Santowels Limited v Stanbic Bank (K) Limited (Civil Appeal 160 of 2018) [2022] KECA 545 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 545 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 160 OF 2018

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

APRIL 28, 2022

BETWEEN

SANTOWELS LIMITED .... APPELLANT

AND

STANBIC BANK (K) LIMITED .... RESPONDENT

(Being an appeal from the judgment and decree of the Commercial & Tax Division Court at Nairobi (O. Sewe, J.) dated 27th March, 2018 in Commercial & Tax Division Court Case No. 648 of 2004)

JUDGMENT

1 By a plaint dated 26th November 2004 and filed in court on 29th November 2004, the appellant sued the respondent seeking the following reliefs:

a) An order that an account be taken and the respondent be ordered to repay the appellant all sums paid as interest over and above 16.5% together with interest thereon:

b) In the alternative, judgment be entered in favour of the appellant against the respondent for the sum of Kshs.8,978,813.63 plus interest thereon at court rates

c) In the alternative, damages of Kshs.8,978,813.63 be awarded plus interest from 13th October, 2004 until payment in full for fraud and misrepresentation

d) The respondent be ordered to pay the appellant any sums that the respondent has collected and converted to its own use from the appellant's account secretly or unlawfully or in breach of its fiduciary duties and contractual rights as well as interest thereon from the date of the debits

e) The respondent be ordered to pay interest on such sum found due from it at court rates

f) The respondents be ordered to pay the costs of the suit

g) Such further or other relief that may seem just to the court to grant.

2. The plaint was thereafter amended twice, the last being on 17th October 2016. By that further amended plaint the amount claimed was increased from Kshs.8,978,813.63/= to Kshs. 68,986,536.28/= or alternatively Kshs. 10,449,411.74/=. It was the appellant's case that in the year 1993, it appointed the respondent as its banker and that between the year 1993 and 1997, it applied for several overdraft facilities from the respondent which were granted at a variable interest rate of 3% above its base lending rate. It was a further term of the facilities that the respondent reserved the right to vary the base rate and the spread. It was the appellant's contention that the actual aggregate rates which the respondent stipulated from time to time, as being applicable during the period of the facilities were as follows:

a) Base + 3% p.a from 1 April 1993

b) Base + 4% p.a from 17 June 1993

c) Base + 6% p.a from 6 July 1995

d) Base + 3% p.a from 31 December 1996

3. The appellant contended that the maximum rate that banks were entitled to charge its customers by law and as gazzeted by the Central Bank of Kenya (CBK) was 16.5% per annum on a reducing balance, and therefore any sums charged by the respondent by way of interest for the period ending 18th April 1997 over and above 5% were unlawful and were recoverable from the respondent.

4. The appellant further averred, in the alternative that by surreptitiously and dishonestly charging it unlawful interest, the respondent acted in breach of its contractual obligations and its duties as a trustee, and is therefore liable to pay the appellant damages.

5. The respondent was further accused of breaching the fiduciary duties it owed to the appellant and gave the particulars as misrepresenting to the appellant that it was entitled to charge any rate of interest; failing to act honestly; acting unlawfully by surreptitiously charging interest over and above the amount permitted by law and even over and above the rates stipulated by it in the agreement; and secretly making illegal debits.

6. It was averred that the overcharge was not discovered by the appellant until early in September 2003 and when the same was brought to the attention of the respondent, it agreed by a letter dated 11th September 2003 to a recalculation of the interest with a view of having the matter resolved amicably, but soon thereafter reneged on the promise necessitating the filing of the suit.

7. The respondent denied these allegations in its further amended defence. It averred that being the appellant's banker it executed its contractual duties with all due diligence and in accordance with the usual banking practices and customs and it honestly accounted for all the transactions in the appellant's accounts. It denied that the contractual relationship between them constituted a trust. It had extended various financial facilities to the appellant which were extended from time to time.

