

IN THE HIGH COURT OF TANZANIA

AT MWANZA

MISC. CIVIL APPLICATION NO. 202 OF 1999

(Originating from High Court Civil Case  
No. 56 of 1997.)

THOMAS K. CHACHA t/a IBORA  
TIMBER SUPPLY (T) ..... APPLICANT

VERSUS

NBC (1997) LIMITED ..... RESPONDENT

R U L I N G

NCHALLA, J.

This application which I thought, and in fact every one else would have likewise thought, to be quite simple and straightforward, has, on the contrary, turned out to be a rigorous tussle and hotly contentious, to such level or degree which can be properly described as cut-throat!

Briefly and substantially, the application is for an order of this court to state specifically the rate of interest at which the amounts claimed by the applicant, who is the plaintiff and decree-holder in the substantive suit, i.e. H/C Civil Case No.56/97, should be charged.

The judgment which the applicant obtained against the 2nd defendant in the main suit, the National Bank of Commerce (1997) Limited, which judgment was passed ex-parte for failure by the said defendant, now the respondent, to file a written statement of defence, was passed on 1/12/98 on the amended plaint which was filed against the two defendants on 5th November, 1998.

The suit against the two defendants, namely, 1st defendant the National Bank of Commerce Holding Corporation, and the 2nd defendant the present respondent, The National Bank of Commerce (1997) Limited,

was based on and founded in contract, that is, a breach of contract committed by the two defendants against the applicant/plaintiff effective in May, 1994 when they unilaterally and without notice to the applicant reduced the overdraft facility from the applicant by 20% and raised the interest rate against his account by 39% as stated in para 8 of the amended plaint. The defendants further mismanaged the applicant's account, whereby the defendants negligently and incorrectly alleged that the applicant's account was indebted to the tune of Shs.17,100,485/15 as stated in para 10 of the amended plaint, when in fact the applicant's account was still liquid to the tune of 14,332,948/=. As a result, the applicant suffered financial loss in business, which loss accounts for specific and general damages claimed in the amended plaint. The defendants refused and/or neglected to correct the true balance of money in credit in the applicant's account, despite repeated written requests to that end, until the applicant filed the suit in question against the defendants on 19/8/97. As already stated, the respondent, the 2nd defendant, failed to file his defence, and this court on 1/12/98 entered judgment against him in the following terms, and I quote:

"Judgment is entered against the 2nd defendant  
NBC(1997) LTD for failure to file defence  
against the plaint, together with costs as  
per plaint."

This judgment was not appealed against to the Court of Appeal. As a result the applicant/plaintiff cum-decree holder filed an application to this Court to execute the decree. In his documents which the applicant filed in his application for execution of the decree, he had worked out the interest due to the sums or heads of claim as detailed in his amended plaint, and, in total, the applicant came up with Shs.86,502,640/=. This Court granted the application for execution in the said amount as the 2nd defendant/judgment debtor who was duly served with the documents in the application for execution,

did not raise objection to the effect that the interest had been wrongly calculated or inflated as the case may be. The two orders of this Court granting execution of the decree in the amount of Shs.86,502,640/= were made twice, first by me, the trial judge on 3/3/99, and again by the District Registrar on 10/8/99. The applicant had worked out the interest pegging on the 40% P.a., which is the rate of interest that was agreed by the parties when they entered into the overdraft or lending agreement, which is the basis of the entire substantive suit i.e. H/C Civ. C. No.56/97.

As the amended plaint in the suit in question shows, the overdraft agreement between the parties was a yearly agreement which was renewable. The last renewed overdraft agreement which was breached by the respondent as already explained, was entered into on 12/6/95, and the rate of interest agreed upon by and applicable to both parties is specifically indicated in that agreement as 40%. That agreement shows that the same would expire on 6/6/96, however, the respondent breached it before it expired, hence the suit which the applicant filed against him jointly with the 1st defendant, and the 2nd defendant, now the respondent, failed to file his defence, hence the judgment which was entered against him for his failure to file the written statement of defence.

As already stated, the execution of the decree was carried out by attachment of the respondent's motor vehicles and other properties named in the application for execution of the decree. As a result, the respondent offered to pay cash money to satisfy the decree instead of his motorvehicles being sold away in execution. He issued a cheque for Shs.30,508,429.20 being part payment of the money-decree for a total amount of Shs.86,502,640/=. The said part-payment was effected on 14/9/99 by a payment voucher that was prepared by the High Court at Mwanza, the payee being the applicant. The said payment voucher is Annexure/Exhibit P8 to the applicant's documents in this application.

I must comment on the procedure and manner in which the respondent unilaterally chose to satisfy the decree in this case. He decided on himself to satisfy the decree by instalment without any leave or order of this Court to that effect. The respondent/judgment debtor simply decided to withhold the rest of the money under the decree on the pretext and allegation that the calculation of interest and the application of the 40% interest rate was wrong and inapplicable to this case. I am of the considered view that what the respondent did at that stage was wrong and not legally valid. This is first because at that material time there were two valid orders of this Court which granted the execution in the exact amount which had been calculated by the applicant/decreed-holder, and with which calculations the 2nd respondent was duly served but never timely opposed, until the two orders referred to above which granted the execution were made by the Court. The two orders in question were not appealed against to the Court of Appeal. So, I am of the considered view, and I find, that the respondent was both estopped and timebarred from disputing the validity or correctness of the calculations of interest by the applicant. Secondly, since the rate of interest at 40% per annum was expressly stated in the contractual document dated 12/6/95, and was agreed upon by the parties, hence the same was binding to both of them, one wonders how these deep-rooted principles of contract could and can be circumvented, namely:

- (1) Privity of contract,
- (2) Consensus ad idem -- the meeting of the minds,
- (3) Consideration,
- (4) Fulfilment of each party's obligation under the contract,
- (5) Breach of the contract, and the discharge of the contract consequent to breach,
- (6) Consequential damages, both specific and general damages upon breach.

All these enumerated legal principles embodied in a valid contract such as the parties entered into in this case, cannot be "hoodwinked" or sidestepped in the eyes of justice.

Be that as it may, at the time the respondent opted to satisfy the decree in this manner, which I find to be improper, the matter was then before the District Registrar to whom the respondent paid the cheque of Shs. 30,508,429/20, and that cheque was issued in the name of the District Registrar as the payee. The applicant/decreed holder could not get that money at once, he had to wait until the District Registrar deposited the cheque and then prepared a payment voucher in the name of the applicant, payable at Dar-es-Salaam because the District Registrar has no deposit Account at Mwanza. It is a long process, so the applicant was bound to travel to Dar es Salaam to get his payment at the Judiciary Headquarters.

According to the payment voucher (Annexure P8), there is a description of the heads of claim which the respondent purported to pay to the applicant plus interest rate of 12.5% for 9 months at Court rate. As the applicant has complained, and I think quite rightly so, the break down and the interest rate of 12.5% being court rate, was effected without any consultation being accorded to the applicant. So, the applicant was not a party to the preparation of the said payment voucher, although he accepted and received the payment of the money stated therein, being part-payment of the amount of his decree. So, the applicant had no opportunity whatsoever to oppose or make any representations against the errors contained in the said payment voucher. The said payment voucher merely described the payment of Shs. 30,508,429/20 as being:

"Compensation as special damages for loss of business and (2) general damages for breach of contract--total 27,893,421/= plus (3) interest at court rate (12.5%) for 9 months awarded per decree on H/C Civ. Case No.56/97".

It will be of advantage to set out hereinbelow the heads of claims in the applicant's amended plaint which were granted as per plaint in the judgment of the Court dated 1/12/98, which was entered against the 2nd defendant, the present respondent:-

"Wherefore: The plaintiff prays for judgment and decree against

either the 1st or the 2nd defendant, or both of them as follows:-

- (a) TShs.16,893,421/= as special damages for loss of business.
- (b) TShs.11,000,000/= as general damages for breach of contract.
- (c) An order to the effect that the plaintiff's account be corrected to reflect a credit balance of TShs.14,332,948/= as at 4/10/95 as per para 10 above, with accruing interest at Bank Commercial rate from that date to that of filing this suit.
- (d) A declaration that the intended disposal of the plaintiff's mortgaged properties is illegal and/or unlawful.
- (e) A permanent injunction restraining the disposal of the plaintiff's mortgaged properties.
- (f) Interest on the principal sum at Bank rate from the date of filing this suit until judgment.
- (g) Interest on the decretal sum at Court rate from the date of judgment until full satisfaction,
- (h) Costs of the suit.
- (i) Any further or other relief(s) as this honourable Court may deem fit."

And the decree which was drawn from the judgment that was entered on 1/12/98 was in the following terms:

" DECREE

CLAIM:-

- (a) TShs.16,893,421/= as special damages for loss of business.
- (b) TShs.11,000,000/= as general damages for breach of contract.
- (c) An order to the effect that the plaintiff's account be corrected to reflect a credit balance of TShs.14,322,948/= as at 4/10/95 as per paragraph 10 of the plaint, with accruing interest at Bank Commercial rate from that date to that of filing this suit.
- (d) A declaration that the intended disposal of the plaintiff's mortgaged properties is illegal and/or unlawful.
- (e) A permanent injunction restraining the disposal of the plaintiff's mortgaged properties.
- (f) Interest on the principal sum at Bank rate from the date of filing this suit <sup>until</sup> judgment.
- (g) Interest on the decretal sum at Court rate from the date of judgment until full satisfaction.
- (h) Costs of the suit.
- (i) Any further or other relief(s) as the honourable court may deem fit.

