



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, J.J.A)

CIVIL APPEAL NO. 48 OF 2015

BETWEEN

PIUS KIMAIYO LANGAT APPELLANT

AND

THE CO-OPERATIVE BANK OF KENYA LIMITED RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Milimani, Nairobi (J. M. Mutava, J) dated 4th October, 2012 in Civil Case No. 499 of 2004)

JUDGMENT OF THE COURT

1. There is a perennial vexing nightmare for borrowers who take a relatively small loan from a lending institution, but a few years down the line, the institution drops a bombshell of a demand for the immediate payment of a colossal sum, literally bankrupting the borrower, if not confining him/her to a hospital bed due to depression. The main bones of contention are invariably: uncertainty of lending terms and documentation, fluctuating rates of interest, penalty interest, default charges, interest on arrears, additional interest, commissions, bank charges, bank statements or lack of them, among others which may or may not have been part of the written contract. Take this case.

2. The appellant, Pius Kimaiyo Langat (**Langat**) was said to have borrowed Sh. 500,000 in 1997 but in 2004 the amount had ballooned to Sh. 4.7 million, rose further to Sh. 6.2 million in 2009 and continued to rise after the Judgment of the High Court in 2012. The respondent, Co-operative Bank of Kenya Ltd (**the bank**) was the lender. Its original claim filed on 15th September, 2004 was simply stated in three paragraphs, asserting that on 25th August, 1997 it gave a credit facility of Sh. 500,000 (Sh. 100,000 in overdraft and Sh.400,000 in term loan) to Langat. Due to his default in payments, the amount rose to Sh. 4,706,570 as at 25th March, 2004 which amount the bank sought to recover with interest thereon at 21% p.a until payment in full. The summons to enter appearance seems to have been issued on 16th December, 2005, which would take it beyond its one year validity, hence acceptance of service by Langat under protest.

3. He denied ever owing such amounts to the bank and dared it to produce the loan facility agreement, any periodic statements of accounts sent to him, statement indicating the interest rates applied to the loan, and any demand notices served on him. The bank responded by listing ten documents as the only ones it had in its possession as follows:

- ***“Loan Appraisal for Individual Borrowers***
- ***Application for term loan of Kshs.670,000/=***
- ***Application for loan facility of Kshs.750,000/=***
- ***Letter of Offer***
- ***Letter of Set Off***

- ***Charge over Title No. Irong/Mutei/321; Irong/Iten/1540 & 1553: Irong/Mutei/352 & Irong/Mutei/347***
- ***Valuation reports for Title No. Irong/Mutei/321; Irong/Iten/1540 & 1553: Irong/Mutei/352 & Irong/Mutei/347***
- ***Correspondence between the plaintiff and Kandie Kimutai & Co. Advocates on registration of the Charges over Irong/Mutei/321; Irong/Iten/1540 & 1553: Irong/Mutei/352 & Irong/Mutei/347***
- ***Chargee?s cautions registered over Irong/Mutei/321; Irong/Iten/1540 & 1553: Irong/Mutei/352 & Irong/Mutei/347***
- ***Statement of Account in respect of the defendant (Account No. 624033) University Way Branch.”***

4. The bank went ahead to apply for, and was granted, an amendment of the plaint to plead that the loan was secured by four properties without any executed Charge or consent of the Land Control Board. It sought an order to compel Langat to execute a Charge and the Land Control Board consent forms. The oral testimony given by the bank's sole witness, **John Martin Chege**, was however, rather revealing. Chege joined the bank in 2007 as a recoveries officer and had neither dealt with Langat as a customer nor spoken to anyone in the bank who had dealt with him. He relied on the documents made available by the bank. Among them were Langat's letters dated 21st July, 1997 applying for a term loan of Sh. 670,000, and 6th August, 1997 seeking enhancement to Sh. 750,000. In Chege's evidence in chief, he asserted that the loan of Sh. 700,000 was approved but there was no support for that assertion, hence his concession in cross examination that Langat never got the term loan. He produced a form showing the loan appraisal process and a letter to Langat dated 25th August, 1997 offering him Sh.100,000 overdraft and Sh. 400,000 term loan. The interest was to be the base rate plus 6%, or 28% at the time, subject to change at the bank's discretion.