8. While conceding that the interest rate was variable, it denied that there was any maximum rate at which banks were required by law to charge interest and it further denied that the rate of 16.5% per annum on a reducing balance was applicable to the subject facilities. In addition, it averred that the appellant had not set out any proper grounds for the rendering of accounts, and that it had accounted to the appellant all funds held in the overdraft account which was closed on or about the 28th March 2002. It denied its liability to the appellant in the sum of Ksh.68, 986,536.28 and or Kshs. 10,449,411.74 as set out in the further amended plaint as the amount due on account of overcharged interest.

9. The respondent went on to aver that there was always an approved limit on the amount the appellant could draw at any particular time and that having made withdrawals in excess of the approved limits on various occasions, it was permissible by law and by contract between the parties for it to charge interest on all amounts in excess of the approved limit. That it did charge interest on the excess amounts, which interest was debited to the appellant's account as is the normal banking custom and practice. Accordingly, it denied the particulars of breach of trust set out in the further amended plaint. Finally, it pleaded that the appellant's claims were in any event time barred and prayed for the dismissal of the appellant's suit with costs.

10. The matter proceeded to hearing and the appellant called Rajiv Raja (PW1) and Wilfred Onono (PW2) as witnesses in support of its case.

11. PW1, the managing director of the appellant testified that the appellant used to bank with the respondent. It obtained several financial facilities from the respondent which were fully repaid as and when they fell due. He maintained that the respondent used to notify the appellant of the various changes in interest rates on a monthly basis or as it deemed fit and proper. It was his further evidence that between 1993 and 1997, the appellant applied for and was granted overdraft facilities to the tune of Kshs.10 million which was to be repaid at an interest rate of 3% above the respondent's variable lending rate. The appellant met its obligations with the belief that the respondent was acting in good faith until 2002 when the terms became burdensome and it requested for a recalculation of the interest for the entire period of the transactions, upon discovering that the CBK had by law capped the interest rates during the period in issue at 16.5%.

12. The respondent refused to concede to the request and the appellant therefore had to seek the services of Interest Research Bureau (K) Limited (IRB) which confirmed that the respondent had overcharged the appellant on interest. This fact was communicated to the respondent in the hope that an amicable settlement would be reached, but this was never to be. He referred the court to various documents to buttress the testimony that during the period in question, the CBK had capped the interest rates chargeable by Commercial Banks at 16.5%, yet the recalculation showed that the appellant had charged higher interest rates than the prescribed limit. The affidavit of Brenda Aluoch filed in the case on behalf of the respondent was also referred to by PW1 to show that the respondent was not even sure as to the rates of interest that it charged it for the overdraft facilities. Indeed,the respondent admitted to discovering the anomaly only in 2005. The appellant thereafter terminated its relationship with the respondent in 2002, after clearing its outstanding loans and had its securities discharged. He concluded his testimony by stating that soon after IRB closed offices in Kenya, it sought a fresh opinion from its successor, Interest Rates Advisory Centre Limited, (IRAC) whose findings were similar in respect of the interest overcharge. The appellant thereafter demanded for the reimbursement of the interest overcharged to no avail.

13. PW2, the Managing Director of IRAC, testified that at the appellant's request he carried out a recalculation of the interest payable by the appellant in respect of the various financial facilities it had been granted by the respondent. It was his evidence that he referred to the Banking Facility Letters and the Bank Statements of all the loan accounts and on that basis, he recalculated the interest due by applying the prevailing rates of interest at the material time based on contractual rates agreed by the parties and another based on the legal rates of 16.5% per annum that the respondent ought to have applied, based on the CBK rates as communicated by Gazette notices from time to time. Therefore the sums owed to the appellant on account of overcharged interest was Kshs. 10,449,411.74/= or Kshs.68,986,536.28 based on either of the two scenarios above.

14. The respondent's witness Nahashon Maina (DW1) testified that the appellant was its customer. It maintained both current and loan accounts and that there were other various facilities advanced to it such as term loans, overdrafts, letters of credit and bank guarantees. He referred the court to various documents setting out the terms of engagement between the appellant and the respondent including the interest rates chargeable.

15. The respondent vide its letters of offer made it clear that the interest chargeable for an overdraft facility was 3% per annum over and above the lenders base rate of 19.5% per annum, compounded with monthly rates and the term loans had similar provisions. The letters of offer were signed by the appellant to signify acceptance and in case of any variation there was a discussion, which the appellant did not object to. There were times when the appellant exceeded the overdraft facilities and it had to charge interest. The appellant was provided with monthly statements whenever it requested. Thus, according to DW1 the terms were negotiated and the appellant accepted the facilities on the agreed terms; and so the claim by the appellant that the respondent overcharged it on interest was not correct.

16. Further, he confirmed to the court that he was aware that IRAC had been contracted by the appellant to recalculate the interest rates but denied that it had agreed to engage in a recalculation of the interest applicable to the appellant's accounts. He denied that the respondent acted dishonestly in dealing with the appellant's accounts. He testified further that the appellant had paid off all sums due on its facilities and that it had since closed all accounts. He therefore prayed for the dismissal of the suit.

17. On 27th March 2018, the trial court rendered its judgment. With regard to whether the appellant's suit was barred by dint of sections 4(1) (a) and 4 (3) of the *Limitation of Actions Act*, the trial court held that time begun to run from 16th September 2003 when the respondent consented to the verification of the accounts for the entire period from 1997 up-to and including 2000. The suit having been filed in 2004 it was well within the six year limitation period.

18. As to whether the respondent overcharged on interest and whether such overcharge is recoverable, the trial court held that at the time there was a legal regime vide section 39 of the *Central Bank of Kenya Act*, that allowed the Governor of the CBK to fix the interest which banks and special financial institutions could charge and at the material time it was capped at 16.5% calculated on a reducing balance method. To the extent that the respondent charged the appellant interest beyond what was provided by the statute, it breached the law and the overcharged interest was therefore recoverable.

19. Regarding whether the respondent owed a fiduciary duty to the appellant, and if so, whether it acted in breach of that duty for which damages are payable, the trial court returned the verdict that since breach of contract was neither alleged nor proved, a determination of the issue was superfluous.

20. In the penultimate paragraph? the trial court concluded its judgment thus "In the result, judgment is hereby entered for the plaintiff in the aforesaid sum of Kshs. 8,978,813.63 plus interest thereon at court rates from the date of filing this suit till payment in full, as well as costs of the suit. The rest of the prayers were either in the alternative or have been overtaken by events and therefore stand dismissed."

21. Aggrieved by the judgment and decree aforesaid, the appellant filed the instant appeal on grounds that, the trial court erred in failing to judicially evaluate the evidence presented by the appellant and thus reached a wrong finding on the amounts due to the appellant; in failing to find that the respondent having failed to seek and obtain approval from the Minister in charge of Finance was not justified to alter interest rates and charges on the appellant's account contrary to the *Banking Act*;. in failing to make a finding that it was not lawful and proper for parties to attempt to contract on matters that were controlled by statute; in failing to find that the rates of interest up to 18th April 1997 were controlled at 16.5% and as a consequence the respondent overcharged the appellant and finally, failing to properly

evaluate the evidence of the expert witness, Mr. Onono on the overcharge and find that the amount due to the appellant as pleaded and adduced evidence was Kshs.68,986,536.28. We were therefore urged to allow the appeal, set aside the judgment of the trial court and in lieu thereof enter judgment for the appellant in the sum of Kshs.68,986,536.28 plus interest thereon at bank rates from the dates of overcharge as well as costs.

22. The respondent filed a cross-appeal dated 8th March 2019 alleging that the trial court erred in law and fact by failing: to find that the case was premised on actions that took place in the years 1993 and 1997 thus it was statute barred by dint of section 4(3) of the ***Limitation of Actions Act*****;** to find that the letter dated 10th September 2003 amounted to an admission to recalculate interest; to distinguish the rate of banking and contractual rate of interest as governed by sections 44 and 52 of the *Banking Act* respectively; that the repealed section 39 of the *Central Bank of Kenya Act* applied to the respondent when in fact the Central Bank of Kenya after the repeal of the interest rate regime vide Gazette Notice No 3348 of 23.7.1991 was not obliged to fix any maximum rate of interest; to be guided by the findings in the case of HCCC No 2005 of 2000 *National Bank of Kenya Ltd v Cador Investment Ltd** to* the effect that banks were at liberty to negotiate interest rates with the borrowers; finding that section 44 required financial institutions to obtain approval of the Minister prior to any variation of the interest when in fact the section referred to the rate of banking that did not apply to interest variation; by re-writing the contract between the parties that allowed for variation of the rate of interest especially when it used the interest rates computation by the IRAC; to consider its evidence and written submissions; to consider the various facility letters that allowed for the unilateral variation of interest which were accepted by the appellant; to consider that the appellant often overdrew its accounts hence attracted interest and finally, awarding the appellant a sum of Kshs.8,978,813.63 with interest at court rates from the date of filing suit till payment in full when in fact interest cannot be recovered for a period in excess of 6 years. We were therefore urged to allow the cross-appeal with costs, dismiss the appeal with costs as well and set aside the High Court judgment with costs.

23. The appeal was canvassed by way of written submissions with oral highlighting. The appellant submitted that the evidence by Mr. Onono painted two scenarios. The first scenario was based on the contractual rates agreed by the parties in the letters of offer, by which the appellant would be owed by the respondent Kshs.10,449,411.74/= on account of overcharged interest. That if the trial court had been persuaded to go down this route then it ought to have entered judgment for the appellant in the said amount and not Kshs. 8,978,813.63.

24. With regard to the 2nd scenario, there was evidence that the respondent was bound by the provisions of section 44 of the *Banking Act* and sections 39 and 41 of the *Central Bank of Kenya Act* by which the interest chargeable was capped. In this regard Mr. Onono found that the respondent had overcharged its account by a sum of Kshs.68,986,536.28/=, an amount the trial court should have awarded. Further that the respondent was a constructive trustee of the appellant and therefore after the verification process which confirmed that the respondent had fraudulently deducted and or overcharged interest on its account, the respondent was duty- bound to make good the loss. This evidence was not challenged by the respondent's witness Mr. Nahashon Maina who did not show any verification done by it pursuant to an agreement in the letter dated 16th September 2003. The allegation that it had overdrawn its account was not proved by the respondent either.

25. To buttress these arguments, we were referred to the decision in *Margret Njeri Muiruri Vs. Bank of Baroda (Kenya) Ltd*[2014]eKLR where this Court stated that section 44 of the *Banking Act* required the banks to notify the Minister for Finance before any change in the rate of interest is effected. The burden remained on the respondent to prove that the rate of interest that was charged on the

appellant's accounts was sanctioned by the Minister for Finance which burden the respondent failed to discharge.

26. That though the respondent had averred that it had executed its contractual duties with due diligence, however this was not the case since the interest rate was not contractual but a controlled interest regime. The respondent's alleged practices and customs could not be used to override the express legal provisions set by the law. It was submitted further that the respondent had fraudulently misrepresented to the appellant that it could charge interest rate above that set by the CBK. We were referred to the case of *Kelly v Salari* (1891) 9 M & W 54 to buttress these arguments. In addition, we were called upon to find that restitution is allowed where the contract calls for payment according to a certain formula and where a payer has overpaid because he has mistakenly applied that formula. We were referred to the persuasive decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & others* [2003] eKLR where Kuloba, J. held as follows:

> "It is possible to highlight albeit in summary for in space of a judgment, some of the common unjust factors which the law recognizes as calling for restitutions. You may call them grounds which form the basis of a restitutionary claim. At the moment I sample the following:

1) Non-voluntary conferment of a benefit such as through mistake or on account of compulsion, necessity or on ignorance or due to an unequal condition between the payer and payee

2) voluntary conferment of benefit for total failure of consideration

3) Benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust

4) Ultra vires demand

5) Abuse of a power entrusted to the defendant by parliament or by a contractual instrument such as a debenture or other agreement

6) Illegal use of self help actions

7) Vindication of equitable title to property."

27. It was the appellant's further submissions that since the court had held that the respondent had not provided any evidence that it obtained the approval of the Minister to charge interest rates above the applicable rate at the time of 16.5% between 1991 and 1997, it followed then that the interest charged by the respondent was unlawful. Hence the court should have made a finding that the overcharge was unlawful and the same was recoverable from the respondent.

28. That the trial court did not have the discretion to apply equity where there were clear provisions of the law. In the decision of *John Gatu Nderitu v Kenya Commercial Bank Ltd* [2011] eKLR,the court held that:

> "...it was the bank that is enjoined to provide documentary evidence to the court to the effect that it has complied with section 44 of the *Banking Act*. A failure to do so would attract the presumption that the bank did not comply with the statutory requirement to increase the interest rate."

29. Finally, we were called upon to find that the appeal has merit and allow it as prayed. In opposing the appeal and in support of the cross-appeal, the respondent submitted that the trial court failed to re-evaluate the evidence since the amount awarded had not been pleaded. That the interest rate had been liberalized since 1991 thus the appellant had not been overcharged. Further that the suit was time

barred, since time had started running from 2003 and not 2013 as held by the trial court. We were also urged to find that the report by IRAC was tantamount to re-writing the contract between the parties, which should not be the case. That it never agreed to the recalculation of the interest as claimed by the appellant, that by the judgment the trial court re-wrote the contract between the parties and ignored that the appellant had voluntarily acceded to the conditions and terms agreed by the parties before the facilities were extended to the appellant. That the alleged capping of the interest chargeable was not applicable in the circumstances of the case. In the premises, we were urged to dismiss the appeal and allow the cross-appeal with costs.

30. This being a first appeal, we are tasked with re-considering and re-evaluating the evidence on record and draw our own conclusions and at the same time give due allowance to the fact that the trial court had the singular advantage of seeing and hearing the witnesses testify before it and give due allowance for it. See *Peters Vs. Sundays Post Limited*[1958] EA 424.

31. Having referred to the record of appeal, the cross-appeal, the submissions, oral highlights by respective counsel and case law referred to we discern the following issues for determination in this appeal:

    i. Whether the suit was time barred

    ii. Whether the trial court erred in evaluating the evidence presented. iii. The interest rate applicable.

    iv. Whether the cross appeal is merited.

32. The issue of limitation was pleaded by the respondent and the same was also raised by way of a preliminary objection in the trial court. The essence of the Preliminary Objection was twofold, that the suit was statute- barred under the provisions of Section 4(1)(a) of the *Limitation of Actions Act*. Alternatively, the claim for the taking of accounts is statute-barred under the provisions of the *Limitation of Actions Act*. The preliminary objection was determined by the trial court vide its ruling on 25th June 2006. In the ruling Azangalala, J. (as he then was) in dismissing the preliminary objection held that the determination of the issue could not be made without interrogating the evidence as the facts were contested. In the premises the same was not a proper preliminary objection. That should have marked the end of the matter. The same has however been raised again by the respondent in its cross appeal. Since it is a jurisdictional issue, it behooves us to deal with it first. In its cross appeal, the respondent has urged that the appellant's case is premised on the activities that occurred between the years 1993 and 1997. That a suit based on contract or taking of accounts has to be instituted within six years. Accordingly, the suit having been instituted in 2004 and being based on contract as well as taking of accounts, it was obviously time barred.

33. It is the respondent's argument that the six year period ended in 2003 since the accountable sums were for the years 1993 and 1997. The appellant's counter argument is that the relationship between the two, led to extension of the overdraft facilities from time to time as seen from the various letters on record, speaking to adjustment of the interest rates, the banking facilities and complaints regarding the higher interest rates applicable. A letter by IRAC dated 14th August 2003 to the respondent by the appellant requesting approval of the period for the verification of the period interest which was responded to by a letter dated 10th September 2003 confirms that the interest verification exercise was to cover the period 1997 up to and including 2000. Yet this suit was filed in 2004. Given the foregoing, we are unable to agree with the respondent's arguments that the cause of action arose between 1993 and 1997. This is because even as of 2003 parties were still engaging with regard to the period to be covered. In addition, the respondent's letters indicate that it kept requesting for more time to retrieve its data and this kept the appellant hoping that the dispute would be resolved amicably as indicated

by the respondent. In any event the appellant only discovered that it had all along been overcharged interest in 2002. It is also around this time that the respondent conceded to the anomaly in the way the appellant's were managed. We therefore do not fault the trial court's finding that the time for purposes of limitation started running in terms of sections 4(1)(a) and 4(3) of the *Limitation of Actions Act* from the 16th September 2003 when the respondent first indicated that it would confine itself to verification on the interest from the year 1997 up to and including 2000. Therefore, the suit was filed within the prescribed time, contrary to the submissions of the respondent. Accordingly, the ground on limitation of time raised by the respondent in the cross-appeal fails.

34. On the 2nd issue, the appellant in its further amended plaint averred that on or about the year 1993 it appointed the respondent as its banker and thus it owed it a contractual duty to accurately and honestly account for all the transactions in its accounts. Between the year 1993 and 1997 it had applied for overdraft facilities which were granted at aggregate rates as follows: Base +3% p.a from 01/4/1993; base + 4% p.a from 17/6/1993; base + 6% p.a from 6/7/1995 and base+3% from 31st December1996.

35. However according to the appellant in the year 1997 the maximum interest that banks were supposed to charge was 16.5% on a reducing balance as per the directives and Gazette notices of CBK. Further that the banks and in this case, the respondent was supposed to seek and obtain approval from the Minister of Finance before it could enhance the interest chargeable beyond that stipulated by law. Therefore, any amount charged on it from the 18th April 1997 above the stipulated rate and without the minister's sanction was thus unlawful.

36. The appellant had a duty to prove that the facts it asserts exist. Of course the burden of proof as to any particular fact lies with who wishes the court to believe in its existence pursuant to section 107(1) and 109 of the *Evidence Act*. We think that the appellant discharged this burden going by the evidence on record. Indeed PW2 in his evidence stated that he recalculated the interest due by applying the prevailing rates at the material time. In one of the reports, he used the contractual rates agreed by the parties and on the other he used the legal rate of 16.5% per annum that the respondent ought to have applied based on the gazette notices issued from time to time by CBK. Therefore the sum due to the appellant was either Kshs. 10,449,411.74/= or Ksh.68,986,536.28/=based on either of the two scenarios. It is also instructive that in its letter dated 26th June 1996, addressed to the respondent the appellant confirmed that indeed it had overcharged the respondent on the three accounts and offered to refund Kshs.283,145.60/= so overcharged. With this kind of evidence how can both parties accuse the trial court of not evaluating the evidence presented judicially or at all or that it did not pay due regard to the legislative framework put in place by the CBK to cap interest rates. Having carefully gone through the judgment, we must point out at once that the trial court did a sterling job in the consideration and evaluation of the evidence presented before it before reaching the conclusions it reached. The accusations to the contrary by both parties are farfetched and has no basis at all.

37. On the 3rd issue, it was the evidence of Nahashon Maina(DW1) that the appellant was advanced various facilities and the letters of offer executed on an annual basis setting out the terms of engagement between the appellant and the respondent. The respondent urged that the trial court in allowing the claim had effectively allowed variation of the interest rates charged and thus had rewritten the contract between the parties. As rightfully held by this Court in *National Bank of Kenya Ltd Vs. Pipe Plastic Samkolit (K)Ltd & Another* [2001] KLR 112.

> "A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

38. But was this the case here? The 1st facility entered into by parties was on 13th April 1993 and the interest rate chargeable was at 3% per annum above the lenders base rate then 19.5%. The respondent kept adjusting the interest rates over a period of time unilaterally and deliberately ignored the legislative measures in place by the Central Bank of Kenya which was to be strictly followed.

39. Section 39 of the *Central Bank of Kenya Act* provides that:

> "the bank from time to time, acting in consultation with the minister, determine and publish the maximum and minimum rates of interest which specified banks or specified financial institutions may pay on deposits and charge for loans or advances:

provided that the bank may in consultation with the minister determine different rates of interest-

i. For different types of deposits and loans,

ii. For different types of specified bank and financial institutions."

40. The respondent was governed by this Act being one of the banks in Kenya till when the same was repealed by section 17 of the Central Bank (Amendment) Act no. 9 of 1996. In Margaret Njeri Muiruri Vs. Bank of Baroda (Kenya) Ltd [2014] eKLR, this Court held that the bank had the 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. Further, that the burden remained with the respondent to prove that the rate of interest that was being charged was with the consent of the Minister. This is so because section 44 of the *Banking Act* places the burden on the bank to seek such approval. Therefore, the respondent was quite aware that the rate of interest was capped and it required the approval of the Minister for any variation of the bank interest rates or interest adjustments from time to time. The respondent was similarly governed by Section 44 of the *Banking Act*, which provided that no institution was allowed to increase its rate of banking or other charges except with the prior approval of the Minister.

41. Besides the foregoing the respondent at one point had to refund the appellant the interest overcharged and therefore the respondent cannot run away from the fact that it unlawfully increased the interest chargeable on the appellant's accounts without the necessary consent and approval from the Minister. Further, the argument that the appellant executed the letters of offer with specific stipulations regarding the interest chargeable cannot be used to override specific provisions of the law. We therefore do not fault the trial court's finding that the respondent had not provided any evidence that it applied for or obtained the approval of the minister to charge interest rates above the applicable rate at the time of 16.5% between 1991 and 1997. Thus the interest charged by the respondent was unlawful.

42. It cannot be gainsaid that where money is paid out to another under the influence of mistake or unlawfully as is in this case, such money is recoverable as already stated elsewhere in this judgment. Two scenarios were presented to the trial court. The amounts recoverable were either Kshs. 10,449,411.74 or Kshs.68,986,536.28 depending on the mode of calculation adopted.

43. The trial court in awarding the appellant the sum of Kshs. 8,498,764.03 as the overcharge stated:

> "Having given consideration to the two scenarios, it is noted that in the premises, and going by the principle that it is ordinarily no part of equity's function to allow a party to escape from a bad bargain; and considering that the court's function is to give effect, within the confines of law to the wishes of the parties as expressed by the terms of their contract, I would adopt the scenario presented by Mr. Onono in the recalculation contained in the plaintiff's exhibit no.5 which was premised on the parties' contractual documents, that the plaintiff

was unlawfully overcharged interest by the defendant to the tune of Kshs. 8,498,764.03, and I so find. It is further my finding that the sums are recoverable by the plaintiff from the defendant."

44. We have no reason to fault this reasoning by the trial court. However, we hasten to add that the trial court got it wrong on the final figure. The figure should have read Kshs. 10,449,411.74 plus interest from the date of filing in the High Court instead of Kshs. 8,498,764.03. In the upshot the appeal succeeds to that limited extent, that is, that the appellant shall be paid Kshs. 10,449,411.74 instead of Kshs. 8,498,764.03. However, the cross-appeal fails and is dismissed. Each party shall bear their own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR