Mwaniki v Consolidated Bank of Kenya Limited (Commercial Case 435 of 2007) [2025] KEHC 12476 (KLR) (Commercial and Tax) (1 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 435 OF 2007

JWW MONG'ARE, J

SEPTEMBER 1, 2025

BETWEEN

DAVID WANDORE MWANIKI .... PLAINTIFF

AND

CONSOLIDATED BANK OF KENYA LIMITED .... DEFENDANT

JUDGMENT

1. This case, which commenced in 2007, has spanned nearly two decades, a duration that underscores an unfortunate reality in our judicial system. Cases of such protracted length strain the resources of the parties involved and challenge the timely administration of justice. No dispute should languish in the courts for so long, as prolonged litigation risks eroding public confidence in the legal process and delays the resolution that all parties deserve. Having carefully considered the evidence, submissions, and applicable law, this Court now renders its judgment to bring finality to this matter.

2. The Plaintiff's claim, as per its re-amended Plaint dated 1st October 2015, concerns allegations of irregular interest, overcharges, and unlawful debits by the Defendant. He states that he took two loans from the Defendant totaling Kshs.2,400,000.00/=; one for Kshs.1,500,000.00/= and another for Kshs.900,000.00/=. In August 2005, while reconciling his accounts, he noticed irregularities, including double entry of charges and unacknowledged deposited funds. He wrote to the bank on 25th August 2005, to inquire about these issues and the Defendant, in a letter dated 6th September 2005, admitted to a double entry. The Plaintiff claims that after further inquiry, the Defendant admitted another error, apologized, and posted the deposited amounts to the Plaintiff's account.

3. The Plaintiff states that due to skepticism and the Defendant's admitted mishandling, he engaged the Interest Rates Advisory Centre (IRAC) to calculate the interest and amounts charged on his account and IRAC's report concluded that the Defendant had overcharged the Plaintiff by Kshs.2,992,331.33/

=. The Plaintiff also stated he paid Kshs.294,302.00/= for IRAC's report. The Plaintiff argues that the Defendant's own admissions of mishandling the account and only correcting errors after repeated reminders justify the Plaintiff's decision to seek an expert opinion.

4. The Plaintiff highlights that Equity Bank cleared alleged arrears of Kshs.2,159,197.93.00/= on 18th July 2006, to take over the Plaintiff's loan from the Bank and the core dispute remains whether the Defendant overcharged the Plaintiff's account. The Plaintiff asserts that the Defendant is guilty of various lapses, including double charging, failing to post deposited funds, and increasing interest rates exorbitantly without notice. These lapses, combined with IRAC's expert report and the Plaintiff's witnesses' testimony, lead to the conclusion that the Plaintiff's claim is meritorious. The Plaintiff requests judgment in his favor as sought in the re-amended Plaint; that is the sum of Kshs.3,237,318.02/= being the refund and loss incurred as aforesaid, costs of the suit and interest.

5. The Defendant responded to the suit by filing its Statement of Defence dated 19th October 2007. It avers that the Plaintiff admitted to willingly entering into contracts for various credit facilities with the Defendant and acknowledged facing repayment challenges and defaulting on payments, requiring assistance from Equity Bank to clear his outstanding loans. The Defendant admits that the Plaintiff identified some errors in his statements while in default, and the Defendant rectified some issues and provided explanations for others. The Defendant states that there are errors in IRAC's recalculation statement and the maker's CV, establishing his expertise in accounting, banking practice, and accounting software. It states that IRAC's report contains flaws in its recalculation, including flawed data, methodologies, and unjustifiable assumptions. Further, that there were different banking regulations applicable during the relevant period.

6. The Defendant states that the Plaintiff's re-amended Plaint does not disclose a cause of action and that it lacks particulars of any claim, and the attempt to establish a basis on implied contract terms is weak, as the source of these terms is not indicated. It reiterates that the Plaintiff identified minor errors after defaulting on the facilities and after Equity Bank took over his loan, and that the Defendant clarified misunderstandings and rectified the minor errors. That the errors complained about have no bearing on the interest earned by the facilities and the Plaintiff has not provided direct evidence of being overcharged, basing his claim entirely on IRAC's report. The Defendant states that IRAC's report is fundamentally flawed and should be disregarded as IRAC omitted contractual fees, charges, and commissions of Kshs.1,263,230.48/=, which reduced the principal amount for recalculations, constituting an unjustifiable assumption. That IRAC subjected its recalculation to maximum rates allowed by section 39 of the Central Bank of Kenya (Amendment) Act, 2000 but this Act came into force on 1st January 2001, but interest rates between 1996 and 2000 were subject to full deregulation. Therefore, applying a maximum rate to this earlier period was erroneous.

7. The Defendant further states that IRAC's report assumed a zero limit for overdrafts due to not having facility letters, meaning it did not consider all overdrafts on the Plaintiff's account, despite the account being overdrawn nearly every month after November 1996. That IRAC also relied on flawed data for 91-day Treasury Bill rates used to compute interest rates for loan facilities and that for 40 out of 44 months between December 2001 and July 2005, IRAC's data was inaccurate compared to Central Bank of Kenya data, representing a 91% inaccuracy rate. It further states that IRAC's methodology lacks verifiability and transparency, making its conclusions unscientifically credible and that IRAC does not disclose its methodology in sufficient detail, mentioning only a "nebulous bespoke mathematical software called 'CREDIT VERIFIER!'" with unknown algorithms and assumptions, which unfairly precludes scrutiny. Further, that IRAC's report failed to detail all daily credit and debit entries, despite contracts stating interest would be calculated on daily cleared balances.

8. For the above reasons the Defendant urges that the Plaintiff has not proven his case on a balance of probabilities and thus is not entitled to the reliefs he seeks and asks the Court to dismiss the Plaintiff's suit with costs.

9. At the hearing, the Plaintiff testified on his own behalf (PW 1) and he also called WILFRED ABINCHA ONONO, an accountant and Managing Consultant of IRAC (PW 2). The Plaintiff relied on his witness statement dated 24th October 2011 and produced the List and Bundle of Documents dated 19th April 2024(PEXhibit 1-41). PW 2 relied on his amended witness statement dated 22nd March 2024 and produced the IRAC report found at pgs. 557-584 of PEXhibit 1-41 (PEXhibit 39-41). On its part, the Defendant called one witness, FELIX MURAGE, its Recoveries Officer, who relied on his Further Substituted Witness Statement dated 25th November 2022. He also produced the Defendant's List and Bundle of Documents dated 19th May 2014 (DExhibit 1-14) and the Supplementary List and Bundle of Documents dated 21st October 2016(Dexhibit 16-21). DExhibit 15, which was the Expert Report on review of the Plaintiff's damages claim was withdrawn as the Plaintiff objected to its production.

10. After hearing the parties, the court directed that they exchange written submissions which are now on record. As the evidence and submissions are a mirror of the parties' positions that I have already summarized above, I will not rehash the same but I will make relevant references in my analysis and determination below.

Analysis and Determination

11. In making this determination, I am in agreement with the Defendant's submissions that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the *Evidence Act*(Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". In Miller v Minister of Pensions 1947 ALL E.R 372, Lord Denning aptly summarised the application of the standard in the following terms:

> " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

12. The Court of Appeal in James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR) simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'

13. From the parties' submissions, I find that the main issue for the court's determination is whether the Plaintiff has proven his case on a balance of probabilities and whether he is entitled to the reliefs sought. As stated, the Plaintiff's position is that the Defendant had overcharged him by Kshs.2,992,331.33/= as per IRAC's report and that he also paid Kshs.294,302/= for the report. In summary, the Plaintiff challenged the interest and charges applied by the Bank on his loan accounts

and he relied on PW 2's report to support his case. On its part, the Bank stated that that IRAC's report was fundamentally flawed and should be disregarded as IRAC omitted contractual fees, charges, and commissions of Kshs.1,263,230.48/=, which reduced the principal amount for recalculations, constituting an unjustifiable assumption. That IRAC subjected its recalculation to maximum rates allowed by section 39 of the Central Bank of Kenya (Amendment) Act, 2000 yet this Act came into force on 1st January 2001, but interest rates between 1996 and 2000 were subject to full deregulation. Therefore, applying a maximum rate to this earlier period was erroneous.

14. The Defendant further stated that the report assumed a zero limit for overdrafts due to not having facility letters, meaning it did not consider all overdrafts on the Plaintiff's account, despite the account being overdrawn nearly every month after November 1996. That IRAC also relied on flawed data for 91-day Treasury Bill rates used to compute interest rates for loan facilities and that for 40 out of 44 months between December 2001 and July 2005, IRAC's data was inaccurate compared to Central Bank of Kenya data, representing a 91% inaccuracy rate. It further states that IRAC's methodology lacks verifiability and transparency, making its conclusions unscientifically credible and that IRAC does not disclose its methodology in sufficient detail, mentioning only a "nebulous bespoke mathematical software called 'Credit Verifier!'" with unknown algorithms and assumptions, which unfairly precludes scrutiny. Further, that IRAC's report failed to detail all daily credit and debit entries, despite contracts stating interest would be calculated on daily cleared balances.

