



IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Omolo, Tunoi & Bosire JJ A)

CIVIL APPEAL NO 135 OF 2001

AJAY INDRAVADAN SHAH APPELLANT

VERSUS

GUILDERS INTERNATIONAL BANK LTD.....RESPONDENT

(Appeal from the ruling & order of the High Court of Kenya at Milimani (Ransley

Comm/Assize) dated 3rd February 2002 in HCCC No 1121 of 1999)

JUDGMENT

Section 26 (1) of the Civil Procedure Act, cap 21 Laws of Kenya provides that:

“Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.”

This section, in our understanding, confers upon the Court the discretion to award and fix the rate of interest to cover three stages, namely:

- (1) the period before the suit is filed;
- (2) the period from the date the suit is filed to the date when the Court gives its judgment, and
- (3) from the date of judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion, fix.

We further understand these provisions to be applicable only where the parties to a dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the Court has no discretion in the matter and must enforce the agreed rate unless it be shown in the usual way either that the agreed rate is illegal or unconscionable, or fraudulent.

Ajay Indravadan Shah, the appellant herein, borrowed Kshs 15 million from Guilders International Bank Limited, the respondent. The borrowing was apparently on 20th March, 1998. Instead of demanding security from the appellant as banks do invariably demand from other Kenyans, the appellant was only

required to and did sign a “guarantee” to repay the sum lent which was not to exceed Kshs 15 million and in addition:

“such interest (in the absence of any agreement to the contrary) shall be calculated with the usual rests and at the ruling rate from time to time for bank advances in the territory in which the liability of the principal is incurred.”

As we have said, “the Principal” who borrowed the money was the appellant himself and he was only required to guarantee that he would repay the sum he had borrowed. No rate of interest was fixed in the document signed by the appellant or in any other document that we are aware of, so that interest on the loan was to be determined by:

“the ruling rate from time to time for bank advances

We were told during the hearing of the appeal, and there was evidence on record to show, that at the time of the borrowing the appellant was himself the chairman of a bank know as Trust Bank (Kenya) Limited, which is now in liquidation, and that in his position as chairman of a bank, he knew or ought to have known what “the ruling rate from time to time for bank advances”, was and that it was not, therefore, necessary to specify the rate. We appreciate the force of this argument in the circumstances of this particular case, but we must hasten to add that in some other circumstances, banks which fail to stipulate particular rates of interest in lending agreements run the risk that the Courts will fall back on the exercise of their discretion conferred by section 26 *ante*, and when it comes to the exercise of discretion, the rate of interest can be as low as 14% per annum which is currently the Court rate. In the case of *ABN AMRO Bank N V v Le Monde Foods Limited*, Civil Application No NAI 15 of 2002 (UR 11/ 02), interest was claimed and awarded:

“..... at commercial rates prevailing from time to time from the date of filing suit until payment in full.”

After judgment the decree-holder returned to court to lead evidence as to what the prevailing commercial rates were and called a specialist, one Mr Walwa to prove what rates were applicable. That case is still pending and it would not be right for us to make any comments on it. But in its ruling dated 8th March, 2002, the Court did wonder:

“..... Whether the Courts should surrender their power to state what interest rate is payable on a judgment it has delivered to persons such as Mr Walwa is of course a moot point, but as to whether the judgment of a court ought to be understood only by persons as qualified as Mr Walwa is clearly an undesirable practice.”

What the Court was saying in that ruling and what we are saying in this judgment is that banks ought to specify in their lending agreements what interest rate is payable. If the lending bank wishes to charge commercial rate of interest or the ruling rate or whatever other name they choose to call it, we can see absolutely no difficulty in ascertaining what that rate is at the time the agreement is being made and inserting it in the agreement with the proviso that it is subject to alteration, either upwards or downwards, as circumstances may dictate.