5. Acceptance of that offer was premised on the following clause:-

“The Borrower?s acceptance of this offer will be signified by the Borrower providing the Lender at the address at the beginning of this letter with the following:-

- a. The enclosed duplicate of this letter duly signified on the Borrower?s behalf as evidence of acceptance of the terms and conditions stated herein.***
- b. The enclosed letter of set off duly signed.***
- c. Enclosed annexure of General terms and conditions duly signed.***
- d. Enclosed loan agreement form duly signed.***
- e. Enclosed personal Guarantee forms duly signed by Kiplagat Chesaina Kose.”***

6. According to Chege, Langat only complied with (a) and (b) above and therefore the processing of the loan did not proceed further. Indeed, from the statement produced to show all banking transactions since January 1995 to 2003, no credit of the term loan of Sh. 400,000 is evident. The statement shows that even before the offer letter was issued on 25th August, 1997, Langat had an overdraft of Sh. 318,756 on his current Account with the bank which overdraft he had been running since he joined the bank. The bank manager's comments made in the appraisal form on 20th August, 1997 on *'the manner the account is operated and the borrower's commitment'* stated as follows:

"The customer had an initial limit of Sh.80,000 expiring in August 1996. The customer later applied for higher limit and he forwarded securities to cover the limit. Although the overdraft has been running higher than approved limit the customer has the capacity to

operate his account effectively" "The commitment the branch is aware of is the customer's current account unauthorised limit of Sh. 291,714.70. Although the account is overdrawn it is within the customer's ability to pay." That was the position before Langat made an application for a term loan of Sh. 750,000. His salary was also being processed through the bank as he was the Chairman of Posta Sacco.

7. It was Chege's evidence that as soon as the account was overdrawn up to Sh. 500,000 in August 1997, no further cheques from Langat were honoured. Explaining how the huge debt accrued thereafter, Chege testified that it was because of penalty interest on the overdraft of Sh. 500,000, sundry commissions, ledger fees, service fees and such like. The interest charged ranged from 33% p.a to 71% p.a and was debited monthly into the account, thereby compounding interest on the interest. He mentioned some letters as having been written by the bank's Advocates but they are nowhere in the record before us.

8. In cross examination, Chege made some crucial concessions and confirmations of his evidence in chief. We may sample some of them: that it would be unconscionable for a bank to charge interest which would be more than the monthly payments on a loan; the acceptance clause in the letter of offer was not complied with; drawdown of the facility was never made since the securities were not perfected; the bank never made any notification to the Central Bank in respect of any interest changes; there was an existing arrangement with Langat which was not the subject matter of the offer letter dated 25th August, 1997; the interest rates applied to the overdraft was between 33% and 71% pa plus an extra 3% penalty; there was no repayment program communicated to Langat by the bank; no bank statements were forwarded to Langat; and that the bank stopped honoring Langat's cheques when the overdraft exceeded Sh. 500,000 on 25th August, 1997.

9. In the light of such evidence, Langat chose, instead of testifying, to have the suit struck out, firstly, because the summons to enter appearance were invalid, and secondly, because the suit was statutorily barred. He also raised issues of law challenging the interest loaded on the purported loan and overdraft as unconscionable, illegal and a violation of **section 44** of the **Banking Act**; and the order sought for compulsion to sign Land Control Board's consent forms as an unknown cause of action in law.

