Oriental Commercial Bank Ltd v Kenya Hotel Limited (Civil Case 195 of 2005) [2021] KEHC 236 (KLR) (Commercial and Tax) (12 November 2021) (Ruling)

Neutral citation: [2021] KEHC 236 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 195 OF 2005

A MABEYA, J

NOVEMBER 12, 2021

BETWEEN

ORIENTAL COMMERCIAL BANK LTD .... APPLICANT

AND

KENYA HOTEL LIMITED .... RESPONDENT

RULING

1. The dispute between the parties emanated from the respondent's default in servicing a loan facility obtained from the applicant. The said loan was secured by a property known as Lake Naivasha Country Club situated on L.R. Nos 6291/1 and 6902 in Naivasha ("the suit property") by way of an equitable mortgage by deposit of title.
2. Following default, the applicant took out an Originating Summons seeking leave to sell the suit property. By a judgment delivered on 28/8/2009, this Court granted the leave sought to recover a sum of Kshs. 69,112,319.17 owed as at 9/10/2001.
3. The respondent appealed against that judgment in CA No. 252 of 2009. By a judgment made on 25/10/2019, the Court of Appeal upheld the judgment of the High Court and dismissed the appeal. However, it ordered that the matter be reverted back to this Court for computation of interest in the manner provided for by section 44A of the *Banking Act*.(hereinafter "the Act")
4. Pursuant thereto, on 14/5/2021, the applicant took out a Motion on Notice under order 20 rules 1 and 4, and order 41 rule 1 of the Civil Procedure Rules. In the Motion, the applicant sought two substantive orders, viz, that Mr. P.V.R. Rao of Tact Consultancy Services, Nairobi be appointed receiver of the respondent, and in particular, Lake Naivasha Country Club situated on the suit property pending the hearing and determination of the application.

5. It also sought a determination that, Kshs. 537,787,410/= is due and owing to the applicant pursuant to the decree of 28/8/2009. Costs of the application were also sought by the applicant.

6. The application was supported by the affidavit of Wilfred Machini sworn on 14/5/2021. He set out the background to the dispute and the history of the case up-to the judgment of the Court of Appeal. That the respondent had allowed the properties to waste and fall into a state of disrepair thereby impacting on their value. The respondent had also denied the applicant and its valuers access to the property. That it was therefore necessary for a receiver to be appointed to facilitate access to the property and prevent further wastage.

7. Amongst the documents produced was "WM5" being a report on the respondent's debt, "WM6" being the Letter of Offer and letter of admission of debt.

8. The respondent opposed the application vide its grounds of opposition dated 28/5/2021 and a replying affidavit sworn by Wajira Perera on 28/5/2021. It was the respondent's contention that the application was premature as there was an existing order issued by the High Court on 14/8/2021 staying execution of the subject judgment pending determination of the respondent's application dated 9/8/2012 which was yet to be heard. That the respondent had also filed a Notice of Appeal dated 6/11/2019 in the Supreme Court against the judgment of the Court of Appeal and that therefore jurisdiction only lied with the Supreme Court.

9. The respondent further contended that there was no instrument that empowered the appointment of a receiver over its properties. That the amount owed to the applicant was Kshs. 233,880,000/= and not Kshs. 537,787,410/= as claimed by the applicant. That the suit property was in good condition and operating profitably. That since the Letter of Offer was neither received nor accepted by the respondent, there was no contractual interest rate or mode of charging interest between the parties. A report was produced vide a further affidavit showing the recalculation of interest.

10. The parties filed their respective submissions which the Court has carefully considered. The Court has also considered the entire record.

11. Although the parties submitted at length on the issue of appointment of a receiver, that matter is not for consideration as the order was only sought in the interim. It was expressed to be pending the hearing and determination of the application. Since that prayer was not granted in the interim in my view, it does not fall for determination now.

