Bank of Africa Kenya Limited v Seven Seas Technologies Limited & another (Civil Case E184 of 2019) [2025] KEHC 87 (KLR) (Commercial and Tax) (16 January 2025) (Ruling)

Neutral citation: [2025] KEHC 87 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E184 OF 2019

A MABEYA & F GIKONYO, JJ

JANUARY 16, 2025

BETWEEN

BANK OF AFRICA KENYA LIMITED ..... PLAINTIFF

AND

SEVEN SEAS TECHNOLOGIES LIMITED ..... 1ST DEFENDANT

MICHAEL KING'ORI MACHARIA ..... 2ND DEFENDANT

RULING

1. The Defendants/Applicants filed a Motion on Notice dated 25/9/2024 seeking the setting aside or variance of the Consent dated 2/12/2019 ("the Consent") and all consequential orders including the decree dated 19/2/2020.

2. The application was based on the grounds set out on the face of the application and the affidavits sworn by the CEO of the 1st Defendant, Michael King'ori Macharia on 25/9/2024 and the Managing Director of Interest Rates Advisory Center (IRAC), Wilfred A. Onono (Mr. Onono) on 20/9/2024.

3. The grounds were that the Consent was entered on the basis of a fundamental mistake in the calculation of the outstanding balances claimed of USD 4,026,728.91 as at 2/12/2019, at the time of entering the consent, and USD 5,647,128.75 as at 15/5/2024 when the Plaintiff filed an application for attachment of debt.

4. The Defendants contended that they only discovered these mistakes recently after a review of the facility documents and computation of interest charged by the Plaintiff following the Judgment in the *Stanbic Bank of Kenya Limited v Santowels Limited* (Petition No. E005 of 2023) and an application by the Plaintiff for garnishee orders. They also claimed that a recalculation of the interest charged by IRAC concluded on 29/7/2024 revealed that: -

a. Interest charged on Current Account No. 3007430015 as at 6/12/2019 was USD 448,125 instead of USD 389,647.68;

b. The outstanding cleared balance in Loan Account No. 3007430413 on 30/6/2017 was not USD 0.00 as computed by the Plaintiff but USD 234,250.26. This amount (USD 234,250.26) should have been credited to Loan Account No. 3007430743.

c. The amount owed by the 1st Defendant at the date of the Consent was USD 3,482,808.84, not USD 4,026,728.91 as stated in the Consent, a difference of USD 543,920.07.

d. The total interest accumulated from the date the Consent was filed was USD 1,379,783.01 placing the total amount owed by the Defendants at USD 4,706,754.35, a difference of USD 940,374.40.

5. The Defendants contended that it would be unconscionable for them to pay these substantial amounts. They will suffer great prejudice if they are bound to pay the current sums claimed by the Plaintiff. The Plaintiff will suffer no prejudice if the orders sought by the Defendants are granted. It will be in the interest of Justice for the court to set aside the Consent dated 2/12/2019 and the Decree dated 19/2/2020.

6. The Plaintiff opposed the application through a replying affidavit sworn by its Head of Recoveries, Idar Kasenge, on 24/10/2024. Its case was that despite the numerous admissions of the debt and payment proposals, the Defendants failed to settle the debt leading to the filing of the suit on 20/6/2019.

7. That thereafter, the Defendants proposed a settlement which the plaintiff accepted and the parties executed the consent on 2/12/2019. The Plaintiff accepted simple interest as a replacement for its claim for interest at the Bank's commercial rates. Therefore, all computations after the consent were based on a simple interest rate.

8. The Plaintiff contended that the Defendants have never complained about the rate of interest applied on the facilities since the first facility was granted in 2008. All the letters of offer allowed interest variation at the Bank's discretion. There were no changes in interest rate as all interest was charged per the various facility letters.

9. That from 2008 to 2017, interest on the facilities was charged as per the letter of offer. From 2017, the Bank charged 16.5% default interest, which was undercharged as the overdue amount should have been charged at 19% pa as per the letter of offer dated 19/6/2017 and signed by the 1st Defendant on 30/6/2017.

10. The Plaintiff also contended that IRAC had purported to rewrite the contract between it and the 1st Defendant. IRAC's computations set out in its letter dated 29/7/2024 were erroneous because it used simple interest at a flat rate of 9% notwithstanding the instances of default the 1st Defendant exceeded the agreed on limit and simple interest only applied after the consent was executed in Court and not prior to execution of the consent.