10. Mutava, J. who heard the suit framed five issues and made findings thereon as follows:-

i. Whether summons to enter appearance were valid and validly served:

Since Langat had entered appearance, filed defence and defended the suit to its conclusion, it was superfluous for him to still insist that the issuance and service of summons was irregular. **Article 159 (2) (d)** of the Constitution, enjoined the court not to accord undue regard to technicalities where they would impede substantive Justice.

ii. Whether the Plaintiff's claim is statutorily time-barred:

Relying on the case of ***Shire vs Thabiti Finance [2000] LLR 1455 (CAK)***, computation of limitation period commenced from the date of the last acknowledgement of part-payment i.e **28th April, 1999**. Under **section 4** of the Limitation of Actions Act (LAA), the debt became statutorily time barred on **27th March, 2006**. As the suit was filed on **15th April, 2004**, it was within the limitation period as contemplated by **section 23 (3)** of (LAA). Furthermore, in a claim for a bank debt that attracts interest on contractual terms, the time for initiating action does not lapse upon the lapse of statutory period of limitation as every time interest is debited on the borrower's account, a new cause of action arises. The High Court case of ***Deposit Protection Fund vs Rosaline Njeri Macharia & Another HCCC No. 399 of 2005*** (unreported) was relied on.

iii. Whether the Defendant was advanced the facilities forming the basis of the Plaintiff's claim:

Yes, Langat was advanced an overdraft and term loan facility of Kshs. 500,000/= as evidenced in the letter of offer dated **25th August, 1997**. The letter constituted the contract of advance of banking facilities between the parties and superseded any informal accommodation or arrangements that the debtor had hitherto enjoyed from the bank.

iv. Whether the Defendant repaid the loan and overdraft facilities extended to him:

The repayments made by Langat through salary remittances did not match the contractual repayment obligations of the facility. Consequently, the debt grew unabated to the sum of Kshs. 4,706,570.05 as at **25th March, 2004** and Kshs. 6,218,619.95 as at **15th September, 2009**.

v. Whether the interest levied on the account was illegal and contrary to Section 44 of the Banking Act:

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.

11. Judgment was ultimately entered for the bank in the sum of **Kshs. 4,706,570.05** together with interest thereon at **21%** per annum from **25th March, 2004** until payment in full.

12. Those are the findings which aggrieved Langat and he challenges them before us on the following grounds which may be summarized, that the learned Judge erred in law and fact by-

a. holding that the respondent's claim was within the limitation period as contemplated by section 23(2) of the Limitation of Actions Act.

b. holding that the appellant did not tender any evidence to controvert the respondent's evidence.

c. refusing to consider the prejudice suffered by the appellant at the respondent's misconduct and procedural unfairness in failing to send bank statements for over 6 years.

d. upholding the contractual provisions on the letter of offer when it was clear that the offer was not accepted.

e. failing to find that there was no loan amount ever disbursed to the appellant but rather an overdraft facility.

f. ignoring the fact that the respondent failed to adduce evidence to prove its allegation that the principal amount advanced was not repaid.

g. misinterpreting the provisions of section 44 of the Act.

h. entering an aggravated and unconscionable Judgment based on non-contractual interest

rates, illegal charges, penalties and sundry commissions.

i. failing to find that the respondent had failed to discharge the evidentiary burden of proof.

13. The appeal was disposed of by way of written submissions and oral highlights. Learned Counsel for Langat, **Mr. Charles Kanjama** and **Mr. Marwa** both instructed by M/s Muma & Kanjama, Advocates, urged the appeal by answering four broad questions based on the above grounds. The 1st question was on **section 4** of the **Limitation of Actions Act** which bars a cause of action founded on contract from being brought after the lapse of 6 years from the date when the cause of action accrued. According to counsel, the six year period must be pegged on the date when summons to enter appearance were issued on **16th December, 2005**. Accordingly, any cause of action that accrued before **16th December, 1999** was statute barred. In this case, observed counsel, the cause of action could either have arisen when Langat exceeded the agreed overdraft on 7th February, 1997; when the last debit was allowed in the account on 25th September, 1997; or the date of the last credit in the account on 28th April, 1999. Whichever way, it was statute barred, submitted counsel. Reliance was made on the cases of **Allan P. Karanja Wathigo vs C.M.C Holdings Company Limited HCCC No. 163 of 2006** and **Divine Contractors Ltd vs Shirinkhanu Sadrudin Samani, Civil Appeal No. 142 of 1997.**

14. Mr. Kanjama further criticized the finding by the trial judge that Langat had acknowledged the debt by making payments when there was no such evidence. As no loan was advanced to Langat, and only an overdraft existed, there could be no basis for the findings made. Reliance by the trial court on the cases of **Shire vs Thabiti Finance (supra)** and **Deposit Protection Fund vs Rosaline Njeri Macharia & Another (supra)**, on extension of cause of action by payment was also misplaced. Counsel closed by citing the case of **Divecon Ltd vs Shirinkhanu Sadrudin Samani, Civil Appeal No. 142 of 1997** where it was held by this Court that the limitation period of six years in respect of contracts cannot be extended.

15. The next question was the evidence presented by the bank and on this counsel was emphatic that the legal burden of proof lay on the bank but was never discharged. Only upon proof by the bank could Langat be called upon to discharge any evidentiary burden but there was none. In counsel's view, the crucial issues for proof were whether there was a loan agreement or an overdraft; whether any loan was advanced to Langat; whether the unconscionable interest rates imposed and demanded by the bank were agreed upon; whether the bank issued any bank statements to Langat for a period of 7 years before filing suit; whether there was any acknowledgement of debt; and whether the bank was forthright in its bank/customer relationship with Langat. All these, it was submitted, were either conceded by the bank's witness or lacked proof on a balance of probability.

17. In that respect, the Supreme Court case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR** was relied on for the proposition that:

"The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law. On the other hand, the evidential burden is a shifting one, and is a requisite response to an already-discharged initial burden. "The evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue" [Cross and Tapper on Evidence, (Oxford University Press, 12th ed, 2010, page 124)]."

18. Lastly, Counsel dwelt on the letter of offer dated 25th August, 1997 for a term loan and overdraft and stressed that it was never accepted in fact or in law. As such, it was submitted, it could not form any basis of a contractual relationship. Even if it was considered, urged counsel, there was no compliance with **section 44** of the Banking Act which prohibited the increase in the rate of banking or other charges without Ministerial approval. In his view, the indiscriminate rates of interest ranging between 33 % and 71% p.a, which the bank applied leading to escalation of a debt from Sh. 500,000 to 4.7 million, without

any recourse to the the borrower were unjustified, illegal and unconscionable. The shady manner in which the alleged credit facility was handled coupled with the failure to provide information to the appellant as a borrower was enough basis for interference by courts of law, concluded counsel. Several cases were relied on, including:-

Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR; Givan Okallo Ingari & Another vs Housing Finance Co. (K) Ltd [2007] 2 KLR 232; Elizabeth Wangui Njuguna vs Housing Finance Company of Kenya Ltd [2006] eKLR; Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298; Manulife Bank of Canada vs Conlin [1996] 3 S.C.R. 415; and a Journal Paper by Lindy Wilmott and Bill Duncan 'Clogging the Equity of Redemption: An outmoded Concept?' Vol 2 No 1 QUTLJJ.

19. Responding to the appeal, learned counsel for the bank **Mrs. Macharia F. S.** instructed by M/s Mungai Kalande & Co. Advocates submitted on the issue of limitation that there was a finding of a part payment made by Langat towards the loan on 28th April, 1999 and therefore the computation of time commenced on that date. Six years would take us to 27th April, 2006, but the suit was filed on 15th April, 2004, within time. In counsel's view, there were payments made in August 2000 before the account became nonperforming in 2004.

20. Counsel further sought to persuade us not to disturb the findings of the trial court since they were supported by evidence on record which was not rebutted. In her submission, a mere denial of a claim is not a sufficient defence. There must be affidavit, oral or other evidence to show a good defence. The case of **Magunga General Stores vs Pepco Distributors Ltd [1987] 2 KAR 89**, was cited in aid.

21. As for the offer letter, counsel supported the finding that it formed the contractual basis of the loan whose security documents were never perfected and so the loan facility was converted into an overdraft. The intention of the offer letter, according to counsel, was to enter into a loan agreement and it was therefore enforceable. Citing several authorities on construction of contractual documents, counsel submitted that the intention of the parties should be ascertained objectively. When this is done it will be confirmed that the amount demanded by the bank was not unjust enrichment but money due to an honest lender. Langat on the other hand was not deserving of equity because his hands were soiled by nonpayment of the loan for a long time. The cases cited included:- **Lalji Karsan Rabadia & 2 Others vs Commercial Bank of Africa Limited [2015] eKLR**; and **Wallis vs Smith [1882] 21 Ch. D 243 at Page 274**.

22. We have anxiously considered the appeal, as well as the submissions of counsel in the manner of a retrial in order to arrive at our own conclusions of fact and law in the matter. See **Rule 29 of the Court of Appeal Rules**. As we do so, we must accord due respect to, and not lightly differ from, the findings of the trial court which had the added advantage of seeing and hearing the witnesses. Nevertheless, this Court has stated time and again that it will interfere with such findings if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching them. See **Jabane vs Olenja [1986] KLR 661**. Indeed, an appellate court is not bound to accept the factual findings of a trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally. See **Mwangi vs Wambugu [1984] KLR 453**.

23. In our view, the following germane issues arise for discussion and are dispositive of this appeal:-

i. Whether summons to enter appearance were valid?

ii. Whether the suit filed by the bank was statute barred?

iii. If not, whether the letter of offer dated 25th August 1997, upon which the suit was grounded constituted a contract between the parties.

iv. Whether the contract, if any, and the interest charged by the bank was in good faith or unconscionable.

v. What orders should ensue.

i. and (ii) On Limitation

24. It is common ground that the cause of action in this matter was based on contract and that **section 4** of the **Limitation of Actions Act** prohibits suits filed after the end of six years from the date on which the cause of action accrued. As **Potter, JA** observed in the case of **Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981)**:

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in **Divecon vs Samani (1995-1998) EA 48** stated as follows:-

“...to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „„the wording of section 4 (1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked??.

25. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See **Letang vs Cooper [1964] 2 All ER 929 at 934, per Lord Diplock. Lord Esher, M. R.** in the case of **Read vs Brown (1888), 22 QBD 128**, defined a cause of action as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.

So, when was the bank in this case entitled to obtain a remedy from court against Langat?

26. The bank ostensibly filed its suit on **15th September, 2004** but the Summons to enter appearance were not issued until **16th December, 2005**, although there is an unauthenticated entry of "**January**" which is cancelled and "**December**" inserted. In all probability, however, "December" was the correct entry because Langat was not served until May the following year when he entered appearance and filed defence under protest on **18th May, 2006**. On that premise, the summons to enter appearance were invalid in law by dint of **Order 5 Rule 2** of the **Civil Procedure Rules** which provides in part: "*A summons (other than a concurrent summons) shall be valid in the first instance for twelve months beginning with the date of its issue...*" Its validity may be extended from time to time before service on a defendant. In the case of **Udaykumar Chandulal Rajani & 3 Others vs Charles Thaithi [1991] eKLR**, this Court, differently constituted, was faced with a similar issue and it held:

“Order V rule 1 provides a comprehensive code for the duration and renewal of summons, and therefore the noncompliance with the procedural aspect caused by failure to renew the summons under this rule is such a fundamental defect in the proceedings that the inherent powers of the court under section 3A of the Civil Procedure Act cannot cure. The first summons having expired and the Deputy Registrar having held that there was no proper service he could not in

the circumstances re-issue fresh summons after the expiry of the aforesaid 24 month period. Neither did the entry of appearance by the defendants revive the summons which had expired."

27. This is distinguishable from cases where a defendant is served with a defective summons to enter appearance and then enters appearance, files defence and participates in the trial throughout. He is taken to have waived the defect and will not be heard to complain in such case. This Court, again differently constituted, made that distinction in the case of ***Equatorial Commercial Bank Limited vs Mohansons (K) Limited [2012] eKLR*** stating:

"The facts in the case of Udaykumar are starkly distinguishable from those of the present one. In the cited case of Udaykumar, the summons had expired and accordingly it was not in existence, nay it was lifeless."

28. On the basis of those authorities, we find and hold that the trial court in this case erred in law in dismissing the objections raised by the appellant on the validity of the summons to enter appearance and finding that the appellant had 'entered appearance, filed defence and defended the suit' and therefore validated the summons to enter appearance. In point of fact there was no unconditional appearance or defence filed by the appellant. They were all expressly done under protest. The summons to enter appearance were thus invalid.

29. Back to limitation. The learned Judge found that the cause of action arose on 28th April, 1999. The basis of that finding was the further finding that the appellant had admitted that he made a final part payment of the debt on that day. The Judge then applied the provisions of **section 23 (3)** of the **Limitation of Actions Act** to hold that the limitation period under **section 4** had been extended. The reasoning was as follows:

"...where the debtor acknowledges the debt or makes part-payment thereof, computation of limitation period commences from the date of the last acknowledgement or part-payment, as the case may be. In that regard, the Defendant in the present suit having admitted that he made a final part-payment of the debt on 28th April 1999, the period of limitation under Section 4 of the Act would commence from the date of that last part-payment. The computation of time for purposes of Section 4 of the Act would mean that the debt became statutorily time-barred on 27th March 2006..... There is judicial authority supportive of the view that in a claim for a bank debt that attracts interest on contractual terms, the time for initiating action does not lapse upon the lapse of the statutory period of limitation as every time interest is debited on the borrower's account, a new cause of action arises."

The authority alluded to was ***Deposit Protection Fund vs Rosaline Njeri Macharia & Another HCCC No. 399 of 2005.***

30. With respect, there was no factual or legal basis for those findings. In the first place, the ***Deposit Protection Fund case*** relied on was not followed in the Court of Appeal decision in ***Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another [2016] eKLR.*** This Court stated:

"As to whether the suit was statute barred under the Limitation of Actions Act, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the "suit" having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit."

31. In the second place, there is nowhere in the record that an admission was made by the appellant that he made a payment towards any loan repayment on 28th April, 1999. The appellant did not even testify! The statement produced by the bank to show the state of the appellant's account does not help either. It has a hotchpotch of entries that defy understanding without expert explanation and the bank's witness, Chege, who produced it said nothing about the appellant having made a final part payment on 28th April, 1999. He was not an Accountant or any expert. The finding was made without supportive evidence and we so find.

32. We must therefore fall back on the pleadings where the bank pleaded a loan facility contract entered into on 25th August, 1997. It does not say when default, and therefore the cause of action, arose but the evidence of Chege is instructive. We may quote him:-

“We did not honour any cheques from 25th August 1997. The defendant could not get any more funds from that account. From 25th August 1997, 6 years elapsed in August 2003. I am aware that suit should have been filed within 6 years. The plaint was filed in September 2004. There have been no statements of loan account. Only the overdraft account. The bank could only supply the statements upon request of the debtor. The bank could only supply upon request. I am not aware that any of the statements was supplied to the debtor”.

33. And so it is that the bank knew it had a cause of action as at 25th August, 1997, at any rate for recovery of Sh. 500,000, but took no action to seek recovery of the debt. Instead, it was making an offer for a fresh loan and overdraft to the appellant. We shall say more on this later in this judgment. As regards limitation, it is our finding, upon consideration of the facts and applicable law, that the suit filed 15th September, 2004 was statutorily barred as at 24th August, 2003.

34. The findings on validity of summons to enter appearance and limitation of actions would have sufficed to conclude this appeal in favour of the appellant. We think, however, that it is necessary to examine the other germane issues.

iii. On the Offer Letter

35. As stated earlier, the learned trial Judge found that Langat was advanced an overdraft and term loan facility of Kshs. 500,000/= as evidenced in the letter of offer dated 25th August, 1997, and that the letter constituted the contract of advance of banking facilities between the parties. We may listen to Chege again on this aspect:

“The bank purported to advance an overdraft facility and not a term loan. Acceptance of the offer was subject to completion of formalities. Acceptance could have been signed without meeting any formalities. The clause on acceptance had consequences. Five securities list in the letter of offer were part of the formalities. None of the securities were ever availed. The provision on draconian (sic) states that the term loan and overdraft facility was available for drawdown subject to completion of the security and guarantee formalities. These formalities were not met. The facility could not have been,(in) that event allowed... The 5 documents that would signify acceptance were not fully provided. Only (a) and (b) were availed.”

36. So that, according to the bank, the letter of offer was prepared on the basis of an application for a term loan made by the appellant. For a contract to ensue in respect of that offer, it had to be accepted in the manner prescribed by the bank, but on the evidence of the bank itself there was no acceptance. In the case of ***William Muthee Muthami vs Bank of Baroda [2014] eKLR*** this Court observed;

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”

37. Lord Clarke, in ***RTS Flexible Systems Ltd vs Molkerei Alois Müller GmbH [2010] 1 WLR 753*** at

[45], [2010] UKSC 14 put it this way:

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41.

39. We have carefully examined the facts and the law on this issue and we are persuaded that the letter of offer dated 25th August, 1997 did not constitute a contract between the parties. Indeed, the bank itself admitted as much through Chege. That is why no securities were perfected and no money was credited to the appellant's account as confirmed by the bank. None of the terms proposed in that letter are of any use to the bank. The trial court clearly misapprehended the evidence on record and arrived at the wrong conclusion. It follows that the bank's case premised on the offer letter comes tumbling down.

iv. On Good Faith and Conscionability

40. That leaves the evidence of the bank, again confirmed by Chege, that there was an existing overdraft before Langat made an application for a term loan. He stated in cross examination thus:

(Referred to statement of Account No. 6 pages 5-10). The statement starts on 23/1/1995. This entry pre-dates the offer letter. This means there was an existing arrangement between the defendant and the plaintiff that was not subject to the offer letter”.

41. It was also confirmed in the appraisal forms submitted in evidence that there was an initial overdraft of Sh. 80,000 which expired in 1996. The limit was further informally enhanced and stood at Sh. 291,714.70 as at 20th August, 1997. According to Chege, it stood at Sh. 372, 276.75 as at 26th August, 1997, and reached Sh. 500,000 by September 1997 when no further cheques from the appellant were honoured. More importantly, Chege confirmed that there were no terms given to the appellant on the overdraft - whether relating to interest rates charged or programme of payment - and for the next seven years, no statement of accounts was sent to the appellant. The bank simply imposed any interest rate it chose to. We may listen to Chege again:-

“The entry on 18/8/1997 shows that the rate of interest changed from 34% to 33%. On 30/9/1997 the rate changed from 37 to 38%. The rate of interest in the letter of offer was 28% p.a. The bank never charged this rate during the term of the overdraft. On 26/8/1997 the rate charged was 33% - 34%....Save for the figure in the loan appraisal document, there was no repayment programme communicated to the customer. The interest rate at 16/3/1999 was 67%. On 31st July, 1998 the rate was 71%. The bank was entitled to charge this rate. The bank was also charging an extra penalty of 3% on the overdraft. This is shown in the entry dated 22/9/1997. This is because the overdraft was beyond the limit account. By 2001, monthly interest was more than Kshs.46,000/= per month (page 30). There was no agreement applicable once the overdraft exceeded Kshs.500,000/=. As per appraisal, Mr. Langat was regarded as a man of integrity hence the bank allowed him to exceed the limit. We did not pay any cheque after the limit exceeded Kshs.500,000/=. All the other entries of debit constituted interest charges and penalties. These were as dictated by the market”.

42. The conduct of the bank as summed up above mirrors the conduct of another bank in the case of *Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited [2014] eKLR*. On the issue of charging interest, (increased from 14% to 45% in that case) this Court examined comparative jurisprudence and came to the conclusion that, even where a lending institution has a written clause permitting it

'in its sole discretion from time to time to charge different rates for different accounts and such interest to be calculated on daily balances and debited monthly by way of compound interest and together with commission, commitment charges, and other usual bank charges and other costs and expenses incurred or to be incurred by the Bank in relation to the customer,' the discretion was not absolute. It cannot be exercised willy nilly to charge exorbitant interest. It was held:

"the discretion on the respondent in the present case was not completely unfettered, and applying those sentiments to the appeal now before us, we find it objectionable that the lender can vary interest to its benefit, without any recourse to or passing such information to the borrower, especially where such interest rises up to an exorbitant level. There does not appear to be any notice to the appellant in this case as to what the rate of interest would be. As stated earlier, the right or discretion given under the contract to vary interest was not unfettered and the contract must be construed reasonably. It must be shown or at least be self evident that at the time the interest was being changed, it was brought to the attention of the borrower."

43. In the case before us, there were no terms in relation to the interest charged and no information was rendered to the appellant. That situation would be worse than the earlier case. Information is crucial in such matters. Apart from enabling the borrower to make an informed decision on the manner of liquidation of the debt or to re-assess the relationship with the bank, it gives an objective appraisal on the circumstances necessitating the interest rate increases: whether it was as a result of the appellant's default; an economic change that altered the bank's base lending rate; loss of value of money or other genuine reasons. It was an act of bad faith, we so find, for the bank to withhold information, including properly kept bank statements, from the appellant.

44. This Court has never shied away from interfering with unconscionable contracts. In *Kenya Commercial Finance Company Ltd vs Ngeny & Another [2002] 1KLR* it stated:

"The court will not interfere where parties have contracted on arms-length basis. However by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions, thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions."

45. Halsbury's Laws of England Volume 22 (2012) 5th Edition at Paragraph 298 states of unconscionability:

"Even in the absence of duress of persons or undue influence, there has long been jurisdiction to interfere with harsh and unconscionable transactions in several different areas of the law: for instance, in respect of salvage agreements; or against contractual penalties, forfeiture of mortgages, extortionate loans or expectant heirs. ... The jurisdiction of the courts to set aside is based on unconscientious conduct by the stronger party; relief will not be granted solely on the grounds that the transaction is unfair or improvident."

46. Finally on unconscionability, this Court in the *Margaret Njeri Muiruri case* (supra) stated:

"Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the a procedural abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case (See Black's Law Dictionary, 9th Edition, Gardner, Ed.)."

47. We associate ourselves with the above case law. The unwritten terms of lending in relation to the overdraft in this matter which appears to have emboldened the bank to run amok in its interest charges up to 71% p.a, bare the hallmarks of an unconscionable transaction, and we so hold.

48. Having so found on the relevant issues, it only remains to make the orders which we now do, that the appeal is allowed and the judgment together with all consequential orders of the High Court is set aside and substituted with an order dismissing the respondent bank's case. The appellant shall have the costs of the appeal and the costs in the court below.

Orders accordingly.

Dated and delivered at Nairobi this 1st day of December, 2017.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR