**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO.74 OF 2011**

**CHRISTOPHER NDOLO MUTUKU.....1ST PLAINTIFF**

**CAROLINE NJOKI MUTUKU.....2ND PLAINTIFF**

**VERSUS**

**CFC STANBIC BANK LIMITED.....DEFENDANT**

**JUDGEMENT**

1. This Decision answers the Appeal filed herein by the Plaintiffs against the Decision of the Deputy Registrar of this Court dated 17th February 2017. The Decision of the Deputy Registrar followed Directions made by Hon. Mabeya J. herein on 15th February 2013 whose background needs to be told.

2. The Plaintiffs were at all material times to the matters giving rise to this suit Customers of CFC Stanbic Bank Ltd (CFC Bank) and had obtained a facility for the sum of Khs.10,530,000/- from the Bank. Arising from an alleged breach of repayment of the facility, the Bank threatened to exercise its statutory power of sale. Aggrieved by that intention, the Plaintiffs presented this suit by way of a Plaint filed on 26th January 2011. One of the matters pleaded in that Plaint was that the Bank had unilaterally and arbitrarily and without notice to the Plaintiffs varied the interest rate levied on the facility from the contract rate of 13%. The grievance is retained in the Amended Plaint filed on 15th June 2012.

3. The Plaintiffs sought two Prayers in the amended pleadings:-

a) An Order for the taking of an account.

b) Interest from 21st February 2012.

4. About 13 months after the filing of the suit and before the Amended Plaint the Plaintiffs filed a Chamber Summons dated 12th February 2012 for the following Orders:-

1. THAT a proper account, with all necessary enquiries, specifically the legally applicable interest rate respecting the Plaintiffs' mortgage account with the Defendant, be taken.

2. THAT any monies found to be due to the Plaintiffs from the Defendant be repaid forthwith, and in any event within seven (7) days of the taking of the account.

3. THAT the costs of this application be met by the Defendant.

At that time the charged property was no longer under threat as the Plaintiffs had paid to the Bank all monies said to have been outstanding. The Plaintiffs were however aggrieved about the state of affairs because they alleged an overpayment of some Khs.3,198,059.78 which they claimed back.

5. Hon. Mabeya J., on 15th February 2013, determined the application as follows:-

"19. *Accordingly, I made a determination of the rate of interest applicable to the facility as follows:-*

*a) From the date of drawdown to 30th September, 2008 – 13% per annum.*

*b) From 1st October, 2008 to date – 15.25% per annum.*

*Having determined the Preliminary issue of the rate(s) of interest applicable, the parties are at liberty now to prosecute the rest of the motion if they deem necessary. The costs of the application shall be in the cause".*

6. It was understood and agreed by the Parties herein that the implication of the ultimate order of the Judge was that there would be the taking of Accounts. At the instance of an application by the Plaintiffs, Hon. Gikonyo J, on 27th June 2014, gave the roadmap and Directions on the taking of those Accounts in the following specific terms:-

"*[15] The upshot is that the application dated 12th February, 2012 is allowed strictly on the following specific terms:*

*a) The Deputy Registrar, High Court Nairobi, will take accounts between the parties herein and specifically determine the total sum paid by the Plaintiff to the Defendant on the loan facility in issue; and applying the rate of interest determined by the Court on 15th February, 2013, certify whether there was any overpayment;*

*b) The Deputy Registrar shall summon and examine such expert witness, administer oaths, direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the purposes of taking the accounts between the parties;*

*c) The above inquiries on accounts should be completed within a period of 30 days and a report thereof filed forthwith not later than seven (7) days of the completion of the inquiry; and*

*d) Costs of the application dated 12th February, 2012 shall be in the cause*".

7. Although the inquiry on the Accounts was to be completed within 30 days of that order and a report thereof filed not later than 7 days of completion, this did not happen until more than 2 years later on 17th February 2017. Indeed one of the Grounds of Appeal by the Plaintiffs is that the Deputy Registrar erred in unilaterally, arbitrarily and without jurisdiction extending/delaying the return date by over 934 days (2 years and 8 months).

8. In all, the Memorandum of Appeal sets out the following 9 grounds:-

1. The Learned Deputy Registrar erred in disregarding the evidence adduced before her, and specifically, the express admission by the Defendant/Respondent's witness that the interest levied against the account of the Plaintiffs/Appellants were 25.3% per annum in direct contravention of the Order of the Hon. Justice A. Mabeya on 15th February, 2013 capping the maximum interest at 15.25% per annum.

2. The Learned Deputy Registrar erred in failing to appreciate the fact the Plaintiffs/Appellants settled the mortgage account and obtained a Discharge of Charge on 21st February, 2012, upon the interest rates/terms set out by the Defendant/Respondent, then at 27% per annum, and before the Order of Justice A. Mabeya on 15th February, 2013 which lowered the rate of interest to between 13% and a maximum of 15.25% per annum. Specifically, the Learned Deputy Registrar failed to appreciate the fact that at the time of making the said ruling, the Plaintiffs/Appellants had been forced by the Defendant/Respondent, by way of threats of foreclosure on their property and intimidation to pay to it the sum of Khs. 18,812,984.37 in order to free their property from the hands of the Defendant/Respondent, which amount was calculated at interest rates of up to 27% per annum, and that the said payment was not disputed by the Defendant/Respondent in its earlier Replying Affidavit in response to the Plaintiff's application dated 12th February 2012 in any other way.

3. The Learned Deputy Registrar erred in failing to appreciate the simple fact that the reduction of the interest rate from 27% per annum to a maximum of 15.25% per annum would logically, mathematically, and scientifically lead to an overpayment of the settlement sum already paid by the Plaintiffs/Appellants to the Defendant/Respondent.

4. The Learned Deputy Registrar erred in failing to appreciate the fact the ruling by Justice A. Mabeya on 15th February, 2013 found that the Defendant/Respondent had breached the contract between the parties herein and thereby declared as unlawful the interest that the Defendant/Respondent had levied against the account of the Plaintiffs/Appellants.

5. The Learned Deputy Registrar erred in disregarding the submission of the Plaintiff/Appellants.

6. The Learned Deputy Registrar erred in wholly accepting the disputed and flawed accounting system submitted by the Defendant/Respondent without subjecting it to a scientific and forensic audit.

7. The Learned Deputy Registrar erred in failing to render a reasoned ruling based on the material before the court.

8. The Learned Deputy Registrar erred in failing to abide by the directions/orders of the Hon. Justice F. Gikonyo issued on 27th June,

2014 and specifically, by failing to take accounts and make a return to the Judge within 30 days, unilaterally, arbitrarily and without jurisdiction extending/delaying the said return by over 2 years and 8 months (934 days).

9. The Learned Deputy Registrar erred in rendering an unreasoned and hastily crafted ruling following incessant complaints/enquiries from the Plaintiffs/appellants, calculated purely at ridding herself of the matter before her.

9. This Court has considered all arguments and submissions made by both sides in support and as a counter to the Appeal. These include submissions filed herein in answer to three questions posed by this Court on 3rd October 2018, framed as follows:-

a) Did the Ruling of Mabeya J. fault other charges and costs save for interest?

b) Ought not the recalculations give full effect to the decision inclusive of periods when rates charged by the Bank were lower than ordered by Court?

c) Is it possible for parties to agree on parameters of Account taking and submit the exercise to a jointly appointed accountant?

10. I think it would be opportune to begin by considering the effect, if any, of the long delay in the return of the report ordered by the Court. If this Court were to find that the delay is not explained and has the effect of invalidating the finding of the Deputy Registrar, then that would be the end of the matter without the need of tasking oneself with evaluating the merit or otherwise of the Decision.

11. Undoubtedly, the Report by the Deputy Registrar came way after the time ordered by Gikonyo J. on 27th June 2014. The delay was for a substantial period worked out by the Plaintiffs to be 934 days. How did this come about?

12. The Record of Court shows that even before the parties herein had moved the Deputy Registrar for the taking of accounts, the Bank filed an application dated 15th July 2014 seeking to stay the implementation of the Orders of Gikonyo J. of 27th June 2014 and all proceedings herein pending the hearing and determination of the Civil Appeal No. 242 of 2014 being an Appeal preferred by the Bank against the Ruling of Mabeya J. of 15th February 2014. It would not seem illogical that this Application needed to be determined before the taking of Accounts and it was not until 27th January 2015 when Gikonyo J. dismissed the said Motion paving the way for taking of accounts. This far the delay is sufficiently explained. Noteworthy as well is that by 27th January 2015, the timelines set in the Ruling of 27th June 2014 had long been breached. Again to be noted is that no new timelines were set.

13. The Court record further shows that efforts by parties to resolve the matter did not bear fruit and on 22nd February 2016 there being a disagreement by Counsel on how to prosecute the taking of accounts, the Deputy Registrar directed that the matter be mentioned on 24th February 2016 when she would give a Ruling on it and unlock the impasse. On this date, the Deputy Registrar set the Ruling for 14th March 2016. But the Ruling did not come until (3) months later on 18th July, 2016. In that Ruling which was really in form of directions, the Deputy Registrar made the following orders:-

"*To enable me discharge my mandate, there is need to establish exactly how much of what the Plaintiff paid went towards the payment of the loan facility and what happened to the balance.*

*To do this, I hereby summon the Defendant's representative to explain the statement of account filed in this Court on 24th February 2016 vis a vis the 1st Plaintiff own statement of account and the Plaintiff's running account with the Defendant.*

*To ensure that there is no further delay of this matter, the undersigned will hear the said explanation which will be subjected to cross-examination by the Plaintiff and a report will be issued thereafter to the Judge as per the orders of 27th June 2014 within 14 days from the date of this ruling".*

In the closing remarks the Deputy Registrar is alive to the deadline set by the Judge on 27th June 2014. So also would the parties.

14. It was not until 28th November 2016 that Mr. Hamilton Suba, a manager of the Bank testified on his accounts and was cross-examined by Counsel for the Plaintiffs. Thereafter the Deputy Registrar reserved Ruling for 16.1.2017 but delivered it a month after schedule on 17.2.2017.

15. The Court record shows that Counsel for the Plaintiffs was happy to participate in the proceedings that were before the Deputy Registrar way after the deadline set by Court had passed. In his participation Counsel for the Plaintiffs was not only robust but without regard to the violated timelines. The Plaintiffs through Counsel acquiesced to any delays and cannot be heard to grieve about the delay in the decision perhaps only because it does not favour them. That ground of Appeal is without merit.

16. The rest of the Grounds of Appeal are around three questions. The first is that the learned Deputy Registrar simply accepted the accounts put forward by the Plaintiffs without rendering a reasoned Ruling based on the material before her. Secondly that the learned Deputy Registrar erred in failing to appreciate that the reduction of the interest rate from 27% per annum would logically, mathematically and scientifically lead to an overpayment of the settlement sum. Thirdly that the Deputy Registrar erred in accepting that additional costs and charges needed to be included in the Plaintiffs accounts.

17. The taking of account before the Deputy Registrar was conducted by the rivals filing their respective sets of accounts, the testimony and cross-examination of a Bank official and written submissions of Counsel. None of the parties complain about this mode. With the material

before her, the Deputy Registrar found as follows:-

> "The mandate of the Deputy Registrar is to determine whether the Defendant applied the applicable interest rate as determined by the Judge. The accounts provided by the Defendant on 24th February 2016 and the workings thereon, indicate that from the date of draw to September 2008, the Defendant levied 13% interest and thereafter from October 2008 to the close an interest rate of 15.25%. Thereafter the interest levied was in accordance with the ruling of the High Court.
>
> I note that though the Plaintiff takes issue when the other charges levied on the account, the High Court Ruling of 15th February 2013 did not impugn all other agreed contractual charges that were applicable under the loan facility".

18. In that short passage the Deputy Registrar gives the reasons why she accepted the Defendants version of accounts over those of the Plaintiff. She accepted the Bank's position that the accounts ought to include other contractual charges other than the rate of interest as the same were not impugned by the decision of Mabeya J. of 15th February 2013.

19. I am unable to agree with Counsel for the Plaintiffs that the Deputy Registrar simply adopted the position of the Defendants without assigning a reason for her finding. The passage set out above demonstrates the clarity of the Deputy Registrar's position. What must concern this Court is whether the Deputy Registrar was justified in finding that other contractual charges needed to be included in the Plaintiffs' accounts.

20. In answer to a question this Court posed as to whether the Ruling of Mabeya J. addressed the question of additional charges and costs, the parties, unsurprisingly took conflicting stands. The Plaintiffs submit that the learned Judge dealt with that issue in paragraph 14 of his Ruling as follows:-

> "14. It may be argued that publication of change of rate of interest in the daily newspapers is an effective convenient and cheaper way of communicating the change of the rate of interest to the borrowers. Lenders may argue that it is cumbersome to write to each of their individual customers to advise on the change of interest rates. To my mind, that cannot be acceptable for reasons that, the lenders do enter into individual contracts with each of their customers therefore having individual obligations inter se. Further, it is not every day that every borrower flips through the daily newspapers to see if his lender has effected changes of the rate of interest applicable to his borrowing. In any event, if a lender wishes to use the media as a form of communication, be it electronic or print as one of the mode of notification, it should expressly state so in the security instrument. My thinking is informed by the fact that, the purpose of the notice to a borrower is to put him on notice of the intended increased/decreased liability. With the usual penal consequence ( by way of penalty interest, default charges and other charges) that follow default in making an adequate repayment on the stipulated time, media publication does not give a borrower adequate, convenient and effective notice to be able to carry out his obligations under the Charge document to adjust the repayment on time. In any event, if a Bank can render a Statement of Account on monthly basis to all its customers, it will likewise make commercial sense if the Bank should notify its borrowers individually of changes in the interest rates that increase the borrower's liability/burden as and when they arise. Accordingly, I hold that, any publication in the newspapers of the change in the rate of interest, which I have found there was none, was not in accordance with the contract between the Plaintiffs and the Defendant and did not affect the rate of interest on the facility".

It was then asserted that in the absence of a lawful notice respecting those additional charges the same could not be levied.

21. That at any rate the Judge having determined that the Bank had fundamentally breached the terms of the Charge Document by applying arbitrary interest rates, the Bank was on the wrong and its actions were to blame for any default that could have attracted penalty charges. It being reasoned that a party cannot benefit from its own breach.

22. Lastly that at the hearing of the application before Mabeya J, the Bank did not, in its Defence, specifically insist on the alleged default and justify any penalties and/or additional charges.

23. For the Bank it was argued that the issue of additional charges and costs was not placed before the Judge and the Judge did not make any findings in that respect. On the proposition that the application of unlawful charges triggered default, the Bank countered that the Judge made no decision on the additional Charges and that it was never alleged, demonstrated and/even determined how each default for which default interest was charged was linked to wrongly imposed credit. That in any event there was default even where interest rate was reduced by the Bank.

24. This Court has familiarized itself with the Decision of Mabeya J. of 15th February 2013 in its entirety. Very early in that Ruling the Judge frames what he understands to be the issue before him. In paragraph 3 he states,

> "*3. The matter subsequently came up for the highlighting of the written submissions by both parties. It is in respect of that Preliminary issue of the applicable rate of interest to be levied upon the loan facility that his Ruling is about*".

And when the Judge makes his final determination it is about the rate of interest applicable to the facility. See the last paragraph of his decision when he states:-

> "19. Accordingly, I make a determination of the rate of interest applicable to the facility as follows:-
>
> a) From the date of drawdown to 30th September, 2008 – 13% per annum.
>
> b) From 1st October, 2008 to date – 15.25% per annum.

Having determined the preliminary issue of the rate(s) of interest applicable, the parties are at liberty now to prosecute the rest of the motion if they deem necessary. The costs of the application shall be in the cause".

25. This Court has looked at paragraph 14 of that decision (which is reproduced in full earlier in this decision). It would be to stretch ones understanding of the emphasized part of that passage to illogical limits to read into it a finding that the penalty interest, default charges or other charges charged by the Bank were unlawful.

26. Even if the Court were to be wrong in this view, to allow the Plaintiffs to take up the issue of additional charges and costs would be to allow them to traverse beyond their pleadings in a manner that is not permitted in law. Both in the original Plaint of 25th January 2011 and its amended version of 12th March 2012, the Plaintiff raise issues around the rate of interest only and not other charges and costs. Parties are bound by their Pleadings and I am not told that the question of other charges and costs were embraced by the Bank as further issues falling for determination by the Court. (see Odd Jobs vs. Mubia (1970) EA 476.

27. Turning to another issue, the Plaintiffs have argued that following the decision of the Judge that faulted the charging of a rate of 27.5% per annum and upholding the rate to be 15.25% per annum as lawful, it be a mathematical and scientific logic that the Plaintiffs had overpaid. This proposition, as correctly argued by Counsel for the Bank, ignores a fundamental issue that the rates upheld by the Judge were in some periods higher than what the Bank had initially and originally charged! The Court would have to agree with the Lawyers for the Bank that the taking of the accounts would have to follow the rates set out by the Judge even if they disadvantage the Plaintiffs. That decision has not been set aside in Appeal or revision and needed to be implemented by the Deputy Registrar.

28. In the end I am unable to fault the decision of The Deputy Registrar of 17th February 2017 and the Court would not have had a difficulty dismissing the Appeal. However in the course of considering this matter I had, on 3rd October 2018, suggested to the parties herein to agree on the parameters of a fresh account taking and submit the exercise to a jointly appointed Accountant. This was informed by this Courts overall impression that a report prepared by a qualified Accountant (who could easily explain and defend his/her findings) could serve the interest of both sides better and perhaps bring some closure to this long running battle. This is not to downplay the ability and training of the Deputy Registrar but an appreciation that certain professionals could be better in their own specialized fields than we lawyers. In their respective submissions filed thereafter both sides were not averse to this suggestion.

29. For that reason I ask the parties to jointly agree on an Accountant within 21 days hereof and in default of agreement, the Accountant shall be appointed by Chairperson, the Institute of Certified Public Accounts of Kenya. The parties shall also, within the same period, agree on the parameters for Account taking which must be in comport with the Directions issued by Judge Mabeya on 15th February 2013 and clarified by this Decision. The report of the Accountant to be presented to this Court within 60 days of his/her appointment.

30. In respect to fees and charges of the Accountant, the same shall be shared equally by the Parties however the party in whose disfavor the Report is made shall reimburse to the other the half share paid.

31. Two more orders.

1) Costs of this Appeal shall abide the Report of the Accountant ordered in the preceding paragraphs.

2) This matter shall be mentioned on 27th February 2019.

**Dated, Signed and Delivered in Court at Nairobi this 18th day of January, 2019.**

**F. TUIYOTT**

**JUDGE**

***PRESENT;***

Wafula for Ogunde for Defendant

N/a for Plaintiff

Nixon - Court clerk