



REPUBLIC OF KENYA



KENYA LAW
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**Ecobank Kenya Limited v Elsek & Elsek (Kenya) Limited & 3 others
(Civil Suit 70 of 2014) [2023] KEHC 22162 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 70 OF 2014**

F WANGARI, J

JULY 7, 2023

BETWEEN

ECOBANK KENYA LIMITED PLAINTIFF

AND

ELSEK & ELSEK (KENYA) LIMITED 1ST DEFENDANT

ELSEK & ELSEK CONSTRUCTION LIMITED 2ND DEFENDANT

OSMAN ERDINC ELSEK 3RD DEFENDANT

DENIS ELSEK 4TH DEFENDANT

RULING

1. The ruling relates to the Defendants' application dated May 20, 2022 seeking the following orders: -
 - a. Spent;
 - b. Spent;
 - c. That this Honourable Court be pleased to settle the terms of the decree dated December 16, 2014 in so far as the amount recoverable is concerned and limit the recoverable interest in accordance with sections 4(4) and (5) of the *Limitations of Action Act* and the in duplum Rule;
 - d. That the Honourable Court do find that the Notice to Show Cause dated April 11, 2022 is unlawful and was unprocedurally issued and do set aside the same unconditionally;
 - e. The costs of this application be awarded to the Defendants.
2. The application is opposed. The Plaintiff filed a replying affidavit dated June 20, 2022 and filed on June 23, 2022. The Defendants filed a further affidavit dated July 4, 2022 contesting some of the Plaintiff's averments in its response.



3. Directions were taken that the application be disposed off by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions. I am grateful to Counsel for complying with the directions and filing able submissions which are very useful to this court in arriving at a fair decision.

Analysis and Determination

4. I have considered the application, response, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;
 - a. Whether the application dated May 20, 2022 is merited;
 - b. Who bears the costs?
5. Before deeply delving to the issue, I note that parties have alluded to a matter in Nairobi, that is, High Court Miscellaneous Case No 356 of 2015 between the 2nd Defendant and an entity called Presbyterian University of East Africa Registered Trustees. It therefore behoves the court to consider the nexus between that suit and the present one. In the said matter, the two parties entered into a consent dated July 7, 2020 which was adopted as order of the court on July 16, 2020. The Plaintiff herein challenged the said consent through applications dated August 12, 2020 and December 9, 2020. The court having considered the said applications rendered its ruling on January 26, 2021 striking out the two (2) applications and gave effect to the notice issued in this matter on February 16, 2018.
6. What gave rise to the present application is the notice to show cause dated April 11, 2022 by the Plaintiff. It was addressed to Presbyterian University of East Africa Registered Trustees. The Defendants have move the court to have the settle the terms of the decree dated December 16, 2014 in so far as the amount recoverable is concerned and limit the recoverable interest. Therefore, there is no dispute that there is a decree which was entered and which decree remains unsettled. I have considered the said decree and at paragraph 5 (a) thereof, it provides as follows: - “The entire amount agreed in this consent judgement (Kshs. 50,000,000/=) plus interest at the rate of 23% per annum from the date of filing suit shall become due and outstanding from the date of filing suit shall become due and outstanding and a judgement for this sum shall be entered in favour of the Plaintiff.” (Emphasis added). The amount agreed was Kshs. 50,000,000/=. The notice to show cause captures a sum of Kshs. 140,495,352.13/=.
7. It is not in dispute that the matter in Nairobi has a bearing on the present matter as the 2nd Defendant is a decree holder in the Nairobi matter and a judgement debtor in the present case. So putting the foregoing into context, it is not in dispute that the consent which was adopted as a decree of this court was never honoured. The decree was self-executing as it provided what would happen in the event of default. Considering that there is no dispute relating to the decree, it would be academic to consider whether the same was a contract or not.
8. The issue is, is the Plaintiff entitled to claim Kshs. 140,495,352.13/= I have no doubt in my mind that when the terms of the consent were not performed, the Plaintiff’s right to execute accrued. In this case, by virtue of the express terms of the consent and/or decree, the interest accrued as from May 30, 2014 when the suit was filed. The interest rate agreed by parties was 23%. Therefore, as decreed in various cases amongst them *National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Limited* [2002] 2 E.A 503 and *Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited* [2017] eKLR. As held, it is not the business of courts to rewrite contracts but only to give effect thereof.



9. Therefore, parties agreed on the interest to be applied in the event of default and this court will only give effect to the terms agreed. Having so defaulted, the Defendants were liable to pay the amount agreed with interest of 23% from the date of filing suit which is May 30, 2014.
10. Is the interest to be applied in perpetuity? In answering this question, a consideration of Limitation of Action Act is imperative. Section 4 (4) of the Act states as follows: - “An action for account may not be brought upon judgement after the end of twelve years from the date on which the judgement was delivered, or (where the judgement or a subsequent order directs payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making payment or delivery in question and no arrears of interest in respect of a judgement debt may be recovered after the expiration of six years from the date on which the interest became due.”
11. The statute is explicit as to what extent one can claim interest. As per the decree, the interest accrued from May 30, 2014. Construing what the statute decrees, the Plaintiff was only entitled to interest up and until May 30, 2020. The authorities of *Nicona Construction Company Limited v Ken South Plastics Limited & Another* [2021] eKLR and *David Makau v Maua Mutie Ndunda* [2017] eKLR affirms the position on the application of section 4 (4) of the *Limitation of Actions Act*.
12. Having held as above, it is imperative to consider how much the Plaintiff could recover from the Defendants. The plaint dated April 15, 2014 and filed on May 30, 2014 leaves no doubt as to the relationship between the Plaintiff and the Defendants. It was purely a bank – customer/client relationship. As such, a consideration of the *Banking Act* would not be amiss. I have no doubt that it was guided by the *Banking Act*. Therefore, any interest to be applied must be in consonance with the Act. Section 44 of the *Banking Act* provides as follows:-
1. “An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under sub-section (2);
 2. The maximum amount referred to in subsection (1) is the sum of the following; -
 - a. The principal owing when the loan becomes non – performing;
 - b. Interest in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing...”
13. Considering the relationship between the parties, once the Defendants failed to honour the terms of the decree, it was open for the Plaintiff to realize the same. “In duplum” is a Latin phrase derived from the word “in duplo” which loosely translates to “in double”. Simply stated, the rule is to the effect that interest ceases to accumulate upon any amount of loan owing once the accrued interest equals the amount of loan advanced. Though there was a contract, once the interest rate exceeded double the amount advanced, it was not in order to charge more. The Applicant could only claim to a maximum of what the legislature demanded. Any other pronouncement would mean re-writing a contract and also sanctioning an illegality.
14. In *Gathua Elizabeth v Cyrus Ombuna Machini & Another* [2021] eKLR, citing the Court of Appeal decision in *Board of Appeal decision in National Social Security Fund v Michael Mwaloi* [2015] eKLR had the following to say; - “A court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleading including any admission made thereon.” I shall say no more. Section 44 of the *Banking Act* provides as much. . Once the loan became non-performing, the Applicant did not need to file suit but simply move court. It was therefore in error



to allow the Plaintiff enforce upon the exorbitant terms. I shall not delve on the other issues as I am satisfied that indeed the Defendants were compliant in terms of the consent which was adopted as a decree of the court

15. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. This is a preliminary application and having sustained the suit, the only order that lends itself on costs is that the same shall abide the outcome of the suit.
16. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The application dated May 20, 2022 is merited and is therefore granted in terms of prayer 3 and 4 of the said application;
 - b. Costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Muiruri Advocate h/b for Limui Advocate for the Plaintiff/ Respondent

Kabaiku Advocate for the Defendants/ Applicant

Barile, Court Assistant

