proved. This was because the interest rate applied was outside the contractual rate of 13%, up to the end of the period. It is doubtful that the Respondent had basis to continue with interest after default and end of the contractual repayment period.

1. The court cannot grant interest rates accruing before filing but which are not pleaded. The court can only deal with pleaded issues. -Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> > ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with

> the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

41. This therefore means that Civil Appeal No. E106 OF 2023, is untenable and is accordingly dismissed with costs.

42. Consequently, I make the following determination.

a. The sum of Ksh. 12,360,888.30/= has imbedded within it illegal charges and non-contractual interest rates of 20% and 36%.

b. The Appellant was not notified change of interest and as such, the interest rate remains at 13%.

c. The matter is therefore remitted back for retrial on only one question, taking of accounts, by: -

   i. Removing interest of 20% and 36% and applying 13%. It does not matter that at some stage, it was 11%, the rate applicable is 13%.

   ii. Removal of illegal penalties and charges.

   iii. Removal of charges that have not been notified.

   iv. Taking into account money paid and recalculating the amount due.

d. Other than the foregoing no knew evidence shall be adduced.

e. On costs, the order that commends itself is that there has been a mixed success. Each party to bear their own costs.

Determination

43. In the circumstances I make the following orders. The Appeal is partly allowed as follows:-

a. The claim for commercial interest rate at 20% and default interest rate at 36% on arrears from 22/8/2016 is dismissed.

b. The sum of Ksh.12,360,888.30/= and Ksh.11,484,117.88 has imbedded within it illegal charges, un-contractual interest rates.

c. The Respondent was bound to inform the Appellant of change of interest rate and give the actual rate. Consequently, the only rate of interest applicable is 13%.

d. Interest rate applicable after filing suit is the court rate not the contractual interest.

e. The claim for Ksh.12,360,888.30/= shall be remitted to the court below for taking accounts, removal of uncontractual interest rates, and taking into account payments made. No new evidence other than the report on accounts shall be admitted.

f. Civil Appeal No. E106 OF 2023, is untenable and is accordingly dismissed with costs of Ksha. 485,000/=.

g. Each party to bear its own costs in respect of Civil Appeal No. E018 of 2023

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 8TH DAY OF JULY, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the Original

Signed

DEPUTY REGISTRAR

In the presence of

Kenneth Wilson for the Appellant

Mr. Ngure for the Respondent

Court Assistant – Jedidah