11. That it assumed interest was accruing at simple interest from the time the facilities were advanced rather than compound interest. It failed to take into account that the consent recorded in Court factored simple interest on the dollar and Kenya shilling loans which was the rate applied in the computations set out in the Plaintiff's Notice of Motion dated 15/5/2024 that is pending delivery of the ruling on the attachment of debt.

12. I have considered the application, the grounds, and the rival affidavits. The issue for determination is whether the discrepancies in the computation of the amounts owing are a fundamental mistake sufficient to warrant the setting aside of the consent dated 2/12/2019.

13. The principles which guide the Court in determining whether to set aside a consent judgment were set out by the Court of Appeal in *Flora M. Wasike v Destimo Wamboko* [1988] eKLR, wherein it was held that: -

> "It is well-settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting aside, or if certain conditions remain unfulfilled, which are not carried out. If a consent is to be set aside, it can only really be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of material matters by legally competent persons... Prima facie a consent order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement... A court cannot interfere with a consent judgement except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.

14. The basis for the Defendants' application is that there were fundamental mistakes in calculating the outstanding loan balances before and after the consent was executed. The Defendants claim that before the consent, the Plaintiff charged USD 4,026,728.91, yet the recalculated amount by IRAC was USD 3,482,808.84, a difference of USD 543,920.07.

15. That after the consent, the Plaintiff claimed USD 5,647,128.75, yet the recalculated amount was USD 4,706,754.35, a difference of USD 940,374.40. The Defendants attributed the fundamental mistakes to the Plaintiff which is obligated to share true and accurate statements to its customers. They argued that the differences in interest are substantial and that it would be unconscionable for them to be required to pay this amount.

16. On its part, the Plaintiff contended that the Defendants are estopped from reneging on the terms of the consent adopted on 12/2/2020 and waiting for over 4 years, 7 months before applying to set aside the consent on 25/9/2024. That there are no grounds to justify the setting aside of the consent as it was entered in good faith that lawfully compromised the suit. It also argued that the interest rate applicable before the consent was in accordance with the facility letters and after the consent remained at simple interest.

17. The law is that the party that seeks to set aside a consent has the duty to show that there is fraud or any form of illegality in the consent. See *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR

18. For the alleged mistakes in the period before the consent, the Defendants exhibited a Report on Interest Recalculation dated 29/7/2024 from the date of disbursement to the date of the consent. Mr. Onono stated that for the period before the consent, its recalculation was based on interest rates as per the correspondences and calculated on a 360 calendar year on daily cleared balances by way of compound interest. He mentioned that there was a probability that the bank increased the interest rate without providing the Defendants prior notice as required.

19. On the other hand, the Plaintiff asserted that IRAC wrongly assumed that interest was accruing at simple interest from the time the facilities were advanced rather than compound interest and that the Defendants had an overdraft until 2024. The Plaintiff also asserted that IRAC did not factor the default interest rate applicable to any payments not paid when due.

20. For the period after the consent, the Defendants exhibited a Report on Interest Recalculation dated 29/7/2024 from the date of the consent to the date of the report. Mr. Onono stated that for this period, the recalculation method was by way of simple interest at 9 % as per the Consent with USD 3,482,808.84 as the principal amount. The Plaintiff responded that IRAC wrongly assumed that the consent recorded in court factored simple interest on the dollar and Kenya shilling loans which was the rate applied in the computations set out in the Plaintiff's Notice of Motion dated 15/5/2024. There was no rebuttal by the Defendants to the Plaintiff's response.

21. The Plaintiff exhibited a statement of reconciliation of the interest on the overdraft facilities from 2008 to 2017. The Plaintiff also exhibited copies of the various facility letters including the Conditional Letters of Offer dated 3/3/2008 and 30/5/2008, Amendment of Conditional Offer of Banking Facilities dated 28/7/2008, Conditional Offers of Banking Facilities dated 5/10/2009 and 26/2/2010, Banking Facilities Letter dated 23/8/2011, Standard Terms and Conditions executed on 12/9/2011, Banking Facilities Letter dated 11/3/2014 and Standard Terms and Conditions Applicable to All Banking Facilities executed by the Defendants on 5/6/2014.

22. From my reading, the standard terms provided that interest on these facilities would be charged at the base rate of interest in relation to a particular currency published and notified to the Borrower from time to time. The facility letters also provided that a default interest of 10% would apply to payments not made when due.

23. The Plaintiff also exhibited the loan repayment summary which explains the two facilities for 2014 and 2017, Conditional Restructure of Existing Facility dated 19/6/2017 and Standard Terms and Conditions Applicable to all Banking Facilities executed by the Judgment Debtors on 30/6/2017.

24. Clause 5.1 of the Letter of Offer dated 19/6/2017 provides: -

> " Subject to the provisions of Condition 6 of the Conditions, Interest on the Facility shall be calculated on a variable interest at a percentage rate per annum equal to the aggregate of the margin of 2.50% per annum ("the Margin") above the Bank's United States Dollar Base Rate (currently at 6.5% p.a.) totalling to 9.00% p.a."

25. Clause 6.3.4 (ii) of the standard terms and conditions provides:-

> " (ii) Default interest – If any sum payable by the Borrower with respect to the foreign currency Facilities is not paid when due, the Borrower shall (without prejudice to the exercise by the Bank of any right or remedy in favour of the Bank) pay to the Bank interest at the rate of Ten per cent (10%), over and above the then subsisting rate of interest payable by the Borrower under Clause 6.1 above on all monies due with effect from the date of the same becoming due until actual repayment of such monies in full (together with accrued interest) (the "Default Rate"). The Borrower acknowledges and agrees that the Default Rate represents a reasonable pre-estimate of the costs, charges and expenses to be suffered by the Bank to fund and to recover the default of the Borrower"

26. From the above, it is clear that the agreed interest rate was 9% and the default rate was 19%. The Plaintiff acceded that it charged a lower default rate of 16.5% due to a system error. However, it maintained the rate of 16.5% in its calculations.

27. Under the terms of the Consent dated 2/12/2019, it was agreed by consent that judgment be entered against the 1st and 2nd Defendants jointly and severally for the sum of USD 4,026,728.91 together with interest thereon at 9% pa and KES. 2,118,803.02 together with interest thereon at 13% pa respectively with effect from 25/11/2019 on any outstanding balance until payment in full.

28. It is evident that while the Plaintiff accepted computations based on simple interest, there was a different rate of interest for the USD Currency (9%) and the Kenya Shillings currency (13%).

29. From the foregoing, I note that while Mr. Onono alleged that there was a probability that the Plaintiff bank increased the interest rate without providing the Defendants prior notice as required, the recalculation reports he produced were questioned. The Defendants did not offer a rebuttal to explain the assumptions made in the reports.

30. Accordingly, from a review of the evidence on the whole, I am not persuaded that there were fundamental mistakes in the calculations of the interest before and after the consent which justify the setting aside of the consent. I am also not persuaded that there were any variations of interest as alluded to.

31. On the question of time, the present application was filed on 25/9/2024, four (4) years and seven (7) months from the date of the consent. In my view, the delay was inordinate. The Defendants contended that they only discovered the mistake in the computations in July 2024 after a review of the loan accounts initiated after the Plaintiff had filed an application dated 15/5/2024. That the review was prompted by the Judgment issued by the Supreme Court in *Stanbic Bank of Kenya Limited v Santowels Limited* (Petition No. E005 of 2023).

32. In that *decision*, the Supreme Court held that banks are required to seek the approval of the Cabinet Secretary responsible for matters relating to finance before increasing interest rates on loans advanced. However, in this case, the Defendants sought to set aside the consent based on a fundamental mistake in the computation of the amount owing and not on increasing interest. As such, the Defendants cannot be heard to say that they were prompted by the Supreme Court *decision*. That is not a satisfactory explanation for the delay.

33. I also note that the last payment made before the suit was filed was Kshs. 100,000/- on 11/12/2017. After the consent, the Defendants only paid USD 4,500 on 18/6/2022. This points to the inference that the application may not have been brought in good faith.

34. In the upshot, the Defendants' application dated 25/9/2024 is dismissed for want of merit with costs to the Plaintiff.

It is so ordered.

SIGNED AT NAIROBI THIS 14TH DAY OF JANUARY, 2025.

A. MABEYA, FCI Arb

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

F. GIKONYO

JUDGE