**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 335 OF 2011**

**A.S. SHEIKH TRANSPORTERS LIMITED.....1ST PLAINTIFF**

**ABDI SAID SHEIKH ALI.....2ND PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED.....1ST DEFENDANT**

**JOSEPH G. MUTURI T/A MUGA AUCTIONEERS**

**& GENERAL MERCHANTS.....2ND DEFENDANT**

**MARTIN WHITEHEAD.....3RD DEFENDANT**

**KURIA MUCHIRU.....4TH DEFENDANT**

**JUDGEMENT**

1. A.S Sheikh Transporters Limited (herein after the 1st Plaintiff or A.S Limited or Company) joined hands with its Director Abdi Said Sheikh Ali (herein after the 2nd Plaintiff or Abdi) in bringing this action against the Defendants in respect to Banking facilities granted to the Company by Barclays Bank of Kenya Limited (the 1st Defendant or the Bank).

2. The facilities were granted within a relationship between the Company and the Bank enjoyed by the Company at the Bank's Eldoret Branch where the Company operated a current Account being Account No.0031128153. The facilities which form the subject matter of this dispute are of two types. The first was an Asset finance Credit facility for the sum of Kshs.43,520,000 granted to the Company through a Letter of offer dated 26th September, 2005. The second was an overdraft for Kshs.2,000,000 made through an Offer Letter of 30th October 2007.

3. As is suggestive of its name the Company was at the material time engaged in Transport Business. The purpose of the Asset finance Credit was to finance the purchase of Trucks, Trailers and Tankers. The facility was for a maximum period of 48 months with repayments being due on the 25th day of each calendar month. A highlight of the facility whose implementation has attracted a controversy is the interest rate. In the letter of Offer, the interest rate was put at 5% above the Defendants base rate then at 13.75% and that the same would be subject to variation from time to time as stipulated in clause 2 of the Master Installment Sale Agreement that was attached thereto. The interest rate was to be calculated annually but compounded on monthly basis. As is not uncommon in arrangements of this nature the Bank reserved its Right to review the interest rate. Another feature of the facility was that there was a negotiation fee of 1% of the amount. In respect to repayment, deductions were to be made automatically from the Company's Account.

4. The facility was to be secured inter alia as follows:-

i. All assets debenture of Kshs.45,000,000.00

ii. Directors' guarantee of Khs.45,000,000.00

iii. Charge to be created over property L.R No.209/8343/55,I.R No.34233/1 Garden view Estate, South C, Nairobi to cover Kshs. 5,000,000.00.

Evidence adduced by Abdi on his own behalf and on behalf of the Company shows that a Debenture dated 1st December 2005 was duly created as anticipated in the Letter of Offer. So too was a Charge of even date over the property. In respect to the guarantee a joint letter of Guarantee and Indemnity was executed by the following:-

- Abdi Said Sheikh Ali
- Dhego Khalif Mohamed
- Abdi Ali Egal
- Kassim Adan Giro
- Dike Dahir Jama
- Mohamed Abdi Said

5. It is the case for both Plaintiffs that no interest rate was agreed upon between the parties under the security Documents taken. It is averred that any interest claim under the said securities by the Bank including the rate of 5% above the Bank's base rate of 13.75% was not levied in terms of the Banking Act (Cap 488 of the Laws of Kenya). Further that any interest due from the Company and/or Abdi under the terms of the Debenture and Guarantee was simple interest at the rate of 13.75% p.a for 48 months being Kshs. 24,750,000. And under the Charge, the interest due from Abdi was simple interest at 13.75% p.a for 48 months being Kshs.2,750,000.

6. It is the Plaintiffs case that, implied in the terms of the facility Letters and the Securities, were the provisions of the Banking Act inter alia that:-

a. The Bank would not increase its rate of banking or other charges except with the prior approval of the Minister for Finance.

b. In the event of the sums advanced under the asset finance facility and the overdraft facility becoming non-performing loans, the amount recoverable by the Bank from A.S Limited and Abdi would be limited to:-

o The principal owing when the loans became non-performing.

o Interest, in accordance with the contracts between the Bank and A.S Limited and Abdi not exceeding the principal owing when the loans became non-performing; and,

o Expenses incurred in the recovery of any amounts owed by A.S Limited and Abdi.

c. If the loans became non-performing and then A.S Limited and Abdi resumed payments on the loans and then the loans become non-performing again, the limitation referred to hereinabove would be determined with respect to the time the loans became non-performing.

7. A complaint by the Plaintiffs is that the Bank has claimed interest over and above simple interest at the rate of 13.75% pa for 48 months, interest capitalization, settlement penalty interest, settlement interest, interest adjustment, and negotiation fee of 1% for which the prior approval of the Minister of Finance has not been obtained. The Plaintiffs assert that the same is fraudulent and unlawful for the following reasons:-

a. The prior approval of the Minister of Finance was not sought and obtained to increase the base rate of 13.75% by 5%.

b. The 1st Defendant inserted ambiguous and imprecise clauses in the debenture, charge and guarantee and indemnity entitling it to unilaterally levy and increase interest and other charges despite clear provisions of the law to the contrary.

c. The 1st Defendant inserted ambiguous and imprecise clauses in the debenture, charge and guarantee and indemnity in order to claim unlawful, oppressive, unconscionable interest and other charges from the 1st Plaintiff and despite clear provisions of the law to the contrary.

d. The 1st Defendant inserted ambiguous and imprecise clauses in the debenture, charge and guarantee and indemnity in order to claim unlawful, oppressive, unconscionable interest and other charges from Plaintiff despite clear provisions of the law to the contrary thereby fraudulently misrepresenting the entire advances to the A.S Ltd with a view to unjustly enriching itself.

8. On another front the Company states that it has repaid the entire asset finance credit facility and overdraft facility together with interest in the total sum of Kshs.69,750,000 through automatic deduction from its Current Account and is therefore entitled to discharge of all Securities given.

9. A further grievance of the Company is that the Bank has breached terms of its Contract by failing and/refusing to give to the Plaintiffs true, correct, regular, periodic or monthly Statement of Accounts in respect of the Company's Account. This notwithstanding several

requests and Demands.

10. It is alleged that on 11th July 2009 and the 22nd July 2010, the Bank served the Company with Notification of Sale threatening the sale of the charged property in recovery of a claimed sum of Khs.50,978,697.35. That sale did not proceed as it was injuncted by Orders made in HCC NO.128 of 2009.

11. That after the filing of the above suit, and Audit undertaken by the Plaintiffs, there were further revelations that the Bank had made Debit entries on the Company's Account in the sum of Khs.16,887,312.50 allegedly towards the purchase price of Trucks, Trailers and Tankers without express instructions from the Company and when the said sum was not payable in any event. In addition that the Bank had failed to make credit entries on the Company's Account in the sum of Khs.7,725,146.62 being a refund on VAT due to the 1st Plaintiff. In respect to illegal charges and interest the Company alleges that the Bank made such charges and interest in the sum of Khs.36,578,997.15.

12. The threatened realization of the charged properties has been challenged for the following other reasons:-

a. Abdi's entire liability under the Asset Finance and/or Overdraft facilities have been repaid in full.

b. Abdi's entire liability is limited to the secured principal amount of Khs.5,000,000.

c. No demand was made to Abdi on 1st January 2006 or on any other date.

d. The Notification of sale was not preceded by a Statutory Notice of Sale or a valid Statutory Notice of Sale.

e. The Notification of Sale is not preceded by a Letter of Instruction from the Bank containing the reserved price for the property based on a professional valuation carried out not more than 12 months prior to the proposed Sale as required by Law.

f. The value of the property is understated.

g. The Redemption Notice that was served was pursuant to instructions from Micro Enterprises Support Programme to whom the Plaintiffs were not indebted.

h. A date for the Sale was fixed in the Notification before the expiry of the 45 days required under the Law.

13. The 3rd and 4th Defendants are joined into the suit as they were appointed on 25th July 2011 as Receivers and Managers of the Company's properties and Assets. Their appointment is challenged as being unlawful, null and void *abinitio* for reasons some of which, have been stated above. In addition the conduct of the Defendants has been criticized for inviting offers for the Sale of seven Trucks and seven Trailers belonging to the Company. It is asserted that the intended sale has not been exercised in the best interest of the 1st Plaintiff and is oppressive and intended to cripple the Business of the Company.

14. In the Amended Plaint of 5th December 2011 and filed a day later, the Company and Abdi seek the following prayers:-

a. The 1st Defendant be directed to render and deliver to the 1st and 2nd Plaintiffs true and correct accounts and the entire statements of account for the 1st Plaintiff's current and loans accounts operated with the 1st Defendant for the asset finance facility dated the 26th day of September, 2005 and the overdraft facility dated the 17th day of October, 2007.

b. A declaration that the 1st and 2nd Plaintiffs' liabilities to the 1st Defendant under the asset finance facility dated the 26th day of September, 2005 and the overdraft facility dated the 17th day of October, 2007 have been repaid in full.

c. A declaration that the 1st Defendant's appointment of the 3rd and 4th Defendants as Receivers and managers of the 1st Plaintiff's property and assets on the 25th day of July, 2011 is unlawful, null and void *ab initio.*

d. The 3rd and 4th Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from acting as receivers and managers of the 1st Plaintiff's property and assets and from taking possession of, interfering, alienating with, offering for sale, auctioning, selling, transferring, alienating and/or otherwise dealing with the property and assets of the 1st Plaintiff.

e. The 1st, 3rd and 4th Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from offering for sale, selling or transferring motor vehicles KAV 250T, Mercedes Benz Actros 2548, KAV 901P Mercedes Benz Actros 2548,KAV 902P Mercedes Benz Actros 2548,KAV 903P Mercedes Benz Actros 2548, KAV 905P Mercedes Benz Actros 2548, KAY 455Y Mercedes Benz Actros 2548, KAZ 516M Mercedes Benz Actros 2548 and trailers ZC 4103, ZC 4107, ZC 4222, ZC 4223, ZC 4224, ZC 4423 and ZC 4425.

f. The 1st and 2nd Defendants whether by themselves, agents, servants or otherwise howsoever be restrained from advertising, offering for sale, auctioning, selling, transferring, alienating and/or otherwise dealing with property L.R No.209/8343/55, I.R No.3433/1 Garden View Estate, South C, Nairobi.

g. The 1st Defendant be directed to execute and deliver to the 2nd Plaintiff a discharge of the charge dated the 1st day of December,

2005 for property L.R No.209/8343/55, I.R No. 34233/1 Garden View Estate, South C, Nairobi.

h. The 1st Defendant be directed to execute and deliver to the 2nd Plaintiff a discharge of the guarantee and indemnity dated the 1st day of December, 2005.

i. The 1st, 2nd, 3rd and 4th Defendants be ordered to pay the 1st and 2nd Plaintiffs costs of this suit together with interest thereon at Court rates from the date of filing of suit until payment in full.

j. Any such other or further relief as this Honourable Court may deem appropriate.

15. Although the Defendants had jointly filed a Defence and Counterclaim on 19th February 2013, this suffered a setback when they were struck out by Hon. Mabeya J. on 10th April 2013 principally because they were filed very late in the day. And before framing the issues that need to be interrogated it would be opportune to consider how, if at all, this and two other issues implicate the outcome of this matter.

16. It was suggested by the Plaintiffs' Counsel that this matter having proceeded on the basis of the pleadings and evidence tendered by the Plaintiffs alone was in the nature of Formal Proof as the Plaintiffs claim is unchallenged. Counsel cited the Decision of Mulwa J. in Mwangi Nderitu Ngatia vs. Africa Pale International Limited [2013] eKLR in which the Judge stated,

> '*it is trite that where a party fails to call evidence in support of its case, the Party's pleadings remain their statements. That means the evidence adduced by the Plaintiff against the Defendant remains uncontroverted and unchallenged*".

17. It is accepted as elementary that he who asserts must prove. This is the purport of Section 107 of the Evidence Act which reads:-

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Unless there is express admission of a Claim or a judgement in respect to a Claim the onus rests on the party seeking a declaration in its favour to prove the essential elements of a Claim. The burden is not taken away merely because the pleadings of the Party are not controverted and are unchallenged. This is why it is not uncommon for Claims which have been processed by way of Formal Proof to fail. The Court of Appeal has had its say on the matter and has authoritatively held:-

> "*The burden on a plaintiff to prove his case remains the same throughout the proceedings, even though the burden only becomes easier to discharge where the matter is not validity defended. The burden of proof is in no way lessened because the case is heard by way of a formal proof."*
>
> (Karugi & another vs. Kabiya & 3 Others [1987] KLR 347).

18. The Plaintiffs are therefore expected to prove the essential elements of their joint and respective claims notwithstanding the striking out of the Defence and Counterclaim.

19. The Defendants on the other hand attempted to gain some capital by arguing that the entire suit is without a legal basis as it is premised on an Amended Plaint which is unsupported by a Verifying Affidavit as is required by the provisions of Order 4 Rule 1(2) and (4) of The Civil Procedure Rules.

20. This argument was in, my view, easily answered by the Plaintiffs' contention that it was not mandatory for an Amended Plaint to be supported by a Verifying Affidavit. In this regard, the Court was asked to be persuaded by the Decision of Ringera J. in Microsoft Corporation vs. Mitsumi Computer Garage Ltd & Another [2001] eKLR wherein discussing the similarly worded Order VII (1)(2) he held,

> "*The third point of preliminary objection is entirely well taken. Order VII does not require any verifying affidavit to accompany an amended Plaint or indeed any other pleading save the Plaint originating the action. The verifying affidavit of Louis Otieno may have been filed by the Plaintiff ex abundanti cautela but is definitely an unnecessary surplusage. I uphold this point of preliminary objection also and order that the said affidavit be struck out of the record*".

Hon. Onyancha J. took the same position in Swaleh Gheithan Saanun vs. Commissioner of Lands & 5 Others [2002] eKLR when he observed:-

> "*The express provision therefore is that the Plaint must be accompanied by a Verifying Affidavit. If the Legislature wanted an amended plaint to also be so accompanied, it would have provided so. In my opinion therefore, an amended Plaint need not be accompanied by a verifying affidavit since the suit already exists in a given form, and any ordered or taken amendments are specified in form and extent. In my view the verifying affidavit filed with the plaint takes care of the mischief targeted by the legislature. I would therefore also hold that it is not necessary and definitely not imperative that an amended plaint should be accompanied with a verifying affidavit*".

21. The holding in these two Decisions is consistent with the object and purpose of the Rule and I am content to add my voice with a small

observation. Order 4 Rule (1)(i)(f) and Order 4 Rule 2 reads,

> "1(1) The Plaint shall contain the following particulars
>
> a. ....
>
> b. ….
>
> c. ….
>
> d. ….
>
> e. ….
>
> f. An averment that there is no other suit pending, and that there have been no previous proceedings in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaint.
>
> 2. The Plaint shall be accompanied by an affidavit sworn by the Plaintiff verifying the correctness of the averments contained in rule (1)(i) (f) above.

Whether or not a verifying affidavit needs to accompany an Amended Plaint must be considered on the context of the averments of the Pleading that the Rules require verification. These are:-

> (i) That there is no suit pending and no previous proceedings in any Court between the parties over the same subject matter.
>
> (ii) The cause of action relates to the Plaintiff named in the Plaint.

The view I take is that verification of an Amended Plaint is unnecessary unless the Amendment introduces an entirely new cause of action or new parties to a suit.

22. The Amendments introduced by the pleadings of 5th December 2011 do not introduce new parties to the suit. In respect to the cause of action, the original pleading had complained about the Appointment of Receivers and Managers over the Company properties and had, inter alia, sought the 3rd and 4th Defendants be restrained from offering for sale or selling the property and assets for the Company. In the Amendment, the Plaintiffs talk of an intended sale of 7 Trucks and 7 Trailers belonging to the Company by the 1st, 3rd and 4th Defendants. In the sense that the Plaintiff had already sought an embargo of the sale of Company Assets by the Receivers and Managers, the complaint of the intended sale cannot be said to be a new cause. I hold, and find, that it was not necessary for the Amended Plaint of 5th December 2011 to be accompanied by a Verifying Affidavit.

23. A third issue which warrants to be dealt with now is the cause of action relating to the charge taken over LR NO.209/8343. In the pleadings Abdi pleads that he is the owner of the charged property. See for example, paragraph 8(e)(iii). In paragraph 11 he pleads that he executed the charge. In paragraph 28 he faults the threatened realization of the charged property. In the end he prays that the Charge be discharged and the Bank delivers to him both a discharge of Charge and Title to the property duly discharged. In essence Abdi holds himself out as being the owner of the charged property.

24. But Abdi made some rather damming revelation in re-examination. On being shown the said Charge he reacts,

> "This is the charge dated 1st November 2005 over LR.209/8343/55. The registered owner of the property is Ali Said. Ali Said is my brother" *(my emphasis).*

25. Quite startling! No explanation has been made by the Plaintiffs as to why Abdi had pleaded that he was the owner of the property or why it was him and not Ali Said (the owner) who had executed it. Flowing from this I have to accept as valid the submission by the Defendant's Counsel that as neither the Company nor Abdi are the registered proprietor of the charged property, the two have no standing to question the Banks exercise of its Power of Sale over this property. The force of the view by Ringera J. in Milimani Civil Suit No. 1838 of 2001 Nairobi Mamba Village vs. National Bank of Kenya is not to be underestimated. The Judge held,

> "*In my judgment the only person who can legitimately complain that a power of sale is being exercised unlawfully, irregularly or oppressively is the chargor".*

This Court is not told that Abdi holds a Power of Attorney on behalf of Ali to argue his case.

26. What are the issues for determination? The following are isolated:-

> (i) Did the Bank charge interest rates and/or other charges in a manner that contravened its Contract with the Company and/or Abdi or the Provisions of The Banking Act?
>
> (ii) Has the Company repaid its entire debt to the Bank?

(iii) Did the Bank fail to provide true and accurate Statements of Accounts to the Company and/or Abdi?

(iv) Was the appointment of the Receiver and Manager in contravention of The Law?

(v) Are the Plaintiffs entitled to the Prayers Sought?

27. Five key Documents must necessarily be discussed so as to understand the issue of interest. These are the facility letters of 26th September 2005 ( P Exhibit pages 2-5) and of 17th October 2007 ( P Exhibit pages 124-135), the Debenture of 1st December 2005 (P Exhibit 48-78), the Charge of 1st December 2005 (P Exhibit pages 79-108) and the Letter of Guarantee and Indemnity ( P Exhibit pages 109-119).

28. The facility Letter of 26th September 2005 has the following clause in respect to interest rate,

"*The Interest rate charged will be 5% above the Barclays Base Rate (currently 13.75%) and will be subject to variations in this rate from time to time, as stipulated in Clause 2 of the attached Master Instalment Sale Agreement. Interest rates will be calculated on a nominal annual compounded monthly ("NACM") basis.*

*We reserve the right during the term of this facility to review the interest rate should there be any:*

- *Statutory change in our liquid assets or capital requirements.*
- *Unforeseen monetary or fiscal changes outside our control, which may have a negative effect on our profitability*".

29. The Debenture has the following provisions on interest,

"*a) subject to sub-clauses 2.2(b) and (c), and to any limits prescribed by law interest shall be charged hereunder (as well after as before any demand or judgment or the liquidation of the Company) at the per annum rate agreed in writing from time to time between the Company and the Bank and in the event that the rate has not been agreed in writing the rate shall be determined by the Bank from time to time in its reasonable discretion. Interest on overdraft facilities shall be calculated on daily cleared balances and debited monthly by way of compound interest according to the usual practice of the Bank but without prejudice to the right of the Bank to require payment of such interest when due provided that the Bank shall be entitled in the Bank's reasonable discretion to charge interest at different rates on each type of banking facility made available to the Company and the Bank shall be entitled in the Bank's reasonable discretion to determine the basis on which interest shall be calculated in relation to each particular type of banking facility and to vary from time to time basis on which interest is calculated.*

*(b) subject to any limits prescribed by law, the Bank shall entitled from time to time to vary the rate of interest chargeable hereunder to such other per annum rate as the Bank is of the opinion represents the per annum rate generally chargeable by banking and financial institutions in Kenya in relation to the facilities made available to the Company and having regard to such other circumstances as the Bank shall deem appropriate, the decision of the Bank not to be questioned by the Company on any account whatsoever. The Bank may, but shall not be bound to, notify the Company of any variation to the rate of interest charged hereunder. It is hereby acknowledged and agreed by the Company that any failure by the bank to notify the Company of a variation to the rate of interest shall not affect the obligation of the Company to pay interest at the varied rate or affect the rights of the Bank to recover any such interest at the rate varied pursuant hereto from time to time*".

The wording in the charge Document is similar but with the following slight variances;-

(i) Sub-clause 2.2.(b) and (c) read 3.1.2 and 3.1.3,

(ii) The beginning of clause (b) the words "subject to any limits prescribed by law" are omitted.

(iii) Reference is made to Chargee and Chargor instead of Bank and the Company.

30. In the Letter of Guarantee and Indemnity mention of interest is in clause 1 in which the Guarantors are enjoined to indemnify the Bank for the debt and interest due from the Principal Debtor to the Bank.

31. The case for the plaintiffs is that no interest rate was agreed between the Bank and the Company under the Debenture and similarly no interest rate was agreed between the Bank and the Guarantors (including Abdi) under the terms of the Guarantee.

32. Fundamentally, the two Securities were taken up as required by the letter of offer of 26th September 2005 which was duly executed by the Company in which the Company bound itself as accepting the facilities subject to the conditions in the Letter of Offer. In that regard clause 2.2.(a) of the Debenture must be read together with the Letter of Offer of 26th September 2005. Although the Debenture does not specify the rate of interest, it makes Reference to interest at the per annum rate agreed in writing from time to time between the Company and the Bank, and in the event that the rate has not been agreed in writing, the rate would be determined by the Bank from time to time in its reasonable discretion. In the Letter of offer the rate agreed by the parties is specified to be 5% above the Barclays Bank rate then at 13.75%. That was the contractual rate of interest.

33. Was it necessary to restate or specify that rate in the Guarantee? The question must be answered from an understanding as to the nature

of a Guarantee. A Guarantee is,

(i) To assume a suretyship obligations to agree to answer for a debt or default.

(ii) To promise that a Contract or legal act will be duly carried out.

(iii) To give security

(see "9th Edition Blacks' Law Dictionary").

In terms of the Letter of Guarantee and Indemnity of 1st December 2005, the Guarantors (including Abdi) make this promise:-

"*The Guarantor will pay to the Bank on demand all money and discharge all obligations and liabilities, whether actual or contingent, now or hereafter due, owing or incurred to the Bank by the Principal Debtor in whatever currency denominated whether on any current or other account or otherwise in any manner whatsoever (whether alone or jointly and in whatever style, name or form and whether as principal or surety) including all liabilities in connection with foreign exchange transactions, swap arrangements, issuing, confirming, accepting, endorsing or discounting any notes or bills or under bonds, guarantees, indemnities, documentary or other credits or any instruments whatsoever from time to time entered into by the Bank for or at the request of the Principal Debtor together with interest (as well after as before any demand or judgement) to date of payment at such rates and upon such terms as may from time to time be payable by the Principal Debtor (or which would have been so and all commissions, fees and charges and, on a full indemnity basis, all legal and other costs and expenses which the Bank may incur in preparing, completing, stamping or enforcing this guarantee or in enforcing or obtaining payment from the Principal Debtor or the Guarantor or attempting to do so*".

34. In respect to the limitation of Liability clause 2 provides:-

"The total recoverable from the Guarantor under this guarantee shall be limited to the principal sum stated in the particulars set out below to which shall be added all interest, fees, commissions, charges, costs and expenses referred to above which shall have accrued or shall accrue due to the Bank before or at any time after any demand made pursuant to the provisions of this guarantee".

At page 9 of the Guarantee the limitation of liability is specified to be:-

"The liability of the Guarantor is limited to the principal sum of Kenya Shillings forty five million (Khs.45,000,000) to which shall be added interest, fees, commission, costs, charges and expenses as provided above". *(my emphasis).*

Under the terms of the Guarantee the Guarantors stood as surety to the Primary obligation of the principal debtor which was stipulated to include interest. The rate of interest need not have been specified in Guarantee as it would be found in the primary Contract between Bank and the Company. Nothing in my view turns on the argument that no interest rate was agreed between the Guarantors and the Bank.

35. But apart from the rate of interest, the Plaintiffs fault the Bank for compounding the interest. In the letter of offer, parties agree that the interest rates would be calculated on a nominal annual compounded monthly ("NACM") basis. The Debenture provides for calculation of interest on

"daily cleared balances and debited monthly by way of compound interest according to the usual practice of the Bank".

36. Whether there was a difference between those two methods of working interest was not explained to Court and it would not be in the place of the Court to make any assumptions on a matter it does not have technical knowledge. Yet, it can be inferred at least from the pleadings, that the complaint was that the provisions on the formula in calculating interest in the Debenture was contrary to what was agreed in the letter of offer. What was crucial is for the Plaintiffs to demonstrate that the Bank worked out interest in a manner that defied the terms of the Contract. This they failed to do!

37. At the time material to this suit, as is indeed now, the provisions of Section 44 of The Banking Act read:-

"No institute shall increase its rate of Banking or other charges except with the prior approval of the Minister"

38. Even before looking at the evidence in respect to the variation of interest rates and want of Ministerial sanction, it would be opportune to consider whether or not Section 44 of the Banking Act extends to interest rates. Counsel for the Bank proposes that the recent Court of Appeal Decision in Pius Kimaiyo **Langat** v. **Co-operative Bank** of Kenya Limited [2017] eKLR has laid to rest the debate whether Section 44 of the Banking Act applies to Interest rates.

39. In that Decision the Court of Appeal set out the findings of High Court in regard to Section 44 which read,

"**Section 44** was not available as a defence since it related to bank charges which are distinct from the interest charges as they concern the price or cost of banking services or products, notably commissions. Interest rate adjustments are not regulated under ***section 44*** and a bank that wishes to adjust interest applicable to a loan facility is not obligated to seek Ministerial approval. At any rate, ***section 39*** of the Act which required consultation with the Minister to determine and publish the maximum and minimum rates

of interest chargeable for loans or advances was repealed in 1996 **(Act No. 9 of 1996),** thus liberalizing interest rates to be determined by market forces. Banks could only be faulted if interest fluctuations contravened the contractual interest rates with borrowers. Langat could have been assisted by the *in duplum rule* under ***section 44A*** of the **Banking Act** which placed a ceiling on interest charges to an amount not exceeding the principal sum lent. But the law became effective from 1st May, 2007 after interest accrual had been applied to the debt".

The submission by Counsel for the Bank is that the Court of Appeal did not disturb that finding and did not deem it an issue that was dispositive of the appeal.

40. While that may be so, the Court of Appeal did not affirm the view of the High Court and indeed did not comment on it. Quite obviously this Court is bound to follow the decisions of the Court of Appeal that have held that Section 44 applied to interest rates as well. These are the Decisions in Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited [2014] eKLR and Daima Bank Limited (in liquidation) vs. David Musyimi Ndetei [2018] eKLR. The latter being a recent Decision of 9th February 2018.

41. So did the Bank breach the provisions of Section 44 of the Banking Act and if so, what would be the ramifications, if any?

42. At the outset, the Court observes that it would not argue too much with the proposition put forward by the Plaintiff's Counsel, relying on the Decision of Prof. David Musyimi Ndekei vs. Daima Bank Limited [2005] eKLR, that the evidential burden of proving that the Bank obtained prior approval of the Minister to increase its rate of interest lay with the Bank. Indeed in the Court of Appeal case in Margaret Njeri Muiruri (*supra*), the Court said as follows in respect to that burden under section 44:-

*"In civil proceedings, 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."*

*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".*

Yet before the Bank assumes this Burden, the Plaintiffs ought to demonstrate that the Bank charged higher rates than those originally contracted.

43. For the Asset Credit Facility, this Court has found contracted interest to be 5% above the Bank's Base rate (then as 13.75%). In regard to overdraft the interest rate as set out in the letter of 17th October 2007 was 5% per annum above the base rate but with the of right of the Bank to charge an additional interest of 24% if overdrawing beyond the limit (clause 7.6) or default interest of 24% in the event of default in payment of the facility (clause 7.7.).

44. While the Bank denies charging any interest beyond 18.75% p.a, that is not in comport with what is revealed in the Demand Letters of 26th January 2009 (D Exhibit pages 164- 167) made out by the Bank's advocates separately to the Guarantors and the principal Debtor. In it the Bank informed the Guarantors and principal Debtor that the outstanding sum of Khs.50,978,697.35 as at 14th January 2009 attracted an interest of 24% p.a annum. To be noted is that this was a demand which combined the overdraft and the sums owing under the Asset credit facility.

45. If the principal Debtor was in default, then the Bank was entitled to levy the Default interest on the overdraft as contracted. Yet in respect to the Asset Credit facility there was no agreement on a Default Interest Rate and the Bank would have to bear the onus of proving that it had obtained the approval of the Minister to increase the contracted rate from 18.75% per annum to 24% per annum.

46. The Bank however made no effort to demonstrate the sanction of the Minister. Does that spell doom for the Bank? The Court is aware of the provisions of Section 52 of The Banking Act which read:-

"1) Subject to subsection (2), where there is a conflict between the provisions of this Act and the provisions of any other written law applicable to an institution licensed under this Act, the provisions of this Act shall prevail.

(2) For the purposes of subsection (1), the expression "written law" does not include the Central Bank of Kenya Act (Cap. 491), the Income Tax Act (Cap. 470), the East African Community Customs Management Act, the Value Added Tax Act (Cap. 476) or any of the other laws set out in the First Schedule to the Kenya Revenue Authority Act (Cap. 469)".

The effect of the Section is to validate any contractual obligations of the parties even where there is a contravention of the provisions of the Act or the Central Bank of Kenya Act save for situations where the Institutions seeks to recover in any Court of Law, interest and other charges which exceed the maximum permitted under the provisions of the Act or the Central Bank of Kenya Act.

47. Prior to 1st August 2005 interest rates were regulated as follows:- "Section 39 of The Central Bank Act read as follows (repealed on 18th April 1997):-

> "39. The Bank may, from time to time, determine and publish the maximum rates of interest which specified banks or specified financial institutions may pay on deposits:
>
> Provided that the Bank may determine different rates of interest-
>
> (i) for different types of deposits; and
>
> (ii) for different types of specified financial institutions".
>
> Section 39 of the *Central Bank of Kenya (Amendment) Act, 2000.* That section provides as follows:
>
> "The maximum rate of interest which specified banks or financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate plus four per centum; provided that the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced and provided further that this subsection shall only apply to contracts for loans or advances made or renewed after the commencement of this section."
>
> 48. However the latter Section was repealed on 1st August 2005 and so that at the time the contracts herein were made (26th September 2005 and 17th October 2007), neither the Banking Act nor the Central Bank Act provided for maximum rates of interest.

49. It would follow that even if the Bank had breached the provisions of Section 44 of the Act, by failing to seek approval of the increase of rate from 18.75% per annum to 24% p.a in respect to the Credit Asset facility, that breach would be excused by the provisions of Section 52(1) of the Banking Act because there was no Statutory limit to interest rates and because the Contract gave the Bank the right to review the interest rate from time to time. In a word the variation of interest was contemplated in the Contract and the infringement of Section 44 was validated by the provisions of Section 52(1).

50. In regard to the formula of working out the interest on the capital Asset Finance, the Plaintiffs asserted that the Bank compounded the interest instead of applying simple interest! But again where was the evidence?

51. There was a similar dearth of evidence to support the Plaintiffs' assertions of illegal debit entries and claim that the Company made total repayments of Kshs.69,750,000/=.

52. In his evidence before Court, Abdi stated that he had commissioned two Audits into his Accounts. The first found that he had repaid a sum of Kshs.44,044,145/=. Upon receiving further documents from the Bank, a second Report established a repayment of Khs.69 million. For some reason the Plaintiffs did not find it necessary to produce any of the two reports. One of the Reports was that prepared by on N. Muturi and which appears on pages 273-285 of the Plaintiffs' Bundle. Yet this report was not formally received as evidence herein because at the commencement of the hearing it was simply marked for identification (PMFI 1). It has not been produced by the maker or the Plaintiffs' only witness. The non-production of the Audit Reports may have weakened the Plaintiffs' case considerably on this issue. Without the reports there would be no succinct evidence of what was repaid and the interest charged, essential elements of the Plaintiffs' case.

53. Attention now turns to the appointment of the 3rd and 4th Defendants as Receivers and Managers of the property and Assets of the Company. The appointment happened on 25th July 2011 and in its submissions to Court, Counsel for the Plaintiffs informed Court that the Receivership ceased before the hearing of the suit and after the Motor vehicles of the Company had been sold. This was not controverted by the Bank's Counsel in the submissions filed in Reply. I take that to be the position.

54. The appointment of the Receivers and Managers was faulted by the Plaintiff on three Grounds. That the facilities had been paid in full, the demanded sum could not exceed the secured amount of Khs.45,000,000, no demand was made prior to the appointment and interest at Ksh.24% comprised in the claimed sum of Kshs.50,978,697.35 was not contractually or lawfully due to the Bank from the Company.

55. Many of the issues have already been answered. This Court has held that the Plaintiff has not provided sufficient proof that the facilities granted to the principal Debtor have been fully paid. On the question of interest charged, any infraction of Section 44 of The Banking Act has been cured by the provisions of Section 52(1) of the same Act.

56. As to the claim that the amount demanded could not exceed the secured sum of Kshs.45,000,000, one has to look at clause 2.1 of the Debenture which is the payment covenant. It provides:-

> "*The Company hereby covenants with the Bank to pay to the Bank on demand in writing made on the Company by the Bank all monies (in whatever currency or currencies dominated) not exceeding the maximum principal amount as may now or at any time thereafter be or become due owing or incurred by the Company to the Bank or for which the Company or any other person for whom the Company is surety from time to time may become liable on any current or other account or in any other manner whatsoever (including, without limitation, in respect of any loans and advances bills of exchange promissory notes drafts payment orders cheques or other negotiable instruments or payment orders drawn accepted or indorsed by or on behalf of or at the request of the Company and discounted and paid or held by the Bank at the request of the Company or in the course of the Bank's business with the Company or otherwise upon any documentary credits or other mercantile instruments opened agreed confirmed or accepted by or on behalf of or at the request of the Company), and to discharge all other obligations and liabilities (including,*

*without limitation, in connection with any hire purchase or leasing arrangements foreign exchange transactions swap and other hedging arrangements and instruments), whether actual or contingent, as may now exist or hereafter be incurred by or on behalf of the Company to the Bank and whether in each case due owing or incurred to the Bank or becoming so due owing or incurred by virtue of any transfer assignment or other disposition to or in favour of the Bank or by virtue of rights or subrogation exercised by the Bank (and whether in any case due owing or incurred by the Company alone or jointly with any other person firm corporation other body whether corporate or unincorporate and in whatever name style or form and whether as principal or surety), together with interest (as well after as before any demand or judgment or the liquidation of the company) on all such monies obligations and liabilities to the date of payment (at the rate determined in accordance with the provisions of this Debenture) and all commissions and other banking fees and charges payable pursuant hereto and/or as may otherwise be agreed between the Bank and the Company and/or as may normally be charged by the Bank to its customers and all other costs taxes liabilities charges and expenses incurred by the Bank in relation to the Company or the charged Assets or in enforcing or seeking to enforce payment of such monies obligations and liabilities and in relation to the preparation preservation execution and/or enforcement of this Debenture and/or the Charged Assets and any other security held by or offered to the Bank for such obligations and liabilities on a full and unqualified indemnity basis (the maximum principal amount together with interest as aforesaid and all other costs taxes liabilities charges banking fees commissions expenses and all amounts payable by the Company pursuant to the provisions hereof shall hereinafter collectively be referred to as the "Secured Obligations").*

57. Without any equivocation the Company covenanted to pay to the Bank the principal amount together with interest and other charges, fees and commissions. The principal sum was Khs.43,520,000 under the Credit Facility plus Khs.2,000,000 being overdraft. The Bank could lawfully demand the Principal sums plus interest if due.

58. On whether or not a demand was issued prior to the appointment of the Receiver, the Bank relied on its letter of 26th January 2009 (P Exhibit page 226) which is reproduced below:-

26th January 2009

A.S Sheikh Transporters Limited

P.O. Box 56113

NAIROBI

Dear Sirs,

DEBT OF KHS. 50,978,697.35 OWED TO BARCLAYS BANK OF KENYA LIMITED UNDER DEBENTURE DATED 1.12.2005.

DEMAND NOTICE

We act for M/s Barclays Bank of Kenya Limited.

As you are no doubt aware, you are indebted to the Bank in the sum of Kshs.50,978,697.35 as of 14.1.2009 in respect of loan facilities granted to you by the Bank at your request and instance, the full particulars whereof are well known to you.

For and on behalf of the Bank, we now demand immediate payment of the said amount together with interest thereon.

Please note that if the said amount is not repaid to the Bank within the period of TWENTY ONE (21) DAYS after the date of service of this NOTICE, the Bank will proceed to appoint a receiver in terms of, and pursuant to, the provisions of the Debenture dated 1st December 2005.

Please also note that any proposal made, if accepted, and any instalments paid thereafter will be accepted without prejudice to the Bank's right pursuant to this NOTICE.

Yours faithfully,

WARUHIU K'OWADE & NG'ANGA

*Signed*

J. M THIGA

This letter is the Plaintiffs Bundle and they do not explain why it is in their possession if it was not duly served. The conclusion to draw was that the appointment of the Receiver was preceded by a proper Notice.

59. What is left for determination is whether the Bank failed to provide true and accurate Statement of Accounts to the Company and/or Abdi. The Plaintiffs take the position that most of the Statements demanded by them were not supplied by the Bank. See the request for the Statements for the month of August and September (presumably 2008 (P Exhibit page 134). See also letters of 3rd July 2009 (P Exhibit

pages 130, 136 137). There is no evidence that the Bank immediately supplied the Statements. That said the Plaintiffs concede that they are in possession of some Statements which they however maintain are incomplete (P Exhibit pages 289-331).

60. This Court is asked by the Plaintiffs to find that because the 1st Defendant's Defence was struck out and cannot answer to the question of Accounts then the Court should deem it that the entire facility has been fully paid. That it would be futile to ask the Bank to furnish the Plaintiffs with the Statements.

61. The Banks reaction is that the statement of Accounts were supplied as far back as 14th July 2009. I was asked to give regard to the Replying Affidavit sworn by Nerean Okanga on 16th August 2011 and sworn on the same day it being argued that the Plaintiffs have not complained of its inadequacy.

62. It has to be recalled that the Defendant's Defence was struck out (Order of Mabeya J. of 10th April 2013). The Defendants interpreted this, perhaps correctly, to mean that they could not call any evidence. To now allow the Bank to rely on a filed Affidavit as evidence would be to permit it to defeat the order of Mabeya J. The Court will not allow it.

63. On the evidence available, the Bank may not have furnished all Statements of the Account to the Plaintiffs. On the other hand the Plaintiffs have failed to prove that the Principal Debtor is not in default. There is evidence that indeed there is default. It would therefore be most injudicious to deem the entire facility as being fully repaid as proposed by the Plaintiffs merely because Statements have not been fully supplied.

64. The upshot is that save for the ground relating to Statements of Accounts the entire claim by the Plaintiff is dismissed. The final Orders are:-

(1) The Bank (the 1st Defendant) shall within 90 days hereof furnish to the Plaintiffs all Statements of Accounts in respect to the two facilities from the date of inception to date.

(2) Prayers (b), (c), (d), (e), (f), (g,) (h), (i), (j), (k) and (L) of the Amended Plaint dated 5th December 2011 are hereby dismissed.

(3) The Plaintiff's Claim has very substantially failed and so the Defendant shall have 90% of the costs of the Suit.

**Dated, delivered and signed in open Court at Nairobi this 15th day of November, 2018.**

**F. TUIYOTT**

**JUDGE**

**Present:-**

**Gichoya for Havi for the Plaintiff**

**N/a for the Defendant**

**Nixon - Court Assistant**