



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GITHINJI, KOOME & SICHALE JJA)**

**CIVIL APPEAL 95 OF 2017**

**BETWEEN**

**INTEX CONSTRUCTION LIMITED.....APPELLANT**

**AND**

**CREDIT BANK LIMITED.....RESPONDENT**

*(An appeal from the Ruling and order of the High Court of Kenya at Nairobi (F. Ochieng' J.) dated 14<sup>th</sup> September, 2016*

In

**NAIROBI H.C.C.C No. 134 of 2016)**

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**JUDGMENT OF THE COURT**

Briefly, to set the stage for this appeal, **Intex Construction Limited** (the appellant, hereinafter Intex), is a Civil Engineering firm mainly engaged with road construction within Kenya. **Credit Bank Limited** (the respondent) has since 2012 granted to the appellant various loans, overdrafts and other banking facilities. These facilities were secured by a legal charge for Kshs. 260,000,000/- registered against the appellant's property known as **L.R No. 209/12318** Elgon Road, Nairobi.

**On 16<sup>th</sup> September, 2015**, Credit Bank Limited demanded **Kshs. 298,900,873.39/=** from the appellant as the total debt due and owing. Kenya Commercial Bank (KCB) agreed to grant to Intex a loan facility of **Kshs. 270,000,000/=** for the purpose of partially taking over and repaying the outstanding sum owed to Credit Bank Limited. The balance of **Kshs.28,900,873.39/=** (hereinafter the residual balance) was payable by equal monthly instalments of **Kshs.2, 677,977/=** plus interest for a period of twelve (12) months to commence after receipt of the loan facility from KCB. The agreed interest payable on the residual balance was 20% p.a and a penalty rate of 28% p.a on any arrears. Intex was also to obtain and forward an irrevocable bank guarantee from KCB securing the residual balance plus interest. KCB duly issued an irrevocable guarantee dated **18<sup>th</sup> September, 2015**. Months subsequent to the issuance of the guarantee, KCB finally paid the sum of **Kshs.270, 000,000/=** to Credit Bank on **21<sup>st</sup> January, 2016**.

By a letter dated **2<sup>nd</sup> February, 2016**, Credit Bank Limited demanded repayment of the residual balance, this time for an amount totalling **Kshs.61,002,548.49/=**. According to Credit Bank Limited, the increase in the residual balance was as a result of accrued interest on the outstanding sum of **Kshs.298,900,875.39/=** (hereinafter the outstanding sum) for the period before KCB paid the sum of **Kshs.270, 000,000/= on 21<sup>st</sup> January 2016**. It was its contention that as at **18<sup>th</sup> April 2016** the residual balance stood at **Kshs.64,258,872.35/=**.

Intex was aggrieved with this sum and blamed it on an unreasonable and illegal variation of the payable interest. Intex sued Credit Bank Limited for, *inter alia*, varying the applicable interest without informing Intex; and for increasing the monthly interest payable from **Kshs.2,677,977/=** to **Kshs.5,651,254.94/=**. Intex sought a permanent injunction restraining Credit Bank Limited from calling up the guarantee and demanding the sum of **Kshs.64,258,872.35/=** as well as an order directing Credit Bank Limited to prepare and render a true account of all the financial dealings in Intex's loan and overdraft account.

Simultaneously with the suit, Intex filed a motion dated **20<sup>th</sup> April 2016** seeking interim orders of injunction to restrain Credit Bank from demanding the payment of **Kshs.64, 258,872.35** and/or from demanding that KCB should honour the guarantee dated 18<sup>th</sup> September 2015 pending the hearing and determination of the suit.

In opposition to the application, a replying affidavit was filed on behalf of Credit Bank Limited wherein, the Bank deposed that it not only charged interest at the rates agreed upon between the parties but that Intex had fallen into arrears which necessitated the calculation of penalty rates. **F. Ochieng J.** heard the application. He noted that the issues between the parties which were to be determined by the trial court were: *the correct interest rates; the correct penalty rates; and consequently, the correct residual balance.*

Nevertheless, the learned judge found that it would be unjust if the court was to stop Credit Bank from demanding the payment of an acknowledged, albeit, unascertained debt. He also considered the injustice to be visited upon Intex should it be compelled to pay a debt which the trial court may ultimately determine to be improperly inflated. On a balance of convenience the learned judge thus ordered Intex to continue to remit monthly instalments in the sum of not less than **Kshs.3,000,000/=**. Credit Bank Limited was restrained from calling up the guarantees of either Intex or Intex's directors for as long as Intex made those payments. It is this ruling that aggrieved Intex, thus this appeal.

The appeal is premised on thirteen (13) grounds set out in Intex's memorandum of appeal dated **10<sup>th</sup> April, 2017**.

On **29<sup>th</sup> April, 2019**, the appeal came before us for hearing. Both parties were represented by learned counsel: **Mr. G. Kang'ethe** appeared for the appellant and wholly relied on his written submissions and a list of authorities filed on **9<sup>th</sup> October, 2011**, whilst **Mr. S. Owino** appeared for the respondent and relied on the written submissions and a list of authorities filed on **21<sup>st</sup> February, 2019**.

To start with, the appellant referred the Court to the letter of offer dated **15<sup>th</sup> September 2015** containing the terms agreed upon between the parties. Though the appellant admitted that the respondent had absolute discretion to alter the terms of contract, the appellant contended that the respondent was also obliged to give to Intex one month notice of any alteration of the terms. Specifically the appellant submitted that the respondent failed to inform the respondent of the variation of the interest rates applicable from 20% p.a. to 40% p.a.; as well as increasing the monthly instalments from **Kshs.2,677,977/=** to **Kshs.5,651,254.94/=**. The appellant submitted that it did not object to payment of penalties for arrears but rather to the unilateral variation of the interest rates applicable.

The appellant highlighted the learned judge's finding that Credit Bank Limited had erred in calling up KCB's guarantee dated **18<sup>th</sup> September 2015** indicating liability of **Kshs.64,258,872.35/=**. The learned judge reasoned that since the guarantee issued by KCB had not been altered, liability remained at **Kshs.28,900,873.30/=** plus applicable interest. The appellant thus submitted that the learned judge ought to have applied this same reasoning to find that the respondent was not at liberty to increase the monthly instalments to **Kshs.5,651,254.94/=** from **Kshs.2,677,977/=** even if the residual balance was over **Kshs.61 million**.

The appellant also pointed out that in the absence of a counter-claim by Credit Bank Limited to enforce payment of any alleged debt the learned judge had no jurisdiction to impose new terms on the appellant which the learned judge did by directing the appellant to pay monthly instalments of **Kshs.3,000,000/=**. The appellant also faulted this order since the instalments were to be paid for an undisclosed period of time and for a residual balance that was yet to be ascertained by the court.

Moreover, it was submitted that the learned judge had failed to consider that the appellant had cleared all previous arrears and the order for payments was ultimately punitive and without basis. The appellant was of the view that the learned judge had failed to apply the principle of 'balance of convenience' fairly as evidenced by the order directing the appellant to pay a debt which was to be determined at trial and by granting extraneous orders. The appellant urged this Court to allow the application dated **20<sup>th</sup> April 2016** as prayed with costs.

The respondent opposed the appeal. In its written submissions, the Court was referred to **United India Insurance Co. Ltd & 2 others v East African Underwriters (Kenya) Ltd 1985] eKLR** to highlight the principle as enunciated by **Madan J.A** that this Court will refrain from expressing concluding views on any issue which may arise in a pending trial. According to the respondent the dispute between the parties was only on one issue, that is, whether the appellant should avoid paying interest on its facilities despite the express terms in the agreement.

The respondent submitted that the learned judge was guided by the principles for granting an injunction as set out in the prominent case of **Giela v Cassman Brown [1973] EA 358**. There was *prima facie* evidence that the residual balance was to be paid within 12 months; and that by necessary implication, the applicant was late in making payments for the months of February, March, and April, 2016 and therefore the outstanding arrears justly incurred penalties. Nevertheless, the learned judge's decision turned on a balance of convenience wherein he was moved to accept the difficulties the appellant had in meeting the monthly instalments of **Kshs.5,651,254.94/=** and reduced the amount to **Kshs.3 million**. The respondent relied on **Fina Bank Ltd v Spares & Industries Ltd Civil Appeal No. 51 of 2000** to show that the learned judge had relieved the appellant of the bargain it had voluntarily entered into by reducing the monthly instalments payable in granting the conditional injunction.

The respondent submitted that Intex was made aware of the proposed review of interest rates and directed the Court to the appellant's acknowledgment of those notices. In any event it was submitted that the reviewed rates were not applied. It was also submitted that though the learned judge found that the guarantee issued by KCB was limited to **Kshs.28,900,873.39/=** plus interest, the limit did not affect the respondent's right to charge interest on arrears or alter the monthly instalments from the previously agreed rates.

The respondent denied that it was required to file a counter-claim to compel the appellant to make payments of its debt as the demands by the respondent and the enforcement of the guarantee were sufficient for purposes of enforcing its contractual rights for payment. All in all, the respondent submitted that the appellant had failed to show sufficient justification to warrant interference with the learned judge's discretionary power and urged the court to dismiss the appeal with costs.

We have considered the rival written submissions, the decisions cited by each of the parties, the record as well as the law.

As submitted by the respondent's counsel, it is not disputed that the appellant as at **15<sup>th</sup> September, 2015** was indebted to the respondent to the tune of shillings two hundred ninety-eight million nine hundred thousand eight hundred seventy three and thirty nine cents (**Kshs 298,900,873.39**). It is also agreed that Kenya commercial Bank took over the appellant's indebtedness to the tune of shillings two hundred seventy million (**Kshs 270,000,000**) leaving a balance of shillings twenty eight million nine hundred thousand eight hundred seventy three and thirty nine cents (**Kshs 28,900,873.39**) which was restructured and was payable by monthly instalments of shillings two million, six hundred seventy seven thousand, nine hundred seventy seven (**Kshs 2,677,977**) inclusive of interest, agreed at 20% per annum.

According to the respondents, the appellant defaulted and a penalty interest was applied, consequence of which the respondent revised the re-payments to shillings five million six hundred fifty one thousand two hundred fifty four and ninety four cents (**Kshs 5,651,254.94**) per month. On the other hand, the appellant contends that no interest rate would be varied until they were given prior notice.

The appellant faulted the trial judge for finding that the respondent was entitled to charge penalty interest without giving notice of one month before effecting any change on the applicable interest. The learned judge was further faulted for ordering that the appellant continues to remit monthly instalments of not less than shillings three million (**Kshs 3,000,000**) with effect from **31<sup>st</sup> October, 2016** inspite of the applicable interest rate not having been determined.

It is important to state that with all the appellant's grievances, it is not disputed that it owes the respondent money. The dispute between the two of them is as to how much is outstanding. At the time of takeover of the appellant's indebtedness by KCB, the sum due and owing was **Kshs 28,900,873.39**). It was agreed that this sum was to be repaid by instalments of **Kshs 2,677,977**. According to the respondent, the appellant defaulted and proposed to increase it to **Kshs 5,652,254.94**. The fact of the matter is that the appellant is indebted to the respondent. As to the exact amount of indebtedness, the applicable interest rate, and whether the respondent is entitled to charge penalty interest, are all matters to be determined after the trial, which is still pending at the High Court. The learned judge, in the impugned ruling directed that the appellant continues to remit instalments of not less than Kshs 3,000,000 permmmonth with effect from **31<sup>st</sup> October, 2016**. Further, he directed that as long as themappellant makes those payments, the respondent was restrained from calling up themguarantees. In our view, the learned judge exercised his discretion judicially and itmhas not been shown that he misdirected himself.

In the celebrated case of **MBOGO & ANOTHER VS. SHAH, [1968] EA 93**, it was held:

***“It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there had been injustice”.***

We do not discern any misgiving herein.

Again, we hold the view that it was not necessary for the respondents to have filed a counter-claim as it has the right to exercise its statutory power of sale and the conditional order of injunction which the learned judge granted was subject to payment of Kshs 3,000,000 per month in view of the fact that Intex's indebtedness is not disputed.

We also hasten to add that as a Court, we do not wish to make conclusive remarks in this matter bearing in mind that the suit is pending lest we embarrass the trial court. (See **UNITED INDIA INSURANCE CO. LTD, KENINDIA INSURANCE CO. LTD & ORIENTAL FIRE & GENERAL INSURANCE CO. LTD VS. EAST AFRICA UNDERWRITERS (KENYA) LTD [1985] EKL.R.**

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

***Dated and Delivered at Nairobi this 28th day of June, 2019.***

**E.M. GITHINJI,**

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**JUDGE OF APPEAL**

**M. KOOME**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

I certify that this is a  
true copy of the original.

**DEPUTY REGISTRAR**