This case coming up this 1st day of December, 1998 for final disposal in respect of the 2nd defendant before Honourable Mr. Justice M. D. Nchalla in the presence of the plaintiff and Mr. Kweka, Esq. learned Advocate for the 1st defendant and in the absence of the 2nd defendant.

THE COURT DOTH HEREBY ORDER THAT judgment be, and IT IS HEREBY, entered against the 2nd defendant - NBC (1997) LTD for failure to file defence against the plaint, together with costs as per plaint.

IT IS SO ORDERED.

GIVEN under my hand and the seal of the Court, this 12th day of February, 1999.

Sgd. M. D. Nchalla

Judge

12-2-99"

To recapitulate, it now appears that the amount of Shs. 27,893,421/= appearing on the payment voucher (Annexure P8) being special damages for loss of business, and general damages for breach of contract, is the total amount of the monies claimed in items (a) and (b) both in the amended plaint and in the decree. Those amounts are Shs. 16,893,421/= plus Shs. 11,000,000/==total Shs. 27,893,421/=. This means only Shs. 2,615,008/20 was worked out as interest at Court rate of 12.5% on these two heads of claim, which brought about the total amount of Shs. 30,508,429/20 indicated in the payment voucher in question. Although I am not a Mathematician, nor am I supposed to be one simply for purpose of this matter, yet I am entitled to say this, that any one who has been to school cannot agree that 12.5% P.a of Shs. 27,893,421/= is only Shs. 2,615,008/20.

As I have already stated, the execution proceedings were before the District Registrar who, it appears, succumbed to the whims of the respondent and then directed the applicant to file this application for an order to state specifically what rate of interest should be applied to the amount of money claimed by him in the various heads as detailed in his plaint and in the decree quoted above.

The applicant filed this application under sections 96 and 97 of the Civil Procedure Code, 1966 and any other enabling provisions of the law. Those sections provide as follows and I quote:

"S.96. Clerical or arithmetical mistakes in judgments, decrees or orders, or - errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any of the parties."

"S.97. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."



The applicant is a layman and is not represented by an advocate in this application, so he drafted and filed the documents in this application in person, and has also argued the application single handed.

On the other hand, the respondent bank is represented by Mr. Galati, learned advocate who argued the application in reply, and strongly opposed the application.

As already stated, the parties' arguments were quite strained and far reaching, and were backed up with several authorities both from the municipal courts of record, and from foreign courts. Very surprisingly even the applicant, a lay man at that, did a commendable exercise, both at arguing his points and also at citing quite relevant authorities which some advocates could, perhaps, not have been able to do.

In arguing his application, the applicant made reference to the various prayers in the paragraphs containing the reliefs in his plaint. He reiterated that he had prayed therein for interest at bank commercial rate. He also made reference to the document or letter which is annexure A2 to his amended plaint, and which is also numbered as exhibit P2 to this application. This is the letter dated 12/6/1995 from the defendant/respondent bank addressed to the applicant/plaintiff, which constitutes the lending or overdraft agreement between the parties, the breach of which terms gave rise to the suit between the parties. In that document it is specifically stated that, the rate of interest applicable to that overdraft agreement is 40%. The said agreement was to endure from 12/6/95 to 6/6/96 when it was to expire. However, as already stated, the respondent bank breached that agreement on or about 4/10/95 before the date of its expiry. The applicant has emphasized that the rights and liabilities of the parties in the substantive suit i.e. H/C Civ. C. No.56/97, from which this application stems, arise from and depend upon the commercial banking contract between them.

Apart from the contractual document (Annexure A2 or Exhibit P2), the applicant annexed to this application a document entitled as "Bank of Tanzania: An Economic Bulletin for the Headquarter Ended 31st December, 1996 Vol. XXIV No. 4 (Exh.P7)." That document contains and stipulates the interest rates structure applicable to all commercial banks in the Country for the period from 1981 to 1996. This period covers the time when the overdraft agreement in question was entered into by the parties. In that Bulletin it is indicated that the interest rates under head C, that is, Lending rates on short-term loans for the year 1995, was between 27.7 and 45.0, while for the year 1996, was between 28.0 and 46.0. These are the interest rate margins which the commercial banks in the country were allowed by the Bank of Tanzania to charge on short-term loans for those years. The parties entered into the short-term lending agreement in June, 1995, so the respondent bank was permitted to charge interest rate between 27.7 and 45.0, and it chose to charge 40% which is within these margins. The applicant cited, in support the decision of the Court of Appeal of Tanzania in The National Bank of Commerce vs. D.M. Investment Group CT. & U LTD cited as CIVIL Appeal No. 41/1992 arising from Mwanza H/C Civ. C. No. 113/1991. The substance of that decision in this case, as far as the question of what interest rate is applicable to the overdraft agreement entered into between the parties, is that, it is that interest rate which is set or stated in the contractual document, and which was agreed upon by the parties, subject to notice of change of such agreed interest rate, and also subject to any directive by the Bank of Tanzania altering such interest rate as the said Bank of Tanzania is empowered to direct under the Bank of Tanzania Act No. 1/1995.

