



**National Bank of Kenya Limited v Carol Construction Engineers Limited & another  
(Civil Appeal E059 of 2021) [2022] KECA 1426 (KLR) (16 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1426 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E059 OF 2021  
K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA  
DECEMBER 16, 2022**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED ..... APPELLANT**

**AND**

**CAROL CONSTRUCTION ENGINEERS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**JEREMIAH MWEBI MAYIEKA ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nakuru  
(Joel Ngugi, J.) dated 21st January, 2021 in H.C.C.C. No. 12 of 2020)*

**JUDGMENT**

**JUDGMENT OF KANTAI, JA**

1. The 1<sup>st</sup> respondent, Carol Construction Engineers Limited was granted banking facilities by the appellant, National Bank of Kenya Limited, in a letter dated February 18, 2008 to provide working capital in an overdraft limited at Kshs 2,500,000. The 2<sup>nd</sup> respondent Jeremiah Mwebi Mayieka gave a guarantee of Kshs 6,500,000 and in a charge dated March 15, 2005 Title Number Nakuru Municipality/Block 2/58 was charged as security for the said facility.
2. It was claimed in an amended plaint filed at the High Court of Kenya at Nakuru that the 1<sup>st</sup> respondent (Carol Construction Engineers Limited) had been offered an overdraft facility Kshs 3,500,000 by the appellant, that the 2<sup>nd</sup> respondent (Jeremiah Mwebi Mayieka) had offered the said title to secure the loan; that the overdraft facility had been renewed between the years 2006 – 2010 but was not renewed in the year 2011; that the appellant had in 2012 stopped debiting interest on the overdraft facility pursuant to Section 44A of the Banking (Amendment) Act 2015 and in pursuance of the in duplum rule; that on March 18, 2013 the respondents had proposed to the appellant, which request was accepted, to be given 60 days to complete construction of some flats whose rental collection was to be remitted to the appellant and that in the reply dated March 21, 2013 the appellant had accepted the



offer on exceptional basis. Further, that the respondents had clarified by a follow up letter that payment of Kshs 600,000 from rental income would be made when all the flats were fully let and that in the acceptance letter (letter of March 21, 2013) the appellant had not made any reference to interest to accrue on the facility. The respondents stated further that following the agreement with the appellant, rental income was paid into the account with the appellant with the result that by October 17, 2017 the account was in credit of Kshs 180,651 as shown in a statement of account issued by the appellant but that the appellant had on October 31, 2017 debited the respondents accounts with an item called main interest; Kshs 3,112,045.87 which sum the appellant demanded to enable discharge of the security offered for the loan. Meetings held to resolve the issue did not resolve it and the respondents contended in the suit that they had met their part of the bargain and were entitled to a discharge of the title; that the appellant was not entitled to serve a statutory notice to sell the suit property; that the proposed sale of the suit property was fraudulent and the court was asked to issue a permanent injunction to restrain the appellant from selling the suit property, the court was also asked to issue an order directing the appellant to discharge the suit property, refund a sum of Kshs 180,651.30, give general and aggravated or exemplary damages and costs of the suit.

3. The appellant delivered a defence where the claim was denied it being contended that the overdraft facility was not renewed in 2011 because the respondents were in default of the existing facilities. It was denied that the Banking (Amendment) Act 2015 was effective in 2012 it being claimed by the appellant that its financial system charged interest continuously in all accounts whether active or in default, that the respondents' account had never had its interest suspended and continued to generate accrued interest without interruption and the balance on account in July, 2017 was Kshs 3,112,045 which continued to accrue further interest at 13% p.a. It was denied that any agreement had been reached with the respondents and the credit balance alleged by the respondents was denied. The appellant stated at paragraphs 14 and 15 of the defence:

' 14. The Defendant admit that interest was uploaded on July 31, 2017 into the Plaintiff's account which happened as soon as the Plaintiffs made a substantial payment triggering an automatic reactivation of the account and uploading of the accrued interest.

15. The Defendant deny that it has ever agreed to waiver (sic) the interest to the Plaintiff's account and the Plaintiff is put to strict proof thereof.'

4. The appellant claimed that it was owed Kshs 4,021,778 by the respondents as at February 12, 2020 which continued to accrue interest; that it had issued statutory notice to realize the security; it denied fraud, deceit or that the respondents were entitled to any damages. The appellant prayed for the suit to be dismissed with costs.
5. The suit was heard by Joel Ngugi, J (as he then was) who after hearing 2 witnesses from the respondents' side and 1 from the appellant, in a considered judgment delivered on January 21, 2021 allowed the suit. A permanent injunction was issued to restrain the appellant from dealing with the suit property in any way inconsistent with the ownership of the respondents; it was ordered that the appellant discharge the charge registered in respect of the suit property within 30 days failing which a discharge of charge be executed by the Deputy Registrar of the Court. The appellant was ordered to pay liquidated damages of Kshs 10,000 to the respondents, the other claims were declined and dismissed and costs of the suit were awarded to the respondents.
6. Those are the orders that provoked this appeal through a Memorandum of Appeal drawn for the appellant by its lawyers M/S Kamonjo Kiburi & Company Advocates where 10 grounds of appeal are set out. It is stated that the Judge erred in law and fact in failing to uphold terms of the letter of offer



and the charge; that the Judge erred in law and fact by finding that the respondents had fully discharged their contractual obligations set out in the letter dated March 21, 2013; that the Judge should not have relied on a letter dated March 30, 2013; that the Judge erred in law and fact by relying on the expert opinion of PW2 on the computation and applications of interest on accounts that are in default. In other grounds it said that the Judge erred by failing to apply or appreciate the applicable Central Bank of Kenya Prudential Guidelines on categories of loans and suspension of interest on accounts in default and that the Judge erred in awarding the respondents liquidated damages of Kshs 10,000. Further, that the Judge erred in finding and holding that the doctrine of promissory or equitable estoppel was applicable in the circumstances of the case; that the Judge erred in finding and holding that the appellant should not charge interest from July, 2012. In the penultimate ground it is said that the Judge erred in issuing a permanent injunction against the appellant 'and changing the terms of contract between the parties by ordering a discharge of the title known as Nakuru Municipality Block 2/58.' Finally, that the Judge erred in ordering costs against the appellant. It is proposed that the said Judgment be set aside and the case by the respondents be dismissed with costs.

7. When the appeal came up for hearing before us on a virtual platform on July 5, 2022 learned counsel Mr Kamonjo Kiburi appeared for the appellant while learned counsel Mr Kyalo Mbobu appeared for the respondents. Both sides had filed written submissions which they fully relied on and did not find it necessary to highlight the same. The appellant summarized the facts of the case in those submissions and reduced the grounds of appeal into 3 – the application and payment of suspended interest on the outstanding amount and whether the appellant is entitled to the same; the terms of the letter of March 21, 2013 and if the same amounts to a promissory or equitable estoppel; the terms of the letter of offer and the charge documents and if the same were ousted by the appellant's letter dated March 21, 2013.
8. The appellant submits on the first issue that 'Banks are in the business of making money' and that this happens when they charge interest and service charge.
9. This was captured in the letter of offer and the charge document and the appellant cites Section 85(1) of the Land Act which obliges a chargor to pay principal and interest.
10. It is submitted that the appellant had suspended charging interest 8 months before the respondents sought indulgence to resume repayment of the facility, which was done by the appellant in compliance with Guidelines in Risk Classification of Assets, Provisioning and Limitations on Interest Recoverable in Performing Loans issued by the Central Bank of Kenya. Further, that when the respondents' account went into credit on October 17, 2017 the suspended interest was captured on July 31, 2017 as the uploads of interest is timed to happen monthly at month end. On the effect of the letter dated March 21, 2013 it is submitted for the appellant that the same did not oust or alter the terms of the letter of offer and the charge document.
11. On the effect of the letter of March 21, 2013 the appellant submits that the other letter dated March 30, 2013 should not have been admitted.
12. The appellant submits on the doctrine of estoppel that the Judge erred in his holding on that issue.
13. In their written submissions the respondents also give a history of the case and identifies as issues for determination as gleaned from the Memorandum of Appeal, whether the terms of the letter dated March 21, 2013 amounts to equitable estoppel; whether the appellant is entitled to payment of suspended interest on the outstanding amount; whether the letter dated March 21, 2013 ousted the terms of the offer letter and the charge documents, and finally, who should pay costs of the appeal. It is submitted on the first identified issue that the appellant did not raise the issue of suspended accrued interest and that the respondents subsequently effected and completed payment of monthly instalments on October 17, 2017 as agreed with the appellant and that it was after that happened that



the appellant demanded payment of accrued interest. Section 120 of the Evidence Act is cited in support of the submission that the appellant made a representation to the respondent through a combination of documents and conduct to the effect that it would not charge interest accrued beyond March 21, 2013. Further, that the respondents acted on the same and made payments until October 17, 2017 thus, according to the respondents, equitable estoppel was created. The case of D & C Builders v Sidney Rees [1966] 2 QB 617 on the said principle is cited where Lord Denning MR held as follows:

' It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or be kept in suspense, or held in any event, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.'

14. The respondents cite this Court's decision in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR in support of the same proposition and it is submitted for the respondents that equitable estoppel was established and the appellant should be estopped and precluded from denying the truth of the representation. On whether the appellant is entitled to charge suspended interest it is submitted that it would be unethical for the appellant to have consistently sent periodic statements to the respondents where it believed that those statements did not reflect the true sums due and owing when the respondents were bank customers entitled to right of information under Article 46 of the Constitution of Kenya 2010. The respondents rely on Section 90 (2) (b) of the Land Act on the effect of a statutory notice and submit at paragraphs 20 and 21 of the submissions:

' 20. It is our humble submission that while there may be laudable reasons for suspending interest on bad bank loans, a statutory notice is so momentous that if the interest forms part of the debt to be paid, then it must be included in the notice. It is our considered submission that as the Appellant in its statutory notice dated October 29, 2019 indicated the debt due and failed to include the interests, it is estopped from claiming interest on the account.

21. My Lords, it is our considered submission that even though the CBK guidelines require omission of suspended interest in the appellant's books, it does not in any way prevent the appellant from notifying the Respondent the true amount of the suspended interest due. The appellant did not offer any explanation as to why it failed to indicate in the statutory notice that in addition to the sum indicated, there is a hidden accrued interest amount which was suspended pursuant to the CBK guidelines.'

15. On the Central Bank of Kenya guidelines which were relied on by the appellant, the respondents rely on the High Court case of Leonard Jefwa Kalama & Anor v Consolidated Bank of Kenya & 3 others [2014] eKLR where it was held:

' In any event, it is doubtful whether the Guidelines relied upon are of legal force affecting the loan contract between the 1<sup>st</sup> respondent bank and the 1<sup>st</sup> petitioner borrower. Indeed, the Guidelines, which are attached to the 1<sup>st</sup> petitioner's written submissions appear to be policy instructions for the accounting standards to be required of banks in the preparation and



maintenance of their books rather than as affecting the contractual relationships between the banks and their customers.'

16. The respondents submit on the effect of the letter of March 21, 2013 that the same ousted the terms of the offer letter and the charge document and an agreement was reached through the letter dated March 30, 2013.
17. I have considered the whole record, submissions made and the law and this is what I think about the issues raised in this appeal.
18. The issues raised by the parties in this appeal relate to the application and payment of suspended interest on the outstanding amount; the effect of the letter of March 21, 2013 and the charge document and the issue of costs.
19. On whether the appellant could claim interest which it had suspended, the learned trial Judge found that the doctrine of equitable or promissory estoppel can be used in Kenya to support a cause of action which would otherwise not prevail without the deployment of the doctrine to prevent the other party from resiling from its representation. The Judge found that in an appropriate case the doctrine of equitable or promissory estoppel can operate to validly preclude a chargee in a bank – customer relationship from insisting on charging interests which would otherwise be owed under the strict terms of the charge.
20. In his testimony before the Judge the 2<sup>nd</sup> respondent testified that during the repayment period the appellant did not post any penalty to the respondents' account and that the respondents had not been made aware by the appellant any other interest. His position was that the loan had been repaid in full as shown by bank statements issued to the respondents by the appellant and that it was fraudulent for the appellant to turn back when the account went into credit to charge interest which it had not notified the respondents in the course of the transaction.
21. Mr Juda Kimutai, an employee of the appellant testified amongst other things that the respondents' account at some point exceeded the overdraft limit and:

' When the account is overdrawn interests are normally held in a suspense account. Then when the account starts to perform the interests are brought forward. When it is brought forward, the system drops the accrued interest which were held in the bank and so when the customer deposited Kshs 10,000/=, the interest were dropped on his account. This is usual and happens for all banks under CBK prudential guidelines.

Interests never appeared anywhere from the month of July, 2012. No interest was charged because the account was non-performing. Interest accrued. The information on accrued interest is not given to the customer except on request'

22. He maintained that the appellant was entitled to charge further interest but confirmed that the appellant had not informed the respondents that it was only suspending, not stopping charging interest. He agreed that the respondents account went into credit in October, 2017 and that is when an item called 'main interest' was introduced in the sum of about Kshs 3,100,000.
23. The appellant's letter of March 21, 2013 played a central role in the case before the Judge. The appellant said this in that letter:

' OUR REF: MJT/IGG/ADV/46/223 March 21, 2013

The Director,



Carol Construction Eng Ltd PO Box 3409-20100, NAKURU.

Dear Sir/Madam,

RE: Your Debt In Our Books – Current Account Overdrawn Balance – Kshs 3,518,308.70 (DR)

Your letter Reference No CCE/MNB/88127 dated March 18, 2013 refers.

We hope you are aware that the overdrawn status of your account is long overdue and this state of affairs is contrary to the agreement you signed with the Bank when you were granted this facility.

However, we have reconsidered your proposal to resume repayment of your overdraft after 60 days from the date of your letter and have exceptionally accepted it in order to give you time to complete construction of your buildings in Kenlands area which you claim are almost complete.

You are hereby required therefore, to make your first deposit of Kshs 600,000.00 on or before May 20, 2013 and by every 20<sup>th</sup> day of every subsequent month until your loan is fully cleared.

Kindly note that any default in payment of the above amount shall leave the Bank with no other option but to commence the process of sale of the security property held through public auction at your costs and consequences in order to clear the debt in our books.

Kindly confirm acceptance of the above terms and conditions on receipt of this letter by signing, stamping and returning the duplicate to us failure to which we shall proceed and take action as indicated.

Kindly oblige. Yours Faithfully, (Signed)

Anne W Maina

Branch Operations Manager. Acceptance:

Name: JM Mayieka Signature (signed) Date March 30, 2013 Name:

..... Signature ..... Date '

24. The respondents responded to that letter by letter dated March 30, 2013 which referred to a telephone conversation and confirmed that deposits of all rental collections would be made to the appellant until the account was fully redeemed and payment of Kshs 600,000 per month would be when the flats were fully let.
25. The Judge found that the letter of March 21, 2013 did not mention payment of any interest but that the appellant had stated that it had 'exceptionally' accepted the respondents' proposal to resume repayment of the overdrawn balance of Kshs 3,518,308/70 which the respondents were required to continue paying at the agreed rate until the account was fully paid. The said letter refers to 'Debt in our Books' and shows an overdrawn balance in the said sum of Kshs 3,518,308.70. It requires the respondents to make the first deposit of Kshs 600,000 on or before May 20, 2013 and by the 20<sup>th</sup> of every subsequent month until the loan was fully paid. This was followed by the respondents' letter of March 30, 2013 which referred to a telephone conversation held by the 2<sup>nd</sup> respondent with the appellant's branch manager, Nakuru, where further negotiations had taken place the effect being that the terms of the letter of March 21, 2013 were modified by the letter of March 30, 2013. Thereafter the respondents made payments to the appellant as was shown in periodic statements issued by the



appellant. The statements did not show or reflect any accrued interests and I agree with the trial Judge that all these facts cemented the respondents understanding that they had a bargain with the appellant that no further interest would be charged. The Judge found, on the appellant's allegation that non-reflection of interest in the periodic statement was in accordance with guidelines issued by the Central Bank of Kenya on non-performing loans:

' However, the CBK Prudential Guidelines are guidelines to Banks to guide on how to prudentially assess and report on non-performing loans so as to credibly assess the risk quotient of banks. It is not an instruction to banks to stop reflecting true amounts due to customers once an account is deemed sub-standard or at risk. The Defendant had an obligation to periodically inform the Plaintiffs as its clients the true amounts it owed. By issuing periodic statements omitting the accrued interests it knew it intended to charge at the back end of the transaction, the Defendant either acted inequitably or was simply acting in accord with its representation to the Plaintiffs that it would not charge interests and then resiled from its position later. Either way, the periodic statements issued by the Bank provide further evidence that there was a representation by the Defendant that it will not charge further interests; and that it was reasonable for the Plaintiffs to rely on that representation.'

26. The Judge found on the facts of the case and documents tendered in evidence that after the respondents had paid all the amounts due in accordance with the periodic statements issued by the appellant and in accordance with the said letter dated March 21, 2013 the appellant through its Nakuru branch printed out a statement indicating that the respondents' accounts was in credit of Kshs 10,000.
27. I fully agree with the findings of the Judge that all those cumulative reasons established adequate evidence to draw the conclusion that the appellant had through a combination of words, documents and conduct made a representation to the respondents that it would not insist on charging all the interests accrued as long as the respondents made the payments on the amount stated in the letter of March 21, 2013. The respondents were entitled to and did rely on that representation and they suffered detriment on account of being led by the appellant to believe that no further interests would be charged on the account. In the words of Lord Denning MR in D & C Builders case (supra) equity will not allow parties who have entered into definite and distinctive terms involving some legal results afterwards to enter into a course of negotiation that will result in one of the parties to suppose that the rights arising from the contract will not be enforced. I also agree with the Judge that the Central Bank of Kenya guidelines are not meant to have secret information held by a bank which it does not disclose to its customer, in this case the respondents. On the facts of the case the respondents were entitled to rely on the doctrine of promissory or equitable estoppel whose effect is to stop the appellant from insisting on charging accrued interests.
28. The findings I have made have the effect that the letter of March 21, 2013 which was acted on by the respondents had the effect of displacing the letter of offer and the charge documents. Once it was acted on and the amount stated in the letter paid in full, the appellant had no other remedy against the respondents who had fully met their part of the bargain as agreed in the said and subsequent letters. My answer to the issues raised by the appellant is that it was estopped from charging any further interests after the account was fully redeemed by the respondents after they paid the amount stated in the letter of March 21, 2013.
29. The last complaint raised by the appellant relates to award of costs to the respondents by the Judge.
30. The Judge found in favour of the respondents on the main prayers and awarded them costs.



31. The appellant has not addressed the complaint on award of costs in its written submissions but the respondents, in support of the holding by the Judge on that issue cite Section 27 *Civil Procedure Act* which holds that costs in civil proceedings follow the event, they cite the finding by the High Court in the case of *Rufus Njuguna & Another v Martha Muriithi & 2 Others [2012] eKLR* to the effect:

' The interpretation of the proviso to the cited section 27 of the *Civil Procedure Act* is that the material event referred to is the result of the proceedings, and it is the successful party in this result who is normally awarded costs.'

32. I agree with the respondents that having succeeded in the main prayers at the High Court they were entitled to costs and the Judge was right in making the award for costs.

33. I have carefully considered the whole record and submissions made and I have not found any merit in this appeal. I would dismiss it with costs to the respondents.

**JUDGMENT OF M'INOTI, JA.**

I have had the advantage of reading in draft the judgment of my brother Kantai, JA., with which I fully agree. I have nothing useful to add.

**CONCURRING JUDGMENT OF J. MOHAMMED, J.A.**

I have had the benefit of reading in draft, the judgment of my brother, S. ole Kantai, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

**Dated and delivered at Nairobi, this 16<sup>th</sup> day of December, 2022.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