In the present case before us, the respondent instituted the suit against the appellant on 17th August, 1999, more than one year after the agreement had been entered into and interest was claimed at the rate of 47%. There was no evidence as to whether that was “the ruling rate” at the time the agreement was entered into or at the time when the suit was filed. Clearly the emerging practice by lending institutions of providing for some vague rate of interest, such as “the ruling rate” in this case or “commercial rates” as in the *ABN Amro Bank NV, ante*, while it is obviously advantageous to the banks themselves, can work an injustice and oppression to the borrower. As an example, if the ruling rate in this case was, say 35% per annum at the time of borrowing, and at the time of filing suit it was 40%, it would clearly be unjust and oppressive to demand interest at the latter rate throughout the period which would be the consequence of granting the respondent’s claim as pleaded in its plaint. It is not surprising to us that Parliament has sought to control the rate of interest chargeable by banks.

Originally, when the appellant was served with the claim, he filed a defence denying liability. The respondent next proceeded to file a chamber summons seeking the striking out of the defence and consequent entry of judgment. The appellant's next move was to file another summons admitting the decretal sum claimed and seeking to be allowed to liquidate it by instalments. Judgment was thereafter entered but the issue of the rate of interest was never resolved. Commissioner of Assize, Mr Ransley, resolved that issue by his ruling of 3rd February, 2000 and ordered that the appellant was to pay to the respondent interest on the decretal sum at the rate of 35% with effect from the date of the loan until payment in full.

That order is the subject of the appeal now before us. As far as we are able to discern from the record before us, none of the parties placed any evidence before the Commissioner as to how he was to exercise his discretion under section 26 of the Civil Procedure Act. The respondent in its plaint had claimed interest at the rate of 47% per annum.

The respondent, however, led no evidence to show why it wanted interest at the rate claimed. In the end Mr Muturi who argued the issue of rate of interest before the Commissioner, left the rate of interest payable:

“..... to the discretion of the Court.”

Mr Billing for the appellant did not contend that interest was not payable at all; all he said was that as the parties had not specified the rate at which interest was to be paid, the respondent was entitled to interest only at court rate. We did not understand Mr Billing to be contending either before the Commissioner of Assize or before us that where the parties have not agreed on the rate of interest, then the applicable interest rate must be the Court rate. If there is any such law, Mr Billing did not bring it to our attention. We are satisfied that there is no such law. The only law on the point is section 26 (1) of the CPA, and that section as we pointed out at the beginning leaves the question of the rate of interest to the discretion of the Court. In fixing the rate at 35% per annum, Mr Commissioner Ransley was clearly exercising his discretion. To be able to interfere with his exercise of discretion, the appellant was bound to demonstrate to us that in coming to his decision, the Commissioner took into account an irrelevant matter which he ought not to have taken into account, or that he failed to take into account a relevant matter which he ought to have taken into account, or that he misapprehended the law applicable, or that he did not correctly appreciate the bearing of some evidence or that the decision itself was plainly wrong. The appellant did not demonstrate to us any of these matters. His complaint appeared to us to be on the issue of how the Commissioner arrived at the figure of 35% per annum. The Commissioner was bound to come up with a figure and even if we ourselves had thought that it was a high figure and would not have awarded it, that alone would not entitle us to substitute the Commissioner's discretion with our own. Some error in principle such as those we have already set out herein had to be shown before we could ever think of interfering with the exercise of discretion. As we have already said, none was shown to us.

We think this is now an appropriate point for us to deal with some remarks made before us by Mr Billing touching upon the integrity of the Commissioner as a judicial officer. Totally out of the blue, Mr Billing, when dealing with the issue of 35% per annum on a question by one of us, brazenly told us that he had found out that Mr Commissioner Ransley was a member of the board of some bank or financial institution and, therefore, he must have got the figure of 35% per annum from his association with the unnamed bank. It may well be that Mr Commissioner Ransley sits on a board of some bank; we do now know. But there is and there has been absolutely no iota of evidence either in the record of appeal before us or from any other source that the Commissioner came by the figure regarding the rate of interest from his own sources. Indeed Mr Harun who argued the respondent's appeal before us told us, and this appears to be supported by the record, that the parties themselves tried unsuccessfully to negotiate the rate of interest and the figures of 32% and 33% were specifically mentioned. We dismiss Mr Billing's remarks as evidencing an attempt to win by means fair or foul. We reject them as gratuitous insult upon the integrity of the Commissioner.

This appeal fails and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 28th day of June, 2002

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K.TUNOI

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JUDGE OF APPEAL

S.E.O BOSIRE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR