



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 58 OF 2016**

**SOUTHERN ACROSS GENERAL TRADING LIMITED.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK LIMITED.....DEFENDANT**

**RULING**

1. The dispute in this case and subject of the plaintiff's Notice of Motion dated 26<sup>th</sup> April 2016 arises from a loan facility offered to the plaintiff by the Bank by a letter of offer dated the 30<sup>th</sup> July 2015 for a sum of Kshs.47,360,000/= with a commitment fees of Kshs.1%, thus Kshs.473,600/=. The bank did not sign this letter of offer. A charge was however drawn and executed by both parties on the 10<sup>th</sup> September 2015 on the basis of the said letter of offer for a loan of Kshs.42,855,000/= and was secured by the plaintiffs existing legal charge over **Title Njoro/Njoro Block 2/97 (Njokerio)** and **Title No Njoro/Njoro Block 2/1504 (Njokerio)** for **Kshs. 42,855,000/=** .

2. By another letter of offer issued by the Bank and dated 11<sup>th</sup> November 2015 after the charge was drawn and executed, the Bank offered to the plaintiff a loan of Kshs.44,230,154/50 with a corporate commitment fees of Kshs.947,200/=. This letter was executed by both the plaintiff and the bank, but was so executed after the charge was drawn and executed as stated above.

3. The dispute is on the two different commitment fees based on the two letters of offer, and charge document.

The plaintiff defaulted in loan repayment for the months of March and April 2016 and asked that the bank apply the difference in the commitment fees of Kshs.947,200/= and Kshs.473,600/= thus Kshs.473,600/= to the March and April 2016 installments.

4. I have considered the affidavit evidence tendered by both parties and oral submissions.

There is no dispute that the letter of offer dated 30<sup>th</sup> July 2015 which stated the commitment fees as 1% of the principle was not signed by the Bank. I have also considered that the charge document was drawn and executed by the parties without a duly executed letter of offer that would have formed the basis and laid down the terms and conditions that would have bound the parties.

5. The second letter of offer dated 11<sup>th</sup> November 2015 came after the charge document was drawn, executed and registered. It is this letter that stated the commitment fees to 2%, double the amount of the first letter of offer. It is trite that a court cannot vary or rewrite a parties contract. See **Francis Joseph Kamau Ichatha -vs- Housing Finance Co. Ltd (2014) e KLR** and **Kennedy Oruru Okise -vs- James Finlay (K) Ltd (2016) e KLR**.

However, I note that the charge was not based on any pre-agreed terms and more specifically on the commitment fees as no letter of offer was executed and registered ordinarily. The letter of offer must precede the charge as it lays down the terms of the loan to be extended to the borrower.

On the other hand without a duly executed letter of offer, the plaintiff rushed and signed the charge document drawn by the defendant thus bound itself to the terms appearing thereon the defendant too executed the charge and registered the same.

6. In my considered view, both parties have raised triable issues and has established *prima facie* case in support of their respective positions.

At this interlocutory stage, I will not go into the interrogation of the merits or otherwise of these positions as that will be for the trial court.

Coming to the main issue at hand, should the plaintiff pay the commitment fees of Kshs.947,200/= of 2% (already debited from its account) or should that amount be applied to offset the mortgage installment for the months of march and April 2016?

I am of the opinion that the plaintiff applicant hereof is under an obligation to pay the commitment fees as stated in the letter dated 30<sup>th</sup> July 2015 as this letter formed the basis of the charge that was executed on the 10<sup>th</sup> September 2015. That is a sum of Kshs.473,600/=. I say so because the defendant prepared, executed and registered the charge before the 2<sup>nd</sup> letter of officer was sent out and therefore relied on the letter dated 30<sup>th</sup> July 2015.

To that extent, I find that the bank ought to debit the plaintiff's account with the said sums of Kshs.473,600/= towards the commitment fees of 1% and Kshs.473,600/= towards March 2016 mortgage installment. That leaves the plaintiff with the April 2016 installment of Kshs.473,600/= unpaid. The plaintiff should make immediate arrangements to pay the April 2016 installment and in any event within 30 days of this ruling.

This is in the interim pending hearing and determination of the main suit.

7. On the 2<sup>nd</sup> limb of the application, I have considered the banks obligations placed upon it by the **Banking Act 2014 and the Credit Reference Bureau Regulations. Section 18 of the Act** obligates the Bank to share information of a customer non-performing loan and any other negative information, but this does not in any way authorise it to share malicious and false information about its customers with the Bureau. See also **Section 49 of the Banking Act 2014 and Regulations** made under the Credit Bureau Agency.

In the case **Barbra Georgina Khaemba -vs- Cabinet Secretary, National Treasury (2016) e KLR, J. Lenaola** (as he then was), dealt at length with the issues pertaining to sharing of a bank customers information being shared with the **Credit Reference Bureau under the Banking Act.**

8. For those reasons, and due to the dispute that awaits determination in a full hearing upon evidence, I am persuaded to allow the plaintiffs application dated 26<sup>th</sup> April 2014 in the following terms:

***(a) That the Defendant is enjoined from referring the plaintiff's name to the Credit Reference Bureau pending the hearing and determination of this suit only on the matter of default in mortgage repayment of the April 2016 installment in the sum of Kshs.473,600/=.***

***(b) That the Defendant is directed to apply the 27<sup>th</sup> November 2015 debit of Kshs.473,600/= from the plaintiff's account towards payment of the March 2016 mortgage installment, and Kshs.473,600/= towards 1% commitment fees pending the court's decision on which percentage the commitment fees shall be applicable in the matter.***

*(c) That the plaintiff is directed to pay the April 2016 mortgage installment within 30 days of this ruling.*

*(d) Each party shall bear its own costs on this application.*

**Dated, Signed and Delivered this 6<sup>th</sup> Day of April 2017.**

**J.N. MULWA**

**JUDGE**