The applicant submitted that, no notice was ever given to him by the respondent bank to change or alter the interest rate of 40% agreed upon and stated in the contractual document annexure A2 or Exh.P2, nor did the Bank of Tanzania issue any directive in the period

decision in Kighoma Malima in which it had held, inter alia, that "various persons should swear affidavits to provide an unbroken chain of evidence to prove a point." Also the decision of three judges of the High Court of Tanzania who constituted a full bench in a Constitutional issue in the case of Augustine Lyatonga Mrema & Others v. Attorney General & 2 others (1996) T.L.R. 243, was cited on the same point. On the same point the following decisions of the Court of Appeal of Tanzania were also cited by the applicant: S'alima Vuai Foun V. Registrar of Co-operative Societies & three Others (1995) TLR.76; John Chuwa v. Anthony Ciza (1992) TLR 233.

Mr. Galati learned Advocate conceded that the documents annexed and referred to in para 3 of Mr. Mapunda's counter affidavit are copies of the original, hence the same are secondary evidence. However, Mr. Galati submitted that the court has discretion to act on those documents in order to arrive at a just decision of this application. Mr. Galati cited proviso (g) to section 68 of The Tanzania Evidence Act, 67 to support his argument: I <sup>need</sup> not touch on all the submissions which Mr. Galati, learned Advocate made in reply to the applicant's submission on the admissibility or otherwise of the documents annexed to the counter affidavit of Mr. Mapunda, and whether or not Mr. Mapunda's averment in paragraph 3 of his affidavit is valid in law. I had the occasion of hearing the parties exhaustively on those questions earlier on, and I had reserved my decision on those questions. I now give my decision to the effect that the documents in question whether admissible or not, and Mr. Mapunda's averment in para 3 of his affidavit whether valid or not, the same is not the determinant on the issue in this application on the interest rate applicable to the amounts of money in the decree which has been granted to the applicant in H/C Civil Case No. 56/97. I am quite settled in my mind, that on the facts and the pleadings in that suit the applicable interest rate is that which is specifically stated in the contractual document cited as

in question altering or changing the interest <sup>rates</sup> / in respect of short-term lending as supported by the Bulletin (Exh.P7).

The applicant also cited section 5 of the Bank of Tanzania Act No.1/95 which <sup>empowers</sup> / the Bank of Tanzania to set or fix minimum and maximum interest rates applicable to all commercial banks in the country at any point in time.

The applicant then turned on to para 3 of the respondent's counter affidavit which was deposed to by one Peter Joseph Mapunda the Branch Manager of NBC(1997) Limited, Nyerere Branch at Mwanza. In that paragraph Mr. Mapunda refers to documents which are numbered as Exhibits GLC/NBC/CA/1 and GLC/NBC/CA/2, which purport to set interest rates applicable to the respondent bank for the period effective from 1st July 1996. Those two documents show interest rates applicable to three types of accounts namely Savings Bank Account, Time Deposit Bank Account and Head Office Account. The interest rates indicated for each one of those Accounts are 10.00%; 7.00% and 20.00% respectively.

The applicant first argued that the said two documents are inadmissible in evidence as the same are secondary evidence or copies of the original. No reason has been given to account why the original documents have not been tendered. Moreover, the applicant argued that, since those documents emanated from the NBC Headquarters in D'Salaam, then Mr. Mapunda who is based in Mwanza, and being not the author of those documents, is not empowered in law to swear an affidavit on the authenticity and substance or rationale of those documents. The authors of those documents are the persons who ought in law to have deposed to affidavits concerning those documents. The applicant cited the decision of the Court of Appeal on this point in Civil Application No. 2/1992 between MARY RUGOMORA V. RENE POINTE at P4 <sup>the</sup> of/cyclestyled ruling. On the same point the applicant cited another decision of the Court of Appeal in Civil Application No.26/1999 between (1) Attorney General (2) Pius Sangali & 16 others And Tanzania Portland Cement Co. LTD. The Court of Appeal referred to its earlier