12. In this regard, the only issue for determination as expressly directed by the Court of Appeal is the computation of interest and ascertaining the amount due from the respondent to the applicant.

13. However, before delving into that issue, I will first deal with the issue raised by the respondent that this Court has no jurisdiction to entertain the matter. It was contended that since the applicant had already filed a Notice of Appeal against part of the judgment of the Court of Appeal, jurisdiction lies there and not in this Court. It was also contended that there was an order of stay that had been given in 2012, pending the hearing and determination of an application dated 9/8/2021, which had sought to set aside the judgment.

14. The view this Court takes is that, the mere filing of a Notice of Appeal in the Supreme Court does not deny this Court jurisdiction to entertain the matter before it. What that Notice did was to confer upon that Court jurisdiction to deal with the subsequent proceedings that might be referred to it.

15. In this regard, there being no order of stay of execution either by the Court of Appeal or the Supreme Court, this Court has jurisdiction to proceed with the matter as per the directions of the Court of Appeal.

16. As regards the alleged stay of execution and some pending application dated 9/8/2021, the same was overtaken by events. Once the Court of Appeal pronounced itself on CA No. 252 of 2009, all the matters pending before this Court were subsumed therein and became subject to the judgment thereof. That objection also fails.

17. I now turn to the real issue that is before this Court, the computation of interest. In order to deal with this issue, I will first revert to, firstly, the Letter of Offer dated 20/3/2001 and secondly, the judgment of the Court of Appeal dated 25/10/2019.

18. The Letter of Offer dated 20/3/2001 provided for interest as follows: -

> "
>
> "7) Interest
>
> Shall be calculated at the aggregate of a margin of 2% pa and the Bank's Base Rate in force from time to time currently 20% pa, effectively 22% pa, at present on a daily basis and the actual number of days elapsed in each year compounded monthly and payable on a date in each month convenient to the bank".

19. On the other hand, the judgment of the Court of Appeal stated at pages 31 to 33 as follows: -

> " According to a copy of the statement of account relied by the appellant Kshs.67,884,813.57 was outstanding as at 31st August, 2001 and no further statement has been attached to demonstrate how that outstanding amount as alleged continued to accrue.
>
> …
>
> When the demand letter was issued by the bank's advocates on 22nd November, 2001, it stated that the indebtedness stood at Kshs. 69,112,319/17 as at 8th October, 2001.
>
> By a letter dated 26th September, 2001, to the respondent's advocates, Cheptumo & Co. Advocates demanded from the appellant immediate payment of Kshs. 64,537,343.25 which he alleged was outstanding amount.
>
> …
>
> The maze of numbers and figures should explain my difficulty and that of the Judge. The Judge merely adopted Kshs. 69,112,319.17 which is the figure the respondent had presented in the Originating Summons and awarded it to the respondent without any attempt to break it down. …
>
> Whereas the rate of 22% pa (being a margin of 2% pa and the Bank's Base Rate of 20% pa at the time) is uncontested, it is not easy to tell, as far as we can discern from the record, whether the applicable rate was flat, simple, reducing balance, compounded or a combination of the rates.
>
> So, I am in very same situations courts often find themselves when figures are plucked from the air and thrown at them. I throw them back to the parties or the court from which the appeal came to reconcile the
>
> figures as was the case in the judgments of the following appeals".

20. It is on the basis of the foregoing that this Court is to deal with the issue of interest. What comes out of the above two documents is that; the rate of interest was a margin of 2% pa on the applicant's Base

Rate from time to time; the same was compounded; that the amount of Kshs. 69,112,319.17 as at 9/10/2001 had not been explained and therefore had no basis; due to the various figures thrown at the court as the amount due, there was no certainty of the exact amount due except the principal sum and therefore, the amount of interest on the principal sum has to be recalculated with section 44(A) of the *Banking Act* in mind for the entire period. The beginning point is therefore 1/03/2001.

21. Section 44 of the *Banking Act* provides for the in duplum rule which limits the interest recoverable on defaulted loan. It provides: -

> "(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 subsection (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 nonperforming; and
>
> (c) expenses incurred in the recovery of any amounts owed by the debtor".

22. It is because of the application of this provision to the facility in question that the Court of Appeal referred this matter back to this Court for computation of the amount due.

23. Both parties recalculated or computed what they considered to be the amount due. Each instructed its own expert who computed the amount and produced a report in respect thereof.

24. The reports produced by the experts are supposed to help this Court arrive at a scientific and appropriate decision. However, I warn myself that expert testimony is always not full proof. It has variously been held that the evidence of an expert witness has to be received with circumspection. Each expert would inevitably advance his principal's cause.

25. In the text, Principles and precedents of the Art of Cross Examination by Aiyar & Aiyar, 10th Edn, pg 996, it is observed: -

> " Expert evidence is viewed with reservation and sometimes with suspicion and mostly as opinion evidence to support any other useful and reliable evidence, but not as conclusive or corroborative.
>
> ....
>
> An expert is fallible like all other witnesses ... therefore, in cross-examining him, it is advisable to get at the grounds on which he bases his opinion ... such evidence must always be received with caution they are too often partisans, that is, they are reluctant to speak quite the whole truth, if the whole truth will tell against the party who had paid them to give evidence.
>
> ...
>
> That there is a natural tendency on the part of the expert witnesses to support the view of the party who called him. Many so-called experts have been shown to be remunerated witnesses making themselves available on hire to pledge their oath in favour of the party paying them".

26. In *[Stephen Kirimi Wang'ondu vs The Ark Ltd](#)* [2016] eKLR it was held: -

> "Expert testimony. Like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves, no more, no less ...
>
> While there are numerous authorities that expert evidence can only be challenged by another expert, little has been said regarding the criteria a Court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.
>
> Firstly, expert evidence does not "trump all other evidence. It is axiomatic that Judges are entitled to disagree with an expert witness ...
>
> Secondly, a Judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence ...
>
> Thirdly, where there is conflicting expert opinion, a Judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
>
> Fourthly, a Judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones".

27. It is on the basis of the foregoing that I will consider the reports of the two experts that were relied upon by the parties.

28. On the part of the applicant, Tax Trail Consultants Limited lodged a report forwarded vide a letter dated 20/3/2020. It computed the amount due to be Kshs. 537,787,410/=. According to them, this was inclusive of the following: -

    a. Outstanding principal amount as at 30/4/2007 – Kshs. 232,210,394/-

    b. Accrued interest from May, 2007 to 31/7/2010 – Kshs. 234,210,394/-

    c. Expenses already incurred including valuation, legal and other professional charges - Kshs. 59,753,822/-

    d. Additional charges to be incurred in case of execution - Kshs. 13,612,800/-.

29. With greatest respect, that computation was wrong for the following reasons: -

    a. The rate of interest applied is a flat rate of 22% pa throughout the period. This had the effect of increasing the amount outstanding as at 1/5/2007 when the in duplum rule came into effect. The Letter of Offer, which is the basis of the facility, provided that the rate of interest was 2% p.a margin on the Bank's Base Rate which at the time the facility was given was disclosed to be 20%. There was no evidence that the Bank's Base Rate remained at that level throughout until 31/7/2010.

    b. The expert's recalculation started on 09/10/2001 with an opening balance of Kshs. 69,112,319/-. With due respect, that was wrong. The Court of Appeal found that there was nothing to support that figure. That this Court, in entering judgment for the applicant, had only relied on the applicant's advocate's demand letter dated 22/11/2001 without showing how it had

been arrived at. A demand by Cheptumo Advocates for the applicant's dated 26/9/2001 had placed the amount due then as Kshs. 64,537,343/25. It is doubtful that an amount of Kshs. 4,574,973/80 would have been the interest charged for the 13 days between 26/9/2001 and 9/10/2001. The recalculation should have therefore begun on 1/3/2001 with the opening balance being Kshs. 60,000,000/- and 22% pa being the applicable rate of interest as per direction (a) of the Court of Appeal.

c. Although valuation and auctioneers' charges are expenses recoverable under section 44 of the Act as an additional amount under that section, there was no evidence that any auctioneer charges had been incurred. This is a claim for special damages. Proof of the same was necessary in the normal way that special damages are proved. The only amount recoverable is Kshs. 750,000/= being valuation charges for 2012 and 2019, respectively and legal fees already paid of Kshs 450,000/=.

d. As regards legal fees for the entire period pegged at Kshs 58,218,822/=, that is subject to taxation by the taxing master of this Court less Kshs. 450,000/= already taken into account.

e. There is a speculative figure of Kshs. 12,612,800/=.

30. In view of the foregoing, the computation by the applicant's expert was erroneous and cannot be relied upon.

31. On the other hand, Irac Interest Rates Advisory Centre lodged a computation report ("Irac report") on behalf of the respondent. It gave two figures, Kshs. 307,776,103/46 when interest is compounded and Kshs. 233,772,723.28 on simple interest. The respondent submitted that since there was no contractual rate of interest, on the basis of contra proferentem rule, the amount due was Kshs. 233,772,723.28 being the amount based on simple interest.

32. As with the report of the applicant, the respondent's computation was erroneous. Firstly, I have already found that the Letter of Offer was the basis of the lending. Although the Court of Appeal had found that there was no evidence to show whether the same had been received or accepted, nevertheless, the lending was on the basis of that letter. The respondent consumed the monies lent on the basis of that letter and cannot therefore run away from it. That letter spelt out the terms and conditions of the lending. It stated that interest was to be compounded. The recalculation of interest on simple interest therefore was without basis and is rejected.

33. Secondly, the Irac Report applied the Commercial Banks Weighted Average (CBWA) as the rate of interest throughout the period. The report failed to consider that although the CBWA rate depicted the market trends over the period, the 2% pa margin that was indicated in the Letter of Offer was not included in the recalculation. To that extent, Irac's report was erroneous and cannot be fully relied on.

34. In *Daima Bank Ltd (In Liquidation) v. David Musyimi Ndetei* [2018] eKLR, the Court of Appeal held: -

> "As all these involve reconciliation and tabulation, we are not in a position to establish how much is owing between the parties taking into account the payments made. Having established the basis for the recalculation of the interest as above, it is incumbent upon the parties to reconcile the position in order to tabulate the exact figures conclusively. This

reconciliation should take into account the various advises on interest changes advised by the appellant from time to time".

35. In this regard, the Court takes judicial notice that Banks Base Rate are not static. They Oscilate from time to time. In the Daima Bank Case above, the Court of Appeal directed that the recalculation do take into account the various rates of interest that were advised by the bank. In the present case, there was no advices given by the applicant neither did it set out what its Bank Base rates was during the period.

36. Having found that both reports by the experts are factually incorrect, what is left for this Court? Should the Court send the matter back to the parties to ask their experts to re-work out the amount based on the above observations? I think that will be a waste of time. The Court of Appeal gave the parties the opportunity to do so failing of which this Court to do the recalculation. At page 15 of the Judgement of the Court, Ougo JA (as he then was) stated:-

> " I throw them back to the parties or the court from which the appeal came to reconcile the accounts or adjust the sum awarded or recalculate the figures afresh…"

37. In this regard, I hold that it is open for this Court, guided by the aforesaid expert reports and the material on record to recalculate the amount due. Indeed, I have found that some of the material provided by the experts is invaluable and can assist this Court to arrive at a just decision without necessarily wasting time by referring the matter back to the parties yet again. The parties had failed to do so in the first instance, at this second instance, they have again failed to get it right. I think the court is well endowed with enough material to reach the right decision.

38. Irac used CBWA rates in its recalculation of interest. Those are rates that were supplied by the Central Bank of Kenya. They varied from time. The court notes that as at the time the facility was given, the CBWA rate was 20.19% while the applicant gave it's Base Rate at the time as 20%. This means that the Banks Base Rate was as nearly as possible aligned to the CBWA at the time. It follows therefore that the Banks Base rate would similarly follow the same trend of the CBWA rate during the period in question.

39. Since the rate of interest applicable was the applicant's Base Rate plus a margin of 2% pa, and there being no evidence of what the applicant's Base Rate was from time to time during the period in question, I hold that what would be applicable is the CBWA rate applicable from time to time plus 2% pa in terms of the Letter of Offer.

40. Further, since the Court of Appeal had observed that there was no evidence to show how the Kshs. 69,112,319/17 as at 9/10/2001 was arrived at and by its direction that the interest be recalculated in accordance with section 44 of the Act, I hold that the recalculation has to be from 1/3/2001 with Kshs. 60,000,000/- being the opening balance.

41. The Court takes Judicial Notice that Banks Base Rate vary from time to time. Under section 107 and 108 of the *Evidence Act*, it was the applicant to prove what the bank's base rates were during the period but it failed to do so. This leaves the Court with no alternative but to use the CBWA rates as the bench mark plus 2% pa margin.

42. Since Irac's Report began the recalculation correctly from 1/3/2001 and applied nearly the correct rate of interest but only failed to add the 2% pa margin, it arrived at a lower figure as the amount due. On the other hand, since Tax Trail Consultants began the recalculation from 9/10/2001 with an erroneous figure of Kshs. 69,112,319/17 and applied throughout a flat rate of 22% pa, it arrived at a higher figure as the amount due.

43. In view thereof, the correct amount due must be between Kshs. 307,776,103.46 (on compound interest) proposed by Irac and Kshs. 464,420,788/- proposed by Tax Trail Cosultants (which excludes the expenses which the Court has already addressed itself on).

44. According to Irac, the interest plus principal exceeded the threshold by 29/2/2012. The period taken from March, 2001 and 29/2/2012 is approximately 11 years. Had Irac used the CBWA rate plus 2%pa margin, the threshold date would have been less than 10 years. Indeed messrs Tax Trail Consultants who used a flat rate of 22% pa the threshold was arrived at 31/7/2010, which is 9 years and 5 months. I would therefore apply a period of 10 years.

45. If the principal sum of Kshs. 60,000,000/= is subjected to 2% pa margin on simple interest for 10 years, the amount would be Kshs. 12,000,000/=. Since however, the same should have been compounded, I hold that a sum of Kshs 18,000,000/= would constitute a reasonable sum equivalent to 2% interest compounded. In this regard, that sum will represent the 2% pa margin which Irac had failed to take into consideration in their recalculation. Further, the expenses incurred by the applicant should be added. These amount to Kshs. 1,150,000/=.

46. Accordingly, in view of the foregoing, I hold that the amount due from the respondent to the applicant is Kshs. 326,926,103/46 made up as follows:-

a). Amount as per Irac's computation – Kshs 307, 776,103.46

b) 2% pa margin – Kshs 18,000,000/=

c) Other expenses

(valuation and legal fees already paid) – Kshs 1,150,000/=

Total Kshs. 326,926,103/46

47. Judgment is therefore hereby entered for Kshs. 326,926,103/46 with costs accordingly.

48. As regards legal costs, which is an expense under section 44 of the Act, the applicant did not prove that it had spent or incurred the sum of Kshs. 58,000,000/= indicated in the expert's report. Accordingly, legal costs will have to be taxed by the taxing Master of this Court accordingly.

It is so ordered.

DATED AND DELIVEREDAT NAIROBI THIS 12TH DAY OF NOVEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE