REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 34 OF 2010

TORMOR KIBORE TANUI.....APPELLANT

VERSUS

NATIONAL BANK OF (K) LTD.....RESPONDENT

(Being an Appeal from the Judgment of Hon. W. Juma,

Chief Magistrate in Nakuru CMCC No.2029 of 2003

delivered on 22nd January, 2010 against the Appellant.)

JUDGMENT

INTRODUCTION

1. This appeal arise from a suit filed by the respondent in the lower court seeking the following prayers

a) claiming kshs.594,368.40,

b) Bank charges and interest on principal sum at rate of 26% or current bank rates of interest calculated on a daily basis from 22nd May 2003 until payment in full.

c) Costs of the suit and interest at court's rate.

2. The trial magistrate found that the respondent/plaintiff had proved the appellant was indebted to the respondent as claimed in the plaint and entered judgment for the respondent/plaintiff against the appellant/defendant for kshs.594,368.40.

3. Being aggrieved by decision of the trial magistrate, the appellant /defendant filed this appeal on the following grounds:-

i. That the learned magistrate erred in law and in fact in holding that the appellant was aware of what the respondent was claiming and when there was no agreement on specific interest rates to be charged by the respondent.

ii. That the learned magistrate erred in law and facts in failing to properly consider the evidence of the appellant and his defence thus arriving at a wrong decision.

iii. That the learned magistrate erred in law and facts in basing her decision on alleged custom in banking law and practice when there was no evidence adduced to support the same nor was it pleaded in the plaint.

iv. That the learned magistrate erred in law and facts in basing her judgment on documents/letters which were inadmissible in evidence having been written on without prejudice basis.

v. That the learned magistrate erred in law and in fact in holding that the respondent had proved its case to the required standards when it had not.

4. Parties herein agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

5. The appellant submitted that in his defence, he admitted being advanced kshs.90,000 between the year 1990 and 1991 but was against the computation of interest and penalties arising from the said amount, which he believed to be unconscionable.

6. Appellant submitted that evidence adduced show that he made efforts to pay until when the amount was inflated to kshs.594,368 and that arrangements between parties were not put in writing.

7. Appellant's argument is that he is not challenging the trial magistrate's order of payment of interest but the award in unconceivable interest as there was no evidence to support the same; that the main issue for determination is computation; the rate and what period the interest is chargeable.

8. Appellant submitted that the subject of unconscionable interest was dealt with in the decision of **Margaret Njeri Muiruri vs Bank of Baroda Kenya Ltd[2014]eKLR** Where the court held as follows:-

> **"As this court held in National Bank of Kenya Ltd vs pipe plastic Sankolit Kenya Ltd Civil Appeal No.95 of 1999 "a court cannot rewrite a contract with regard to parties are bound by the terms of their contract "nevertheless, courts have never been shy to interfere or refuse to enforce contracts which are unconceivable, unfair or oppressive due to real procedural abuse during formation of meaningful choice for the other party. An unconceivable contract is one that is extremely unfair. Substantive unsociability is that which result from actual contracts terms that are unduly hard commercial, unreasonable and grossly unfair given the existing circumstances of the case."**

9. Appellant submitted that as shown at page 79 of the record of appeal, costs of the interest of the loan and penalties varied from 30 to 40%; he argued that it is unconscionably unfair and oppressive.

10. Appellant further submitted that there exist the now accepted *In duplum* Rule which was introduced vide **Section 44** of the **Banking Amendment Act no.9 of 2006.**

11. Appellant further argued that in view that, what was owing from the initial debt was kshs.35,000, the interest is kshs.35,000 making a total of kshs.70,000 payable at courts rate as held in the decision of **Westmount power Kenya Ltd Vs Kenya Oil Company Ltd civil application No. Nairobi 254 of 2013[2014] eKLR.**

12. Appellant further submitted that all through, he acted in good faith and informed the respondent of his inability to pay through various correspondences. He urged court to set aside the lower court's judgment and dismiss the suit; in the alternative order that the respondent is entitled to kshs.35,000.

SUBMISSIONS BY RESPONDENT

13. Respondent's argument is that the appellant admitted owing the bank through several letters. Respondents submitted that, there is nothing unconscionable in charging the kind of interest charged in 1990 to 1993 given the inflationary rate applicable then and the sum of kshs.90,000 rising to kshs.594,368 is not surprising.

14. On the issue of *In duplum* rule introduced by **Section 44** of the **Banking Amendment Act**, respondent submitted that the loan was applied and admitted before the Act came into existence/operation; that the Act would not therefore apply to the figure of kshs.593,368, which was already on record at the time.

ANALYSIS AND DETERMINATION

15. PW1 an officer from the respondent bank testified that by letter dated 1st October 1997, the appellant acknowledged owing the respondent kshs.70,000 and proposed to pay kshs.7,000 per month. He added that by 3rd October 2001, the outstanding amount was kshs.519,168.50. He stated the interest rate charged was between 16% and 30%. He produced a schedule on interest charged. He stated that at the time he testified on 3rd June 2009, the respondent had stopped charging interest and ledger fees 2 years before.

16. In cross-examination, PW1 testified that the appellant was advance loan totaling kshs.94,600 and on 3rd May 2007 the balance was kshs.588,051.40. He stated that over kshs.500,000 of the amount claimed is interest. He said the appellant did not sign any agreement on what would be charged on interest. He said that interest was charged on outstanding balance. In reexamination, PW1 said the respondent stopped charging interest in 2003.

17. The appellant admitted that he opened an account in the respondent bank in 1990 and was given a loan of kshs.50,000 and after 2 weeks, he was given kshs.20,000. He said he did not agree with the bank on when he was to repay but he promised to transfer his salary from Standard Chartered Bank so that deduction of kshs.2000 could be done from salary monthly. He said they did not discuss interest rates. He said he did not take any other amount but on being shown cheques, he admitted having drawn them. He admitted having drawn a cheque in the name of his colleague **Thomas Kimutai Bingii** to take to his family. He said his salary went through the respondent bank but never showed any deduction from salary.

18. Appellant said he paid kshs.50,000 leaving a balance of kshs.40,000 and later kshs.5,000 leaving a balance of kshs.35,000 but interest from 1991 made it rise to kshs.594,369.40. He denied having agreed to pay interest at 26%. In cross-examination, appellant said he was working with special branch and he did not know what the bank was giving people money for. He never availed any pay slip showing

deduction and alleged that his pay slips got lost. He therefore failed to prove that the bank/respondent deducted his salary to repay the loan up to June 1992 when it was stopped after being involved in an accident.

19. Appellant further stated that he offered to pay kshs.5000 in 1992 and kshs.50,000 he paid was not reflected in bank statement. He however never produced any document to prove payment.

20. The appellant is not disputing the fact the respondent advanced funds to him. Further, evidence clearly show that about kshs.500,000 of the amount claimed is interest. The question that arise is whether the appellant should benefit from *in duplum* rule. The *in duplum* rule mean that the bank or financial institution should not charge interest more than double the principal sum.

21. **Section 44A** of the Banking Amendment Act 2006[Cap 488] provide 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 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 non-performing; and**
>
> **c) Expenses incurred in the recovery of any amounts owed by the debtor.**

22. What now follow is, **whether the above provision is applicable to loans owing before its operation.** The respondent submitted that in duplum rule is not applicable as the loan was admitted before **Section 44A** of the Banking Amended Act came into operation.

23. Section 44A (6) provide as follows:-

> (**6) This section shall apply with respect to loans made before this section comes into operation**, **including loans that have become non-performing before this section comes into operation:**

Provided that where **loans become non-performing before this section comes into operation,** the maximum amount referred to in subsection (1) shall be the following—

> **a) the principal and interest owing on the day this section comes into operation; and**
>
> **b) interest, in accordance with the contract between the debtor and the institution, accruing after the day this section comes into operation, not exceeding the principal and interest owing on the day this section comes into operation; and**
>
> **c) Expenses incurred in the recovery of any amounts owed by the debtor.**

24. It is not disputed that the loan herein became nonperforming before the operationalization of **Section 44A** of the **Banking Amendment Act 2006**. PW1 testified that the respondent stopped charging interest in the year 2003. The appellant admitted being advanced loan. He never adduced evidence of any payment neither did he adduce any evidence on calculation of interest. There is therefore no evidence to counter the respondent's calculation of interest on the loan advanced. As seen above the *In duplum* rule in its application to loan before its operation in Kenya, maximum sum referred to in **Section 44A(6)** is principal sum plus interest owing at the time section came into operation.

25. The sum by respondent claimed is what was owing before this section came into operation. From the foregoing, I therefore see no merit in the appeal herein.

26. **FINAL ORDERS**

1. Appeal is hereby dismissed.

2. Costs of the appeal to the respondent.

Judgment dated, signed and delivered at Nakuru this 18th day of July 2019.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:-

Schola/Jenifer Court Assistant

Ms. Wanjiru holding brief for Kiburi Counsel for Appellant

N/A Counsel for Respondent