15. In his testimony, the Plaintiff admitted that as per the facility letter dated 16thAugust 1996, Clause 3 therein spoke about interest at a rate of 30% per annum (see pgs. 11-12 of DExhibit 1-14) for the subject loan and that the Defendant reserved "the right to change the rate of interest at any time without notice..." on a reducing balance basis. The Plaintiff also admitted that Clause 6 therein provided that the Plaintiff would pay ancillary fees and charges for the loan to be disbursed and that Clause 7 provided for default penalties of not less than Kshs.500.00/=. The Plaintiff also admitted to the facility letter dated 8th April 1998 which included interest at a rate of 33% p.a with the Defendant reserving the right to vary the rate without notice.

16. The Plaintiff further admitted that in its letter of complaint dated 26th August 2005, the Defendant addressed all the issues raised by the Plaintiff in the letter: The Defendant rectified the double entry and the Defendant apologized for not indicating the correct cheque number and that there was no irregularity. The Plaintiff admitted that nowhere in this letter of complaint did he indicate that he had been overcharged interest.

17. On his part, PW 2 admitted that he did not have competency certificates to prove that he is qualified to recalculate interest on bank loans. He also stated that he had omitted a sum of Kshs.1,263,230.40/= which were contractual fees, charges, and commissions and he advised the Plaintiff that the Facility Letters were not legal documents and that he used the Plaintiff's information rather than the Facility Letters in the preparation of the report. He also admitted that he did not capture monthly payments stated in one of the Facility Letters and that he did not go into details of the ancillary costs and charges of the loans. He further admitted that he relied on monthly aggregates as opposed to daily cleared balances as is the norm by the Central Bank of Kenya (CBK) to calculate interest rates. He also stated that IRAC uses a software system to calculate the interest payable but he admitted that he did not bring any document showing whether the system was functioning correctly.

18. Going through the summary of the evidence above, I am inclined to agree with the Defendant that PW 2's recalculation was based on unjustifiable assumptions, flawed data and methodology. PW 2 relied on information from the Plaintiff that contradicted the express terms of the Facility Letters and omitted contractual fees, charges, and commissions which reduced the principal amount for recalculations. He did not analyse all the relevant information regarding the facilities and relied on inaccurate information

to come up with the report. PW 2 did not disclose its methodology in sufficient detail, leading to an implication that the methodology lacked verifiability and transparency, making its conclusions unscientifically credible. The report failed to detail all daily credit and debit entries, despite the Facility Letters stating interest would be calculated on daily cleared balances, a fact acknowledged by PW2.

19. It should not be lost that Facility Letters, also known as Letters of Offer, are critical documents in the context of banking and loan issuance. They serve as the primary contractual agreement between a bank and a borrower, outlining the terms and conditions under which the bank agrees to provide credit or financing. They specify the key terms of the loan, including the loan amount, interest rate (fixed or variable), repayment schedule, fees, charges, commissions, security requirements, covenants, and conditions precedent to drawdown. These terms form the legal foundation of the lending relationship and ensure clarity and mutual understanding between the bank and the borrower, reducing ambiguity and potential disputes and they cannot be ignored when disputes between the parties arise.

20. Once accepted by the borrower, the Facility Letter becomes a legally binding contract and represents the formal offer by the bank and the borrower's acceptance, creating mutual obligations. The letter serves as evidence of the agreed terms, which courts rely on to resolve disputes, such as challenges to interest rates or repayment obligations

21. In this case, the Facility Letters specified how interest is calculated and included details of applicable fees, charges, and commissions. PW2's failure to account for these terms undermines their report's credibility, as it does not reflect the agreed-upon method for calculating interest. The interest rates and charges applied by the Defendant were enforceable as long as they complied with the Facility Letter and applicable laws and PW2's reliance on contradictory information from the Plaintiff and omission of contractual terms suggests the Plaintiff's challenge lacks a legal basis. Courts have consistently upheld Facility Letters as binding unless they are unconscionable or illegal (see Dhiman v Shah [2025] KECA 1264 (KLR)]

22. As the Plaintiff has not argued that the Facility Letters' terms were unclear, unfair, or not properly communicated, there was no reason or legal basis for PW 2 to disregard them and as such, the terms therein prevail. The deficiencies in PW2's report, that is, reliance on inaccurate and incomplete information, lack of transparent methodology, and failure to account for daily cleared balances as per the Letters of Offer and; the Plaintiff's own admission that his complaints to the Bank had been addressed, mean that his claim cannot be sustained. These findings determine his suit in the negative and I hold that the Plaintiff is not entitled to the prayers sought in his re-amended Plaint of 1st October 2015.

Conclusion and Disposition

23. In the upshot, the Plaintiff's suit is dismissed with costs to the Defendant. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2025.

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J.W.W. MONGARE

JUDGE

In The Presence Of

Ms. Githii for the Plaintiff.

Mr. Ligami for the Defendant.

Amos- Court Assistant