**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Tunoi, Shah & Keiwua JJ A)**

**CIVIL APPEAL NO 95 OF 1999**

**NATIONAL BANK OF KENYA LTD ……..…. APPELLANT**

**VERSUS**

**PIPEPLASTIC SAMKOLIT (K) LIMITED**

**PROFESSOR SAMSON K ONGERI…….....RESPONDENTS**

(An appeal from the ruling of the High Court at Nairobi, O'Kubasu J,

dated 23rd December 1998 in HCCC No 1078 of 1996)

**JUDGMENT**

This is an appeal by National Bank of Kenya Limited (the appellant) against the ruling of the superior court (O'Kubasu, J as he then was) whereby he ordered waiver of certain percentage(s) of interest payable by the two respondents Pipeplastic Samkolit (K) Limited and Professor Samson K Ongeri. Apart from the complaint as regards the waiver of interest the appellant also appeals against the order of the learned judge granting the respondent time to pay the sum assessed, by instalments. We will hereafter refer to the appellant as the defendant and the respondents as plaintiffs for ease of reference.

The plaintiffs had filed a suit in the superior court against the defendant claiming the following reliefs:

"(a) A declaration that the 1st plaintiff has a right to redeem the charge registered against the 2nd plaintiff's property LR Number 209/9499 Dandora Nairobi.

(b) An injunction restraining the defendant company, its servants and/or agents from selling the 2nd plaintiff's property aforesaid or in any way interfering with it.

(c) Special damages together with interest at court rates.

(d) Costs of this suit together with interests thereto (sic) at court rates.

(e) Any other or further relief this Honourable Court may deem fit and just in the circumstances."

Simultaneously with the filing of the suit the plaintiffs sought, by way of an application by chamber summons, an injunction to restrain the defendant, its agents and/or servants from selling by public auction or otherwise or in any other way whatsoever interfering with the 2nd plaintiff's property namely LR No 209/9499, Dandora, Nairobi, until the hearing and final determination of the suit. By that application the

respondents also sought, *inter alia*, the following order:

"That the defendant do furnish the plaintiffs with a true statement of payments received from the plaintiffs and outstanding balance if any."

The plaintiffs averred in the plaint that the first plaintiff had borrowed a sum of Shs 25,000,000/= from the defendant in 1991; that the second plaintiff's property LR 209/9499 was charged to the plaintiff as security for the said loan; that the second plaintiff had guaranteed repayment of the loan; that the first plaintiff faced some financial difficulties in 1993- 1994 when as a result of meetings between the parties the repayment of the loan was rescheduled; that they complied with such rescheduled repayments; that despite all that the defendant had advertised the said property for sale thus frustrating the plaintiffs' efforts to redeem. The defendant, on the other hand, had pleaded that the plaintiffs had not satisfactorily serviced the loan; that they had acknowledged the debt; that despite sufficient indulgence having been given the plaintiffs had failed to repay the loan amount plus interest; that after paying a sum of Shs 1,900,000/= on 24th October, 1995 no other substantial repayments had been made; that the amount due had reached a staggering sum of Shs 72,116,115/60 as at 28th February, 1997; that the plaintiffs were given credit for all payments made; that the defendant's right to sell the property had arisen; that if there was any dispute as to the amount owed an auction sale cannot be withheld and that the plaintiffs were not entitled to the injunction they were seeking.

On 13th March, 1997 Aluoch J issued an injunction *ex parte* restraining the defendant from selling the said property until further orders. The defendant by its application dated 17th July, 1997 sought re-hearing of plaintiff's application dated 3rd May, 1997. By a Notice of Withdrawal dated 24th November, 1997 the defendant intimated to the superior court that it did not wish to proceed with the prosecution of its application dated 17th July, 1997.

On 3rd February, 1998 the parties' advocates appeared before Aluoch J and the following consent orders were recorded:

"1.The injunction orders granted on 13th March, 1997 be and are hereby set aside.

2. Parties to take accounts within 45 days.

3.In the meanwhile counsel for the defendant undertakes not to sell or advertise for sale the charged property."

On 17th December, 1998 counsel for all the parties appeared before O'Kubasu, J when it transpired that there was a difference of opinion between Mr Wagara for the plaintiffs and Mr Kange'the for the defendant as regards what was to be before the learned judge. Mr Wagara insisted that the defendant was to furnish true statement of accounts whereas Mr Kang'ethe insisted that accounts had been supplied and a meeting was awaited, probably, for settlement of the suit. Be that as it may, when the matter once again came up before O'Kubasu, J Mr Wagara argued the third prayer in his application dated 3rd May, 1996, that is the one for taking of accounts.

At this stage it must be remembered that none of the reliefs sought in the plaint included the taking of accounts. The plaint itself made no reference to the taking of accounts. The averments in the plaint, which we have already set out in brief, show that the plaintiffs were alleging compliance with an alleged rescheduling of payments but despite that the defendant put up the property for sale. We would also at this stage, refer to the instrument of charge itself. The interest payable as agreed between the defendant and the second plaintiff was a minimum of 20% per annum to be calculated on reducing balances, payable monthly in arrears.

What the learned judge had before him, was the relief sought, in an interlocutory application, for taking of accounts when there was no basis for the same in the suit. The other prayers in that application were of course abandoned. Mr Wagara proceeded, before the learned judge, to argue on the accounts. He stated that the total amount owed by the two plaintiffs to the defendant, when the two accounts were merged,

was Shs 40,459,257/=. Mr Wagara further argued that that figure was arrived at after calculating the interest at 18% and 12%, the latter being after filing of suit. How he arrived at 18% rate of simple interest is not understood when the parties had agreed to a minimum of 20% rate of interest and it is common knowledge that rates of interest kept on fluctuating, at the material times, mostly upwards. Mr Wagara added for good measure that the interest rates charged by the defendant were punitive and so high that ordinary businessmen could not operate under such circumstances.

Mr Kang'ethe defended the defendant's position that it was entitled to charge interest at the rates applicable compounded monthly. He defended the amounts of sums owed by the two plaintiffs to the defendant which at that time, together, exceeded Shs 100,000,000/=. The learned judge appreciated that the plaintiffs had radically changed their position. He said:

"This is an interesting case in which the plaintiffs came to court seeking judgment against the defendant (National Bank of Kenya) but it has now become quite clear that they are the ones who should have sued for recovery of amount advanced to them. The plaintiffs have now come to realize that they indeed owe the defendant some money advanced to them in the year 1992."

The learned judge continued later on in his ruling:

"Mr. Wagara argued that the amount owing is so high due to interest charged. But the answer to that is that the bank was entitled to charge interest at rates higher than 20% and this interest rate is charged on monthly basis. This is the standard practice for all banks and financial institutions in the world. Another aspect that the plaintiffs overlooked, was the fact that when they defaulted in payment the bank imposed penalty charges which amount continued to attract interest. This is why the original figure of Kshs.15 million (for 1st plaintiff) shot up to about 72 million and that of 6 million (for 2nd plaintiff) shot up to about 31 million"

Having correctly analysed the decision in the case of *Harilal & Company & another vs. The Standard Bank Limited* (1967) EA 512 the learned judge said:

"The above sets out clearly the practice of charging interest. In our present case there can be no doubt that the defendant bank was entitled to charge interest at rates higher than 20%. Hence the calculations by the plaintiffs where interest rates were put at 18% or 12% are not acceptable. The plaintiffs are bound by the provision of charge dated 22nd May, 1992. The plaintiffs cannot turn around and claim that the defendant charged high interest. We know the relationship between a bank and a customer/borrower is that of a stronger party (bank) and the weaker party (borrower).

In the present case when the plaintiffs applied to be advanced some money they knew that interest would be charged. It is also now clear from the statements produced that plaintiffs were not making any payments and hence the amount continued to go up. Mr Wagara introduced another argument to the effect that there was no letter of offer. But that cannot be a serious argument since there is no dispute that these amounts were advanced to the plaintiffs. This is a clear case in which the plaintiffs borrowed some money from the bank and defaulted in payment. They made use of this money and must surely pay back. They have enjoyed these facilities since 1992. They cannot escape liability. They are however now saying that they borrowed only 21 million but the bank is now demanding almost 100 million. The bank has shown by its statement that the figure shot up because in the first place the plaintiffs made no efforts to repay and secondly this was due to interest and other penalties.....

In these transactions of borrowing and lending each party must comply with the conditions of contract.....

The position in this matter is that the bank has shown that it is owed about 100 million by the plaintiff....."

Having directed himself so far quite properly, the learned judge proceeded to assume (when there was no basis for such an assumption) that the appellant bank would be willing to waive some of the interest

charged. Stepping into the shoes of the appellant bank the learned judge decided that a large part of the interest would or could be waived. This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

The learned judge erred not only in substituting what he thought ought to have been the proper rate of interest in place of what was agreed between the parties but he also erred in assuming jurisdiction to hear arguments, and rule thereon, on taking and settlement of accounts when such a relief was not part of the plaintiff's claim. Taking and settlement of accounts is not done, normally by judges. Order XIX rule 1 of the Civil Procedure Rules provides that if a plaint prays for an account or where the relief sought or the plaint involves taking of an account an order for proper accounts with all necessary inquiries and directions usual in similar cases shall be made. It must be noted that, as pointed out earlier, there was no issue in the plaint, for taking of accounts. We reiterate that it is not for a judge to take accounts. The reason is clear. It is not the job of a judge to be an accountant. That is why Order XX rule 16 of Civil Procedure Rules gives special directions as to taking of accounts. Elaborate provisions have been made therein. The *ad hoc* method in which the learned judge proceeded to take and settle accounts was not only unprocedural but erroneous and without jurisdiction.

The sum total of all that we have said means that the ruling of the learned judge cannot be sustained in law. The result is that this appeal is allowed with costs and the plaintiffs' application before the superior court dated 3rd May, 1997 is dismissed with costs. As far as the suit is concerned the parties may decide on their next course of action. It is not for us to say.

For avoidance of any doubt we say that the *status quo* preceding the filing of the suit in the superior court now prevails.

Dated and Delivered at Nairobi this 8th day of June, 2001

**P.K.TUNOI**

**……..**

**JUDGE OF APPEAL**

**M.M.O. KEIWUA**

**……..…..**

**JUDGE OF APPEAL**