REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 21 OF 2007

JAMES KABATHI MWANGI

T/A TANGERINE AUTO HARDWARE....................PLAINTIFF

- VERSUS -

KENYA COMMERCIAL BANK LTD................. DEFENDANT

JUDGMENT

1. **James Kabathi Mwangi t/a Tangerine Auto Hardware** is the plaintiff. The defendant is **Kenya Commercial Bank Limited.**

2. The case arises from the Client/Banker relationship between the plaintiff and the defendant. It is not denied that on diverse dates between the years 1980 and 1999 the defendant afforded the plaintiff various banking facilities. The plaintiff secured those facilities by creating legal charge over four of his properties namely:

i. Loc 15/Kangare/1622;

ii. Loc 2/Maragi/3622;

iii. Loc /Maragi/1771; and

iv. Loc 11/Maragi/3509.

The plaintiff operate a current account No. 272780422 and a loan account number 272930678.

3. By this claim the plaintiff has alleged the defendant was fraudulent in that it charged exorbitant, usurious, illegal and uncontracted interest rate and penalties to his account. He pleaded that on 2nd August 1999 he paid the defendant an amount that was more than enough to clear the principal debt and yet the defendant demand from him ksh 4 million. That the defendant proceeded on 27th March 2002 to sell, by auction, his property Loc 2 Maragi/3509.

4. It is also the plaintiff plea that the defendant had failed to provide him with bank statement, though requested to do so.

5. The plaintiff does seek prayers of permanent injunction restraining the defendant from selling the remaining properties, and for a declaration that the notification of sale of those properties is invalid. The plaintiff seeks a declaration that the sale of Loc. Maragi/3509 was illegal. The plaintiff seeks the delivery of all documents in possession of the defendant in relating to the remaining properties. Finally the plaintiff seeks that the defendant does provide accurate accounts of his two bank accounts.

6. The defendant denies allegation of fraudulent dealing with the plaintiff’s account and pleads that the plaintiff had admitted his indebtedness in various correspondences and is therefore not entitled to the relief he seeks. The defendant further pleaded that it was entitled, as provided under the charge to consolidate the plaintiff’s account and to vary interest rate. It denied it illegally sold the plaintiff’s property Loc 2 Maragi/3509.

ANALYSIS

7. There are three distinct issues that arise for determination. They are:

i. was the defendant's charge of interest rate and consolidation of Plaintiff's account unlawful

ii. was defendant sale of Loc 2 Maragi/3509 unlawful

iii. If the answer to (i) and (ii) above is in the affirmative what remedy should the court give to the plaintiff.

ISSUE(i)

8. The plaintiff by his pleading and by evidence before court stated that the defendant variously charged him exorbitant interest rate. It is evident even in the plaintiff's correspondence to the defendant that the plaintiff was concerned of the charges to his account, even before he filed this case. Such correspondence is the letter dated 1st December 2003 where the plaintiff sought that the defendant would forgive some of his debt. In the relevant part of that letter the plaintiff stated:

> ***"You might not have noted that I have paid the original amount I was given by the bank in excess of 7 million Kenya Shillings. The interest that has been compounded to the principle amount is over 7.5 shillings not considering the penalties and other miscellaneous debts which have also been debited to my account which are in excess of Ksh. 1.5."***

9. The plaintiff also stated that his property was irregularly sold.

10. The plaintiff called Wilfred Abincha Onono to testify. Mr Onono is qualified as a certified Public Accountant (CPA) (K). He is the managing consultant of Interest Rates Advisory Center Ltd (IRAC). He has previously worked for the government as the Deputy Secretary in the Ministry of Agriculture and Rural Development and also as Auditor General for State Corporation. He worked in the private sector at **Unilever Kenya Limited, Mumias Sugar Company** and **Kenya Seed Company**. IRAC has specialized in financial consultancy and undertakes audit of borrowing contracts and interest rate. This it does by reviewing the terms of the contract thereby getting the applicable interest rate and the agreed mode of repayment. Once they do so, the information is fed into a software of IRAC called credit verifier. This recalculates the interest chargeable on amounts in the statements of account. Mr Onono stated that the accuracy of that software "is certified on a mathematical basis."

11. In this case he was requested to recalculate the plaintiff's two accounts, current and loan account. He produced the following report:

> *"REPORT*
>
> *Current Account No. 272780422*
>
> *According to The Central Bank of Kenya Act, the legal Maximum rate of 16.5% p.a has been applied during the period 23/07/1991 to 17/04/1997. Section 39 of The Central Bank of Kenya (Amendment) Act 2000 applied from 01/01/2001.*
>
> *There are various periods of missing statements of account and unclear amounts. The differences in the statement balances during these periods have been included in the report as miscellaneous debits or credits as appropriate. Missing interest charges have been estimated and factored in the miscellaneous figures.*
>
> *Section 44 of The Banking Act is applied throughout and charges contrary to this Act amounting to Ksh 464,976.70 have been omitted from the report.*
>
> *On 11/08/1999, and according to the offer letter dated 02/08/1999, KCB amalgamated and converted the existing facilities into one composite loan of Ksh 3,800,000.00. IRAC has on the same date converted Kshs 2,000,000.00. This indicates a transfer difference of Kshs.1,800,000.00 in favour of Tangerine Auto hardware.*
>
> *There is a recalculation difference in the cleared balance on 30th April 2001 between KCB [Kshs 98,478.95 CR] and IRAC [Kshs 382,794.81 CR] of Kshs 284,315.86 in favour of Tangerine Auto hardware.*
>
> *Loan Account No. 272930678*
>
> *Account activity is as reflected in the statements of account.*
>
> *KCB's schedule of interest rates for short term loans is applied.*
>
> *Section 44 of The Banking Act is applied throughout the charges contrary to this Act amounting to Ksh 3,170.00 have been omitted from the report.*
>
> *On 11/08/1999, KCB amalgamated and converted part of the existing overdraft facilities of current account 272 780 4222 into one composite loan of Kshs. 3,800,000.00. IRAC has on the same date converted Kshs 2,000,000.00.*
>
> *There is a recalculation difference in the cleared balance on 31st August 2002 between KCB [Kshs 3,763,652.60 DR] and IRAC [Kshs 834,130.54 DR] of Kshs. 2,929,522.06 in favour of Tangerine Auto hardware.*

Total Overcharge

The total overcharge in the two accounts amounts to Kshs 3,213,837.92 [Kshs 284,315.86 + Kshs 2,929,522.06]

12. The defendant relied on the evidence of Williamson Machua Mwangi, the defendants credit administrator at Muranga branch where the plaintiff's accounts were operated. In respect to the allegation of application of illegal interest rates this is what this witness stated in examination in chief:

> ***"The allegations that the defendant charged unlawful interest and penalties or that the plaintiff has cleared his outstanding loan are an afterthought. The plaintiff has not cleared the debt under the charge and the outstanding loan amount as at 6th May 2006 is Ksh3,534,096.95. see a copy of the plaintiffs Bank Account Statement produced as document No 26 on the Defendants list of Documents."***

13. When this witness was cross examined and on being asked about the rate of interest the plaintiff was charged he respondent thus:

> ***"There are interest rates vary (sic). They are in the letter of offer and there are different interest when there is default."***

14. On being asked what response the defendant had to IRAC's report this witness stated that the plaintiff had admitted indebtedness. He also referred a two page bank statement of plaintiff's account for 6th December 2003 to 6th May 2006 showing a constant debit balance of Ksh 3,534,096.95.

15. Although the plaintiff pleaded and stated in evidence that he had sought copies of his bank statements the defendant did not produce those statements before court. The defendant's witness stated that there is a bank policyn to destroy the statements every 7 years. If that is to be believed the least this court could have expected is bank statements dating seven **years** back from the date this suit was filed, this suit was filed in the year 2007. Alternatively the defendant could have attempted to reconstruct the account. Is it that not feasible in the modern age of computers. None of that was done. As a consequence Mr Onono had to rely on incomplete set of Bank statements in producing the report reproduced above.

16. One would ask a rhetorical question: what did the bank have to hide that it failed to produce any sort statement that would answer the plaintiff's plea that he was charged illegal and exorbitant interest rates. The defendant had a legal burden as provided under Section 112 of the Evidence Act. They failed to shift that burden. Had the defendant provided those statements or provided a report much like the one produced by Mr Onono, which showed the interest rate applied each time, then this court would have considered whether it countered the IRAC's report in respect to its evidence that the defendant breached section 39, 44 and 52 of the Banking Act. In this regard I rely on the Court of Appeal decision **Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR** thus:

> *"In the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR (Civil Appeal No. 239 of 2009) this Court, differently constituted held that:*
>
> *"Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."*
>
> *20. In the appeal before us, it was the respondent bank which fell within Section 112 and which had a duty to demonstrate that it had indeed sought approval to increase the interest rate because this would be a fact that would be within its knowledge. We find and hold therefore, that the burden remained on the bank to prove that the rate of interest that was being charged was charged with the consent of the Minister. This is especially so because Section 44 of the Banking Act places the burden on the bank to seek the approval. How would the applicant be able to tell if indeed the bank had sought approval from the Minister?...................*
>
> *The Banking Act came into commencement on 1st November 1989. By virtue of Section 44 of the Act, it was incumbent upon the respondent to seek approval from the Minister before it raised any interest to be charged on the outstanding amounts. There is no evidence that that approval to increase the interest charged was sought. On the face of it therefore, the interest rate increases were not in accordance with the law........................*
>
> *Even though under that section a failure to comply with Section 44 of the Banking Act would not, in and of itself, render the contract between the parties void, Section 52 (3) of the Act prohibits financial institutions from recovering interest or other charges which exceed the maximum permitted under the provisions of the Act in the following terms:*
>
> *"This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act."*

17. I do accept the defendant's submission that the defendant was entitled to consolidate the plaintiffs account. This was made clear by the Court of Appeal in the case **Barclays Bank of Kenya Limited vs Kepha Nyabera & 191 Others** [2013]eKLR stated:

> "34.At paragraph 29.16 of ***Pagets Law of Banking*, 13th Edition**, it is stated that the banker may combine two current accounts at any time without notice to the customer even though the accounts are maintained at different branches.
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> 35.We are also guided by the passage in ***Pagets Law of Banking, supra,*** **paragraph 29.13** where it is stated thus:

"Right of bankers of set-off which is right of combination or of consolidation of accounts is but the manifestation of a right analogous to the exercise of the banker's right of lien, a right which is of general application and not in principle limited to account or other similar accounts."

36.*This position is further buttressed by* ***paragraph 395 of the Halsbury's Laws of England 3rd Edition*** *which states as follows:-*

"unless precluded by agreement or course of business, a banker is entitled to combine all accounts kept in the same right by the customer, whether deposit or current, and whether at the same branch or different branches, and to exercise his lien or set off for the resulting balance."

37.Further, in **Sheldon's, Practice and Law of Banking**, it is stated that:-

"Before paying the balance to the judgment creditor or into court, as the case may be, the banker is entitled to deduct from the balance any debts due to him from the customer which existed as the date of the order, and for this purpose he can combine all the customer's accounts, which he previously could have set off without notice to the customer."

38.Thus, in circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts."

18. In my view the plaintiff has adequately met the civil burden of proof through his testimony and the report of IRAC that the defendant breached the law and applied illegal rate of interest and charges other charges not permitted by law in the plaintiff's account. The first issue therefore is found in the affirmative. Although the defendant contended it was entitled to vary interest rate, that right was not absolute as was stated by the court of appeal in the case **Margaret Njeri Muiruri** (*supra*)

"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 v Staunton; Paragon Finance plc v Nash [2001] EWCA Civ 1466 [2002] All 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 arrears 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 the 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."

ISSUE (II)

19. This issue seeks the consideration whether the defendant's sale by auction, of the plaintiff's property was unlawful.

20. I have considered the parties evidence in respect to this issue. There is however something very intriguing or perhaps to put it more accurately I would say sinister about the sale of the plaintiff's property. Although I have noted the three months notice was sent to the plaintiff by the defendant's advocate (page 48 of the defendant's document) and I have noted that the auctioneer notification of sale was served on an adult at the plaintiff's business place it is strange that the defendant's witness, who described himself as the then credit administrator at the defendant's Muranga branch, was unable to tell the court, firstly how much was realised at the auction and whether or not the amount realised was credited to the plaintiff's account. This is what this witness said when cross examined:

"There is no documentary document (sic) of how much was realised…..

There is no statement from the Bank showing credit made of the sale proceed."

21. In my view for such evidence to be presented by the Bank, the defendant, nothing can be more damning. The question that arises is: was the property sold by auction or was it transferred by the defendant to another person. There is certainly no evidence before corut showing it was sold. My finding in respect to the second issue is also in the affirmative.

22. What remedies should the court grant the plaintiff?

23. The plaintiff has shown by IRAC's report that the defendants were in breach of the law in charging interest and other charges. The plaintiff is therefore entitled to permanent injunction to restrain defendant from selling his properties. The plaintiff is also entitled to an order to have all documents, including titles, of the remaining property delivered to him. The plaintiff, having prayed for other reliefs the court deems fit, is entitled to orders of discharge of charges and declaration he is not indebted to the defendant.

24. The plaintiff having substantially succeeded in his claim is entitled to costs of the suit as provided in section 27 of the Civil Procedure

Act.

CONCLUSION

25. The judgment of the court is:

> ***a. A permanent injunction is hereby issued restraining the defendant, its servants or agents from advertising for sale by public auction or private treaty or otherwise howsoever the plaintiff's properties known as:***
>
> > *i. Loc 2 Maragi/1771*
> >
> > *ii. Loc 15 Kangare 1622*
> >
> > *iii. Loc 2 Maragi/3622*
>
> ***b. A declaration is hereby made that the plaintiff is not indebted to the defendant or at all on bank accounts No. 272780422 and 272930678.***
>
> ***c. An order is made requiring the defendant within 30 days from todays date to deliver to the plaintiff or to such person he might appoint all the title documents of properties set out below and their discharge of charge:***
>
> > *i. Loc 2 Maragi/1771*
> >
> > *ii. Loc 15 Kangare/1622*
> >
> > *iii. Loc 2 Maragi/3622*
>
> ***d. The plaintiff is awarded the costs of this suit.***

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **14th** day of **APRIL,** 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE