



## REPUBLIC OF KENYA

### IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Ibrahim, Wanjala & Njoki, SCJJ)

#### PETITION NO. E005 OF 2023

– BETWEEN –

**STANBIC BANK KENYA LIMITED ..... APPELLANT**

– AND –

**SANTOWELS LIMITED ..... RESPONDENT**

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*(Being an appeal from the Judgment of the Court of Appeal at Nairobi (**Okwengu, Asike-Makhandia & J. Mohammed, JJ. A**) delivered on 28<sup>th</sup> April, 2022 in Civil Appeal No. 160 of 2018)*

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#### Representation:

Mr. Allen Gichuki, SC & Mr. Franklin Otieno for the appellant  
(*Wamae & Allen Advocates*)

Mr. Kelvin Mogeni for the respondent  
(*Mogeni & Co. Advocates*)

### **JUDGMENT OF THE COURT**

#### **A. INTRODUCTION**

[1] This appeal is premised on Article 163(4)(b) of the Constitution. It was filed pursuant to leave issued by the Court of Appeal by its ruling of 17<sup>th</sup> February, 2023. The matters certified as being of general public importance, revolve around the

question of whether banks and financial institutions are required to seek approval of the Cabinet Secretary responsible for matters relating to Finance (Cabinet Secretary) envisaged under Section 44 of the Banking Act (Cap 488 Laws of Kenya) prior to increasing rates of interest on loans and/or facilities advanced to their customers. Concomitantly, whether the issue of interest is simply a contractual matter subject to mutual negotiation by the institutions and their customers.

## **B. BACKGROUND**

### ***(i) Factual History***

**[2]** At one point, Stanbic Kenya Limited (the appellant) and Santowels Limited (the respondent) were in a bank/customer relationship which led to the appellant granting the respondent several facilities between 1993 and 1997. The pertinent terms of the said facilities were that they could be renewed and/or extended; the rate of interest was 3% per annum above the appellant's base lending rate; and the appellant reserved the right to vary the rate of interest. Periodically, the appellant notified the respondent of interest adjustments whenever they occurred, and the respondent paid the interest as and when it fell due. However, in 2002 the parties' relationship became difficult as the respondent began having doubts concerning the interest charged by the appellant. Consequently, the respondent paid the outstanding debt and closed its accounts with the appellant in the same year.

**[3]** Nonetheless, in 2003 the respondent engaged Interest Research Bureau (K) Ltd. to audit and/or verify the accuracy of the interest charged on the facilities. In addition, the respondent notified the appellant of the said engagement vide a letter dated 11<sup>th</sup> June, 2003 and requested the appellant to accord Interest Research Bureau (K) Ltd. the necessary cooperation. Thereafter, correspondence relating to recalculation of interest were exchanged between Interest Research Bureau (K) Ltd. and the appellant. Ultimately, according to Interest Research Bureau (K) Ltd.'s computation, the appellant had overcharged interest on the facilities granted to the respondent. In turn, the appellant through a letter dated 30<sup>th</sup> October, 2003

disputed the said computation which it termed as inaccurate. What was more, the appellant denied any liability on its part, and that is what escalated the dispute to a long litigation before the two superior courts below and the present appeal.

**(ii) Litigation History**

**(a) At the High Court**

[4] It is the aforementioned state of affairs that instigated the respondent to file a suit in the High Court, **HCCC No. 648 of 2004**, against the appellant. The respondent's plaint was amended twice with leave of the High Court. Its claim revolved around the contention of overcharged interest by the appellant. In particular, the respondent anchored its claim on Section 39 of the Central Bank of Kenya (CBK) Act (Cap 491 Laws of Kenya), which was later repealed by Section 17 of the CBK (Amendment) Act No. 9 of 1996. Section 39 read as follows:

**“39. The Bank may, from time to time, acting in consultation with the Minister, determine and publish the maximum and minimum rates of interest which specified banks or specified financial institutions may pay on deposits and charge for loans or advances.**

***Provided that the Bank may in consultation with the Minister determine different rates of interest-***

- i. for different types of deposits and loans; and***
- ii. for different types of specified bank and financial institutions.”*** [Emphasis added]

[5] In line with the then Section 39, the Governor of CBK through Gazette Notices set the minimum and maximum rates of interest. Of relevance to the matter at hand is Gazette Notice No. 1617 of 1990 which stipulated that-

***“In exercise of the powers conferred by Sections 39 and 41 of the Central Bank of Kenya Act, it is notified that the Central Bank of Kenya has determined the following ...***

***(a) ...***

***(b) The maximum rate of interest which specified banks may charge for loans or advances granted for a term not exceeding three (3) years shall be 16.5 per cent per annum calculated on a reducing balance method, with monthly rests.***

***(c) The maximum rate of interest which specified banks may charge for loans or advances granted for a term exceeding three (3) years shall be 10 per cent per annum calculated on a reducing balance method, with monthly rests.***

***...***

***This notice shall be deemed to have come into effect on 1<sup>st</sup> April, 1990 ...”***

[6] It is useful to note that the above Gazette Notice was subsequently revoked by the Governor of CBK about a year later vide Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991. Of worthy to note also is that neither Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991 nor did the Governor in any other way stipulate the new capped rates of interest thereafter. Be that as it may, the respondent claimed that the Governor lacked the power to completely revoke capped interest rates in the manner he did. Rather, that his mandate under Section 39 of the CBK Act was to simply adjust capped interest rates applicable to specified banks and financial institutions. As such, the respondent urged that the capped interest rate of 16.5% per annum stipulated by Gazette Notice No. 1617 of 1990, despite its revocation, remained applicable until Section 39 of the CBK Act was repealed by Section 17 of the CBK (Amendment) Act No. 9 of 1996, which commenced on 18<sup>th</sup> April, 1997.

[7] In other words, it was the respondent's case that the capped interest rate of 16.5% per annum on a reducing balance was applicable to the facilities in question up to 18<sup>th</sup> April, 1997. Therefore, the respondent maintained that the interest rates applied by the appellant to the facilities were over and above the capped rate of interest. In that regard, the respondent urged that the overcharged interest based on the capped rate of interest as at 31<sup>st</sup> October, 2004 was Kshs. 17,256,522.66. In the alternative, the respondent posited that the appellant had even overcharged interest beyond the rates stipulated in the contract between the parties, as evinced in facility letters, and the interest adjustments communicated by the appellant. The respondent computed the overcharged interest based on the contractual rate of interest as at 31<sup>st</sup> October, 2004 at Kshs. 8,978,813.63.

[8] The respondent further claimed that it believed the appellant was applying the correct interest rates, and as such, it offset the overcharged interest on the facilities in good faith. The respondent thereafter learnt of the anomaly in September 2003 after the audit and recalculation of the interest charged. As far as the respondent was concerned, the appellant not only owed it a duty of care as a trustee but was contractually bound to accurately and honestly handle its funds. The respondent urged that the appellant had acted fraudulently and in breach of its fiduciary duties in overcharging interest on the facilities. Moreover, the respondent claimed that the appellant had unjustly enriched itself by unlawfully and secretly converting the respondent's money (through illegal debits on its running accounts) yet it was not entitled to such money.

[9] The respondent's position is that it is entitled to recover the illegally overcharged interest it had paid to the appellant. Towards that end, the respondent, through its amended plaint sought the following reliefs in the High Court:

***a) An order that an account be taken and the defendant (the appellant herein) be ordered to repay the plaintiff (the***

respondent herein) ***any interest over and above 16.5% plus further interest thereon. (sic)***

- b) In the alternative, judgment be given in favour of the respondent against the appellant for the sum of Kshs. 8,978,813.63 or alternatively, Kshs. 17,256,525.66 plus interest thereon at court rates.***
- c) In the alternative, judgment be given in favour of the respondent against the appellant for the sum of Kshs. 8,978,813.63 or alternatively, Kshs. 17,256,525.66 plus interest from 13/10/2004 until payment in full for fraud and misrepresentation.***
- d) The appellant be ordered to pay the costs of the suit.***
- e) The appellant be ordered to pay the respondent any sums that the appellant has collected and converted to its own use from the respondent's account (which amounted to payment by the respondent to the appellant) secretly or unlawfully or in breach of its fiduciary duties and even contractual rights and interest thereon from the date of debits.***
- f) The appellant be ordered to pay interest on such sum found due from it at court rates.***
- g) Such further relief as the court may deem just.”***

**[10]** Later on, Interest Research Bureau (K) Ltd. stopped its operations in Kenya, and the respondent engaged Interest Rates Advisory Centre Ltd. (IRAC) to recalculate the interest charged on the facilities. In discharging the instructions, IRAC prepared two reports based on two different scenarios. The first report which

was based on the capped rate of interest of 16.5% per annum set out the overcharged interest at Kshs. 68,986,536.28. The second, which was based on the contractual rates, indicated the overcharged interest as Kshs. 10,499,411.74. It is on this basis that the respondent, with the leave of the court, filed a further amended plaint dated 14<sup>th</sup> October, 2016 wherein the order seeking Kshs. 17,256,525.66 and Kshs. 8,978,813.63 which had been pleaded in the amended plaint was substituted with Kshs. 68,986,536.28 and Kshs. 10,499,411.74 respectively.

**[11]** In response, the appellant filed a statement of defence which was amended thrice with leave of the court. The long and short of the appellant's 'further further amended defence' dated 18<sup>th</sup> October, 2016 was that the parties relationship was at all material times contractual; the appellant never assumed the role of a trustee or a fiduciary; the appellant executed its contractual obligations with due diligence and in accordance with the banking practices and customs; at no time during the duration of the contractual relationship were interest rates regulated by the law or capped at 16.5% per annum; the rates of interest applied on the facilities were contractual and known by the respondent; on various occasions, the respondent exceeded the approved limit of the overdraft facilities and was therefore, charged interest on the exceeded amount as permitted by law; and the respondent was notified of interest adjustments and supplied with monthly statements of accounts. Besides, the appellant urged that the respondent's suit was time barred by dint of the provisions of Section 4(1)(a) and (3) of the Limitation of Actions Act (Cap 22 Laws of Kenya). This is because, in its view, the claim (which was founded on a contract) and the prayer for accounts were based on facilities that were issued between 1993 and 1997 yet the suit was filed in 2004 outside the six (6) years' statutory timeline.

**[12]** Upon considering the parties' pleadings, submissions and the evidence adduced, the High Court (*Sewe, J.*) in her judgment dated 22<sup>nd</sup> March, 2018 distilled three issues as arising for determination. That is, *whether the*

*respondent's claim or any part thereof was barred by dint of Section 4(1)(a) of the Limitation of Actions Act; whether or not the appellant overcharged interest, and if so, by how much, and whether the sums are recoverable; and whether the appellant owed a fiduciary duty to the respondent, and if so, whether it acted in breach of that duty for which damages are payable(sic).*

**[13]** Beginning with the *issue of limitation*, the court found that despite the claim being pegged on alleged unlawful interest charged between 1993 and 1997; firstly, the running accounts were settled in 2003. Secondly, by virtue of Section 26 of the Limitation of Actions Act, the cause of action is deemed to have arisen in 2003 since it was the respondent's contention that it only learnt of the appellant's alleged fraudulent actions in September 2003. Thirdly, that the appellant by a letter dated 16<sup>th</sup> September, 2003 had committed to an amicable solution and agreed to verification of the accounts only to renege by a letter dated 30<sup>th</sup> October, 2003. Therefore, the High Court held that the time contemplated under Section 4(1)(a) and (3) of the Limitation of Actions Act began running from 16<sup>th</sup> September, 2003 which meant that the suit was filed within time.

**[14]** *On overcharged interest*, the court held the view that the legal regime that was applicable at the time was Section 39 of the CBK Act, which granted the Governor of CBK power to determine and regulate maximum rates of interest chargeable by commercial banks such as the appellant. Pertaining to Gazette Notice No. 1617 of 1990, which prescribed capped interest rate of 16.5% per annum, the court held that it was properly revoked by Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991. In doing so, the court found that Section 39 of the CBK Act gave the Governor discretion to cap interest rates, which discretion also entailed the power not to set any limits if it was in the best interest of the sector, economy and the public. The learned Judge went on to state that following the repeal of Section 39 of the CBK Act, residual power to control rates of interest charged by banks and/or financial institutions is preserved in Section 44 of the Banking Act. In particular, that a bank

and/or financial institution is required to seek approval of the Cabinet Secretary before increasing its rate of interest.

[15] The High Court further held that, the appellant did not demonstrate that it had obtained the requisite approval to charge interest rates above the applicable rate which it deemed was 16.5%. Accordingly, the court found that the interest charged by the appellant was unlawful in spite of the appellant's contention that the interest rates applied were contractually agreed upon. Moreover, the court found that Section 52(3) of the Banking Act prohibited the parties from entering into a contract outside the express provisions of the CBK and Banking Acts. Notwithstanding the foregoing finding, the learned Judge in determining the amount of overcharged interest which was recoverable by the respondent relied on the computation based on the contractual rates. This is what the Judge stated in that regard,

***“ ... it is noted that in the premises, and going by the principle it is ordinarily no part of equity's function to allow a party to escape from a bad bargain; and considering that the court's function is to give effect, within the confines of the law, to the wishes of the parties as expressed by the terms of their contract, I would adopt the scenario presented ..., which was premised on the parties' contractual documents, that the Plaintiff (the respondent herein) was unlawfully overcharged interest by the Defendant (the appellant herein) to the tune of Kshs. 8,498,764.03, and I so find. It is further my finding that the said sums are recoverable by the Plaintiff from the Defendant.”***

[16] On whether *the appellant had a fiduciary duty to the respondent*, the court found that the parties' relationship was contractual. Further, it found that the respondent had neither alleged nor proved breach of contract on the appellant's part hence there was no basis for awarding the respondent additional sums. In the

end, the High Court entered judgment in favour of the respondent in the sum of Kshs. 8,978,813.63 plus interest thereon at court rates from the date of filing the suit until payment in full, and awarded it costs of the suit.

***(b) At the Court of Appeal***

[17] Aggrieved by the High Court's decision, the respondent filed an appeal in the Court of Appeal, **Civil Appeal No. 160 of 2018**. In a nutshell, the respondent took issue with the High Court's finding with respect to the amount due to it. As far as it was concerned, the High Court ought to have found that the amount due, as pleaded and established by evidence, was Kshs.68,986,536.28 in line with the computation based on the capped rate of interest. Therefore, it sought an order that, the High Court's judgment be set aside and substituted with judgment in its favour in the aforementioned sum plus interest thereon at bank rates from the dates of the overcharge.

[18] Likewise, the High Court judgment did not go down well with the appellant who filed a cross appeal. It faulted the High Court for failing to find that the respondent's suit was time barred; finding that Section 39 of the CBK Act was applicable; finding that Section 44 of the Banking Act required financial institutions to obtain approval of the Cabinet Secretary prior to any variation of interest whilst the said section referred to the rate of banking as opposed to interest variation; failing to distinguish between the rate of banking and contractual rate of interest as governed by Sections 44 and 52 of the Banking Act, respectively; rewriting the contract between the parties and allowing variation of the rate of interest; and relying on the interest rate computation by IRAC. In the circumstances, the appellant urged the Court of Appeal to dismiss the respondent's appeal, and allow its cross appeal by setting aside the High Court judgment in its entirety and dismissing the respondent's suit with costs.

[19] The Court of Appeal (*Okwengu, Asike-Makhandia & J. Mohammed, JJ.A*) framed four issues for determination, *to wit, whether the suit was time barred;*

*whether the trial court erred in evaluating the evidence presented; the interest rate applicable; and whether the cross appeal was merited. On limitation of time, the court concurred with the High Court's finding. As for evaluation of the evidence, it found that the High Court did what it termed as a sterling job. With regard to the rate of interest charged, the Court of Appeal, like the High Court, held that by dint of Section 39 of the CBK Act the applicable rate of interest was 16.5% between 1991 and 1997. Therefore, that the appellant unlawfully increased the rate of interest without the necessary approval from the Cabinet Secretary under Section 44 of the Banking Act. While the Court of Appeal did not fault the High Court for relying on the computation of overcharged interest based on the contractual documents, it found that the High Court got it wrong by setting out the figure as Kshs. 8,498,764.03 instead of Kshs. 10,449,411.74 in line with the further amended plaint. Lastly, on the cross appeal, the Court of Appeal found that it lacked merit. Accordingly, by a judgment dated 28<sup>th</sup> April, 2022 the Court of Appeal allowed the respondent's appeal to the extent that it found that the amount due to it was 10,449,411.74, and dismissed the appellant's cross appeal. Each party was directed to bear their own costs for the appeal.*

**[20]** Perturbed by the Court of Appeal's judgment, the appellant filed an application, **Civil Applic. Sup. 196 of 2022**, anchored on Article 163(4)(b) of the Constitution before the same court and sought leave to lodge an appeal in the Supreme Court. The appellant argued that the intended appeal raises fundamental points of general public importance. By a ruling dated 17<sup>th</sup> February, 2023 the Court of Appeal (*Musinga (P), Omondi & Gachoka, JJ.A*) granted the leave sought to file an appeal before this Court.

### **(c) At the Supreme Court**

**[21]** Pursuant to the leave granted, the appellant filed its appeal before this Court premised on nine grounds. Subsequently, the appellant condensed the grounds in its written submissions in the following terms:

- i. Whether the Court of Appeal erred in law and fact by failing to find that the respondent's case was time barred.***
- ii. Whether the Court of Appeal erred by failing to distinguish between rate of banking and contractual rate of interest as governed by Sections 44 and 52 of the Banking Act respectively that allowed the bank discretion to vary the rate of interest.***
- iii. Whether the Court of Appeal erred by relying on the interest rate computation by IRAC that did not consider the bank's evidence on applicable rate of interest but instead rewrote the contractual rate of interest.***
- iv. Whether the court failed to evaluate the evidence and entered judgment for an amount not pleaded or proved.***
- v. Whether the Court of Appeal's failure to consider the appellant's cross appeal was a breach of the right to a fair hearing.***

**[22]** Based on the aforesaid grounds, the appellant sought the following reliefs: -

- i. The appeal be allowed on the following terms or such terms as the court deems fit:***
  - a) A declaration be issued that the total effect of the revocation of Gazette Notice No. 1617 of 1990 by Gazette Notice No. 3348 of 1991 and subsequent repeal of Section 39, 40 and 41 of the CBK Act liberalised the bank interest rates regime from control or regulation of by the Minister (now referred to as Cabinet Secretary) for Finance through CBK, and granted financial***

*institutions liberty to contractually negotiate interest rates with their borrowers.*

- b) A declaration be issued that Section 44 requiring financial institutions to obtain approval of the Minister for Finance prior to any increase of the rate of banking or other charges does not refer to variation of interest rates under Section 52(1) of the Banking Act.*
  - c) A declaration be issued that the rate of banking and other charges under Section 44 of the Banking Act as defined in the Banking (Increase Rate of Banking and other Charges) Regulations, 2006 that obligates every financial institution to post, in a conspicuous position at every place of the institution's business, does not apply to contractual interest rates under Section 52 of the Banking Act. (sic)*
  - d) A declaration be issued that the respondent's claim was statute barred.*
  - e) A declaration that IRAC had no authority or jurisdiction to rewrite the various contracts between the parties.*
- ii. The Judgment of the Court of Appeal dated 28<sup>th</sup> April, 2022 be set aside, the cross appeal filed at the Court of Appeal be allowed with costs, the judgment of the High Court be set aside, and the suit be dismissed with costs.*
  - iii. An order be issued directing the respondent to refund the full decretal amount and all costs and auctioneers charges with interest at court rates of 14% per annum from the date of payment until payment in full.*

- iv. The costs of this appeal, Civil Appeal No. 160 of 2018 and HCCC No. 648 of 2004 be awarded to the appellant.**

**[23]** In opposing the appeal, the respondent filed a replying affidavit sworn by its Managing Director, Rajiv Raja, on 24<sup>th</sup> March, 2023. In addition, the respondent filed a cross appeal on 31<sup>st</sup> March, 2023 anchored on seven (7) grounds, which can be summarised as the Court of Appeal erred by-

- i. Failing to set aside the High Court judgment and to enter judgment as prayed in the appeal before the Court of Appeal.**
- ii. Failing to properly evaluate the evidence presented by the respondent and examine the accounts and applicable law thus making an error in the amounts due to the respondent.**
- iii. Finding that the respondent should be paid Kshs. 10,449,411.74 instead of Kshs. 68,986,536.28.**

**[24]** On its part, the respondent prayed for the following orders:

- i. The overcharge recoverable should have been calculated in reference to the unsanctioned capped interest rates. (sic)**
- ii. Judgment be entered for the respondent in the sum of Kshs. 68,986,536.28.**
- iii. An award be made for general damages bearing in mind the time it has taken to litigate the entire claim and the actions of the appellant.**

*iv. The respondent be awarded interest at the prevailing commercial lending rates.*

[25] In turn, the appellant filed grounds of objection on 24<sup>th</sup> April, 2023 questioning the propriety of the respondent's cross appeal. In a nutshell, the appellant urged that this Court lacked jurisdiction to entertain the cross appeal since firstly, the respondent did not specify under which appellate jurisdiction of this Court it was premised. Secondly, that the respondent did not seek certification prior to filing the cross appeal. Therefore, the appellant urged that the cross appeal was defective and ought to be struck out *in limine*.

**C. PARTIES SUBMISSIONS**

**(i) Appellant's Submissions**

[26] The appellant relied on its written submissions filed on 23<sup>rd</sup> October 2023, and grounds of objection set out herein above. The appellant urged that the respondent's claim was based on alleged breach of contract and overcharged interest contrary to statute. In its view, that was why the respondent sought an order for taking of accounts. Citing Section 4(1)(a) of the Limitation of Actions Act, the appellant submitted that actions relating to a contract, like the matter at hand, can only be brought to court before the lapse of six (6) years from the time the cause of action arose. It was posited that the cause of action arose between 1993 and 1997 when the respondent alleged that the appellant applied unlawful rates of interest to the facilities. Therefore, the appellant faulted the Court of Appeal for not finding that the respondent's suit was time barred. Further, the appellant claimed that the superior courts below misapplied Section 26 of the Limitation of Actions Act since the suit was neither premised on fraud nor was fraud established.

[27] It was asserted that prior to the respondent filing the suit at the High Court, the interest rate regime had been liberalised from 23<sup>rd</sup> July, 1991 when Gazette Notice No. 1617 of 1990 was revoked by Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991. As such, the appellant claimed that the Court of Appeal had failed to appreciate

that banks were at liberty to negotiate interest rates, as held in ***National Bank Ltd. v. Cadon Investment Limited***, HCCC No. 2005 of 2005 (unreported). Instead, the court relied on its *dicta* in ***Margaret Njeri Muiruri v. Bank Baroda (Kenya) Ltd.*** Civil Appeal No. 282 of 2004; [2014] eKLR (***Margaret Njeri Case***), which in the appellant’s opinion was *per incuriam* to the extent that it found that a bank was enjoined to provide proof of compliance with Section 44 of the Banking Act.

[28] Expounding on its argument, the appellant made reference to Sections 44 and 52 of the Banking Act. It contended that by virtue of the *ejusdem generis* rule, the operative words in Section 44, “*rate of banking or other charges*”, do not relate to interest rates under Section 52. Besides, it was urged that the Court of Appeal failed to consider other decisions rendered by the superior courts below after its decision in the ***Margaret Njeri Case***. Reference was made to the ***National Bank Ltd. v. Cadon Investment Limited (supra)***; ***Sammy Japheth Kavuku v. Equity Bank Ltd. & Another***, HCCC No. 84 of 2013; [2014] eKLR; and ***Jimmy Wafula Simiyu v. Fidelity Commercial Bank Ltd.*** [2016] eKLR in support of this position. In particular, the appellant stated that the overwhelming majority of High Court decisions correctly interpret Section 44 to exclude the application of interest rates and confirm the liberalisation of interest rate regime between 1991 and 2001. The appellant added that the position taken by the courts so far has been that they would be reluctant to interfere with contractual provisions regarding interest except in cases where fraud is manifest or is proved.

[29] The appellant further submitted that the repealed Section 39 of the CBK Act dealt specifically with “*rates of interest*” and co-existed alongside Section 44 of the Banking Act. In its view, the repeal of Section 39 meant that interest rates were freed from the control of the Cabinet Secretary of Finance, a position which it said courts have readily accepted. If Section 44 was to be interpreted as the superior courts below did, urged the appellant, it would contradict the government’s

decision to deregulate interest rates chargeable by financial institutions. It was further pointed out that the CBK (Amendment) Act 2000, in introducing a new Section 39 aimed at regulating interest rates of specified banks and/or financial institutions, is a clear indication that interest rates are not covered under Section 44 of the Banking Act. Otherwise, there would have been no need for the inclusion of the new Section 39 in the said Amendment Act. It was also pointed out that the said new Section 39 was in any event later repealed by Section 4 of the Central Bank of Kenya (Amendment) Act No. 8 of 2004. The appellant also made reference to the Banking (Increase of Rate of Banking and other Charges) Regulations, 2006 published by the Minister (now the Cabinet Secretary) of Finance vide Legal Notice No. 34 of 12<sup>th</sup> May, 2006. In particular, it referred this Court to Regulation 2 thereof which expressly mentions an application for approval of increase in rate of banking and other charges as opposed to interest rates.

[30] Citing the often-quoted case of *National Bank of Kenya Ltd. v. Pipeline Samkolit (K) Ltd. & Another* [2001] KLR 112, the appellant maintained that a court cannot rewrite a contract between parties, and that the parties are bound by the terms thereof. Consequently, the appellant claimed that the superior courts below erred in relying on the interest computation report by IRAC which did not take into account the applicable contractual rates. To buttress that proposition, this Court was referred to a number of decisions, one of which was *Daima Bank Limited (In liquidation) v. David Musyimi Ndeti*, Civil Appeal No.171 of 2010; [2018] eKLR where the Court of Appeal rejected IRAC's computation report on the basis that it could not rewrite the contract therein, and the bank had discretion to vary the rate of interest as per the terms of the contract. In any event, the appellant postulated that it is unconscionable for the respondent to file a suit 11 years after it obtained the first facility in 1993, and demand to have the contract rewritten despite the interest rates regime having been deregulated from 1991.

[31] As far as the appellant was concerned, the Court of Appeal failed and/or ignored to consider its cross appeal and the arguments advanced therein. It was submitted that the court was under a duty to consider all issues raised by parties as appreciated in *Bia Tosha Distributors Limited v. Kenya Breweries Limited & 6 Others*, SC Petition No. 15 of 2020, [2023] KESC 12 (KLR). The effect of which, the appellant stated, was that the Court of Appeal, in not doing so occasioned a miscarriage of justice and violated its right to a fair trial as well as its right to property. In conclusion, the appellant urged this Court to allow the appeal and strike out the cross appeal based on its grounds of objection.

**(ii) Respondent's Submissions**

[32] The respondent relied on two sets of submissions filed on 11<sup>th</sup> May, 2023 and 2<sup>nd</sup> November, 2023 in opposition to the appeal; submissions in support of its cross appeal filed on 11<sup>th</sup> May, 2023; and submissions in response to the appellant's grounds of objection filed on even date.

[33] At the hearing, we understood the respondent's counsel to suggest that the appellant's appeal, despite certification, does not raise any issues of public importance as contemplated under Article 163(4)(b) of the Constitution. Whilst acknowledging that the respondent did not seek review of the certification, counsel contended that the respondent was not precluded from raising the issue at hearing of the appeal. According to respondent's counsel, the issue of interpretation of Sections 44 and 52 of the Banking Act did not arise before the superior courts below. Therefore, the said issue was not properly before this Court.

[34] However, it was urged that should this Court find otherwise, the issue of limitation was factually considered by the superior courts below based on the peculiar circumstances of the case. The respondent thus reiterated that the circumstances of its case fell squarely within the provisions of Section 26 of the Limitation of Actions Act. This is because it argued that it only discovered the unlawful overcharged interest by the appellant after the recomputation and

verification done in September, 2003. Furthermore, it had pleaded fraud on the part of the appellant and set out the particulars thereof. Therefore, the respondent maintained that its suit was brought within time.

**[35]** The respondent further asserted that the Court of Appeal correctly held that the appellant was required to seek and obtain the Cabinet Secretary's approval before increasing its interest rate. Moreover, the respondent submitted that contrary to the appellant's contention, the Court of Appeal's decision in the ***Margaret Njeri Case*** was not *per incuriam*. Rather, it posited that based on the doctrine of *stare decisis*, decisions of the Court of Appeal are more persuasive than those of the High Court. To support that argument, this Court's decision in ***George Mike Wanjohi v. Steven Kariuki & 2 Others***, SC Petition No. 2A of 2014; [2014] eKLR was cited. In addition, the respondent asserted that the Court of Appeal in relying on the ***Margaret Njeri Case*** did find that the operative words "*rate of banking or other charges*" in Section 44 of the Banking Act did indeed relate to interest rates by virtue of the *ejusdem generis* rule.

**[36]** Pertaining to the cross appeal, the respondent averred that Rule 47 of the Supreme Court Rules, 2020 allows a respondent to file a cross appeal in the manner it did. Besides, the respondent argued that there are no provisions requiring certification or leave to file a cross appeal. In its view, the leave contemplated in Article 163(4)(b) of the Constitution speaks to appeals as opposed to cross appeals.

**[37]** On the merits of its cross appeal, the respondent maintained that by virtue of the then Section 39 of the CBK Act the rate of interest was capped at 16.5% per annum until the said section was revoked on 18<sup>th</sup> April, 1997. Therefore, it was contended that the superior courts below ought to have awarded the overcharged interest based on the capped rate as opposed to the contractual rate. More so, having found that the appellant was required to seek the Cabinet Secretary's approval prior to increasing the rates of interest above the capped interest rate of 16.5%. It was submitted that, the respondent was not bound by the terms of the

contract due to the appellant's fraudulent activities, and the terms therein being contra-statute. In any event, the respondent urged that IRAC's computation based on the capped rate of interest was not controverted by the appellant. Consequently, the respondent submitted that the superior courts below erred by failing to award it Kshs. 68,986,536.28 which was the computation of the overcharged interest based on the capped interest rate.

#### **D. ANALYSIS**

**[38]** Having considered the pleadings, the impugned judgment, and the parties' respective submissions, it is apposite to first address issues concerning this Court's jurisdiction to entertain the appeal and cross appeal herein.

##### *i. Appellant's Appeal*

**[39]** To begin with, the respondent, through its counsel, urged that despite certification by the Court of Appeal, the appellant's appeal does not raise any issues of general public importance. Putting it differently, the respondent is challenging the certification by the Court of Appeal that the appeal raises issues of general public importance. Can certification by the Court of Appeal be challenged at this stage and in the manner that the respondent purports to?

**[40]** It is trite that certification of an intended appeal as raising issue(s) of general public importance or the decision declining such certification by the Court of Appeal is only subject to review by this Court. Article 163(5) of the Constitution is clear on that issue and in point of fact, the provision limits the orders this Court can issue as either affirming, varying or overturning the Court of Appeal's decision on certification. However, Rule 33(2) and (3) of the Supreme Court Rules, 2020 goes on to set out the timeline, procedure and parameters of seeking review of certification. In particular, it prescribes that such review should be sought within 14 days of the Court of Appeal's decision on certification through an Originating Motion. In this case, the Court of Appeal certified the appellant's appeal in its

ruling dated 17<sup>th</sup> February 2023. The respondent's counsel admitted to non-compliance with the laid down timeline, procedure and parameters but still maintained that the respondent could raise the issue at the hearing of the appeal. We wish to disabuse the respondent of this misconception and observe that the point at which an objection ought to have been raised had long passed.

**[41]** The procedure and parameters for seeking review as delineated under Rule 33(2) and (3) of the Supreme Court Rules are not merely technical requirements that can be wished away. This Court has on numerous occasions emphasised on the importance of litigants complying with its Rules. See ***Okoti & 3 Others v. Cabinet Secretary for the National Treasury and Planning & 10 Others***, SC Applic. No. E029 of 2023; [2023] KESC 69 (KLR). This is for good reason as compliance will ensure good order, certainty and predictability in the disposal of disputes/matters before the Court and in the administration of justice. In any event, it is not lost to us that the challenge by the respondent's counsel was raised from the bar during the hearing of the appeal depriving the appellant adequate opportunity to prepare and respond to the same. It would be an affront to justice to allow such practice especially where the procedure and the parameters of raising such a challenge are provided and known to a litigant, like the respondent. Accordingly, the respondent's contention simply rings hollow and is dismissed.

*ii. Respondent's Cross Appeal*

**[42]** As indicated in the preceding paragraphs of this judgment, the respondent lodged a cross appeal before this Court against the impugned judgment. On its part, the appellant through its grounds of objection questioned the suitability of the cross appeal on two fronts. Firstly, that the respondent failed to specify the appellate jurisdiction of this Court it was invoking; and secondly, that the respondent had not sought leave or certification prior to filing its cross appeal. In response, the respondent latched on Rule 47 of the Supreme Court Rules as the

basis of filing its cross appeal, and added that there was no provision which necessitated certification as a pre-requisite to lodging a cross appeal.

[43] The appellate jurisdiction of this Court is circumscribed under Article 163 (4) of the Constitution and is well settled by a plethora of decisions of this Court on this aspect. In particular, not all decisions of the Court of Appeal can be subject of an appeal to this Court. It is for that reason that Article 163(4) acts as a sieving mechanism to ensure only deserving cases falling within the scope of the two categories set thereunder are entertained by this Court. See **Lawrence Nduttu & 6000 others v. Kenya Breweries Ltd & Another**, SC Applic No. 3 of 2012; [2012] eKLR. Besides, the two avenues under which this Court can hear appeals from the Court of Appeal are distinct, and cannot be invoked at the same time in one matter as appreciated in **Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others**, SC Applic. 35 of 2014; [2015] eKLR.

[44] This Court considered the place of a cross appeal filed in the Court in **Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v. Maurice Munyao & 148 Others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)**, SC Petition No. 3 of 2016; [2019] eKLR. Towards that end, this Court held that any respondent who opts to cross appeal must bring the cross appeal within the realm of the substantive appeal. In its own words, this Court pronounced itself as follows:

***“...Where the appeal requires certification as being a matter of great public importance under the provisions of Article 163(4)(b) of the Constitution, it is our position that during such certification, the respondent is at liberty to raise the cross appeal and the grounds applicable for such. In that instance, should the Court of Appeal or Supreme Court***

*dealing with the certification find that the ground raised either in the application for certification and/or cross appeal qualifies as raising great public importance, then the issues and grounds will be framed as such to form the basis of certification of the appeal to the Supreme Court. With such certification, as may be reviewed by the Supreme Court where necessary, the respondent will be at liberty to file the cross appeal in accordance with the Supreme Court directions.”*

[45] Contrary to the respondent’s assertion, Rule 47 of the Supreme Court Rules merely sets out the form that a cross appeal should take and in no way acts as *carte blanche* for respondents to file cross appeals. Strictly speaking a cross appeal is a separate and independent appeal that must be considered on its own terms and merits independent of the main appeal. As discussed in the **Albert Chaurembo Case**, the respondent’s cross appeal should have been brought within the realm of the appellant’s appeal which was filed following certification under Article 163(4)(b) of the Constitution. Therefore, the respondent should have sought certification of the issues raised in its cross appeal prior to lodging the same. There can be no justification to hold otherwise as the adage goes, what is good for the goose is good for the gander. Equally, we remain alive to the fact that this Court can only be seized of a matter, in this case the cross appeal, where its jurisdiction is properly invoked. In the circumstances, we agree with the appellant that the cross appeal is defective for the aforementioned reasons, and is hereby struck out.

[46] Having pronounced ourselves as we have, it follows that only the appellant’s appeal falls for our consideration. Nonetheless, we also note that the grounds of appeal therein, the reliefs sought and the submissions thereto, as set out in the preceding paragraphs, go beyond the scope of the certification by the Court of Appeal. We say this because the Court of Appeal in its ruling for certification pronounced itself in the following manner:

***“We have also considered the applicant’s grounds in support of certification and in our view, the intended appeal primarily revolves around the proper interpretation and application of sections 44 and 52 of the Banking Act. As we understand it, the applicant is saying that the courts have given different interpretation on instances when the consent of the minister in charge of finance is required and instances when the parties have freedom of contract to agree on the rate on interest, including the right to vary that rate.***

***Having considered the issue, we find there is uncertainty in the law arising from the contrary views in the High Court and this Court on the question of the rate of interest and banking charges which requires certainty.***

...

***In our view, the interpretation of sections 44 and 52 of the Banking Act transcends the interest of the parties that are before us. A determination of this issue will bring certainty to this question once and for all...*** [ Emphasis added]

[47] It is discernible from the foregoing that the Court of Appeal certified the interpretation of Sections 44 and 52 of the Banking Act as issues of general public importance based on the uncertainty occasioned by contradictory decisions of the superior courts below. However, the Court of Appeal in its concluding paragraph in the said ruling stated as follows:

***“For the foregoing reasons, it is our considered view that the questions raised by the applicant are certainly of general public importance that transcend the dispute between the applicant and the respondent. It is therefore our holding***

***that the application has met the test set in the now-famous Hermanus Steyn case. We, therefore, grant leave to the applicant to file the intended appeal in the Supreme Court within the next 14 day.”***

It is necessary to point out that the appellant, in its application for certification had listed the following seven (7) questions as issues of general public importance:

- a. Does Section 44 of the Banking Act that restricts financial institutions from increasing the rate of banking or other charges except with the prior approval of the Minister apply to interest rates?***
- b. Does Section 52 of the Banking Act allow contractual freedom to financial institutions to contractually vary interest without ministerial authority?***
- c. Does the rate of banking refer to interest rates?***
- d. Can a third party rewrite a contract between a financial institution and its customer by relying on Section 44 of the Banking Act?***
- e. Does it amount to unjust enrichment for a bank customer to claim a refund on the basis of a third-party recomputing interest on time-barred claims on the basis of misapplying Section 44 of the Banking Act?***
- f. Does the application of Section 44 of Banking Act apply retrospectively to revive time-barred claims?***

[48] Perhaps, the aforementioned concluding paragraph in the Court of Appeal’s ruling may have contributed to the appellant exceeding the parameters of the certification. Consequently, when it comes to certification, it is important for the

Court of Appeal to specifically formulate or delineate the issue(s) it deems is/are of general public importance, and warrants consideration by this Court. Such formulation will not only guide litigants from going off on a tangent but will act as an indicator of whether an appeal lodged pursuant to certification under Article 163(4)(b) of the Court of Appeal exceeds the parameters pursuant to which it was admitted. See *Muriithi (Suing as the Legal Representative of the Estate of Mwangi Stephen Muriithi) v. Janmohamed SC, (Suing as the Executrix of the Estate of Hon. Daniel Toroitich Arap Moi) & Another*, SC Petition No. 41 of 2018; [2023] KESC 61 (KLR), and *Dhanjal Investments Limited v. Kenindia Assurance Company Limited*, SC Petition of Appeal 7 of 2016; [2018] KESC 16 (KLR).

[49] In the matter at hand, the issue of limitation as raised by the appellant does not fall within the ambit of this Court's jurisdiction under Article 163(4)(b). It entails revisiting the factual findings of either the High Court or Court of Appeal on this issue, which is not within the scope of our mandate in an appeal such as this one which is lodged under Article 163(4)(b). See *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)*, SC Petition No. 3 of 2018; [2021] KESC 34 (KLR). Equally, the contention that there was a miscarriage of justice due to the alleged failure by the Court of Appeal to consider its cross appeal was neither the basis of certification nor can it now be a matter that requires our attention. See *Hermanus Phillipus Steyn v. Giovanni Gneccchi-Rusccone*, SC Applic No. 4 of 2012; [2013] eKLR. Accordingly, we hereby frame the issues for determination as follows:

- i. What is the correct interpretation of Sections 44 and 52 of the Banking Act?**
- ii. What orders can issue?**

**i. Interpretation of Sections 44 and 52 of the Banking Act**

[50] As set out in the opening paragraph of this judgment, the issue at hand is the determination of what the interpretation of these two provisions are in as far as the increase of rates of interest on loans/facilities advanced by banks/financial institutions is concerned. In particular, whether the increase of such interest rates is subject to the approval of the Cabinet Secretary or it is a matter purely of contractual freedom. In other words, whether increase of such interest rates is subject to regulatory control or is it liberalised?

[51] It is common ground that certification of this appeal was based on the contradictory interpretation of the said provisions by the superior courts below. From the Court of Appeal's observation, and rightly so, there appears to be generally two schools of thought on the issue. On one hand, some of the decisions of the superior courts below are to the effect that banks and financial institutions are required to obtain the Cabinet Secretary's approval under Section 44 of the Banking Act prior to increasing the rate of interest on loans/facilities advanced to their customers. The High Court in *John Gatu Nderitu v. Kenya Commercial Bank Ltd.*, HCCC No. 55 of 2001; [2011] eKLR, for example, pronounced itself as follows:

***“There is a statutory control in the manner banks should vary upwards the rate of interest on loans advanced to their customers. The relevant provision is Section 44 of the Banking Act...***

...

***In other words, banks should not increase the rate of interest without seeking the approval of the Minister for Finance.”***

Likewise, the said position is reflected in the Court of Appeal decision in the **Margaret Njeri Case** as well as the High Court decision in **Husseni Dairy Limited v. Southern Credit Banking Corporation Limited & Another**, HCCC No. 252 of 2008; [2020] eKLR, and **Amandari Limited & 2 others v. NIC Bank Limited**, HCCA No. 28 of 2018; [2020] eKLR to mention but a few.

[52] On the other hand, is the position that banks/financial institutions do not require the Cabinet Secretary's approval since the approval envisaged under Section 44 of the Banking Act does not apply to interest rates on loans. In **Co-Operative Bank of Kenya Limited v. Pius Kimaiyo Langat**, HCCC No. 499 of 2004; [2012] eKLR, the High Court held that-

**“... a distinction needs to be drawn on what charges Section 44 of the Banking Act governs. The marginal note on the section clearly states that it relates to restriction on increase in bank charges. Bank charges in my view are distinct from interest charges as these relate to the price or cost of banking services or products, notably commissions. This means that interest rate adjustments are not regulated under Section 44 and a bank wishing to adjust interest rate applicable to loan facility is not obligated to seek Ministerial approval. Interest rate charges must therefore be considered separately and not as part and parcel of Section 44.”**

The aforementioned position was also advanced by the Court of Appeal decision in **Daima Bank Limited (In liquidation) v. David Musyimi Ndeti (Supra)**, and the High Court in **Morris and Co Ltd v. Kenya Commercial Bank Ltd & Others** [2003] 2 EA 605, among other decisions.

[53] It is therefore important for this Court to pronounce itself on this issue so as to give clarity and certainty. More so, as one of the fundamental ingredients of the

rule of law is certainty and predictability of law. In doing so, we are persuaded by the view expressed by Lord Nicholls of Birkenhead in ***In re S (Minors) (Care Order: Implementation of Care Plan)*** [2002] 2 AC 291, 313, para 39 where he aptly observed that, “*Interpretation of statutes is a matter for the courts*”.

[54] The essence of interpretation of statutes or documents, in this case the provisions in issue, is to discern the intention of the Legislature. This entails consideration of the words employed by the Legislature in the provisions, as appreciated in ***Law Society of Kenya v. Attorney General & Another***, SC Petition No. 4 of 2019, [2019] KESC 16 (KLR). Further, regard has to be given to the context as the Supreme Court of India in the often-cited case of ***Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Others*** (1987) 1 SCC 424 expressed –

***“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important... A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in***

***isolation. Statutes have to be construed so that every word has a place and everything is in its place.”***

[55] The preamble of the Banking Act provides that it is, “*An Act of Parliament to amend and consolidate the Law regulating the business of banking in Kenya and for connected purposes*”. Essentially, the preamble clearly sets out the primary objective of the Act relates to regulating the business of banking in the country. According to Spong Kenneth, *Banking Regulation, Its purpose, Implementation and Effects*, (2000, 5<sup>th</sup> Edition) p. 5, banking regulation in its strict sense refers to the framework of laws and rules under which banks operate. With that in mind, the next consideration is the meaning of the provisions in issue.

[56] Beginning with Section 44 of the Banking Act it provides that-

***“No institution shall increase its rate of banking or other charges except with the prior approval of the Minister.”***

It is instructive to point out that Section 2 of the Act, which sets out the definition of words used in the Act, does not define the term “*rate of banking*”. In that regard, the appellant contends that the term does not include interest rates on loans while the respondent maintains that the converse is the correct position. This is the same path taken by the contradicting decisions of the superior courts below on the interpretation of the said term.

[57] Be that as it may, the *Black’s Law Dictionary*, 8<sup>th</sup> Edition (2004) at p. 441 defines banking as the business carried out by a bank. Section 2 of the Banking Act defines banking business in the following manner:

***“banking business” means—***

***(a) the accepting from members of the public of money on deposit repayable on demand or at the expiry of a fixed period or after notice;***

- (b) ***the accepting from members of the public of money on current account and payment on and acceptance of cheques;***
- (c) ***the employing of money held on deposit or on current account, or any part of the money, by lending, investment or in any other manner for the account and at the risk of the person so employing the money; and***
- (d) ***such other business activity as the Central Bank may prescribe; ...*** [Emphasis added]

Based on the foregoing, loans and facilities advanced by banks fall within the banking business. The word ‘rate’ is defined in the *Black’s Law Dictionary* 8<sup>th</sup> Edition (2004) at p. 3956 as, “An amount paid or charged for a good or service <the rate for a business...” It follows therefore, that the rate of banking relates to charges for the banking business/service offered by a bank/financial institution. As we noted earlier, banking business includes the advancement of loans/facilities.

[58] Moreover, Section 31A of the Banking Act provides for disclosure of information on loans in the following terms:

***“A bank or financial institution shall, before granting a loan to a borrower disclose all the charges and terms relating to the loan.”*** [Emphasis added]

The use of the word “charges” relating to loans in the above provision in our view cannot be interpreted in any other way other than to mean that it includes interest relating to loans. This is flowing from the understanding that a bank/financial institution charges interest in return for advancing a loan/facility to its customer. Accordingly, we find that the term “rate of banking” as employed by the Legislature under Section 44 of the Banking Act includes and covers interest rates charged/applied by banks on loans/facilities advanced. Our finding is further

fortified by the fact that the marginal note to the said Section 44 makes reference to, “*Restrictions on increase in bank charges*”. Towards that end, we approve the Court of Appeal’s finding in ***Desai Sarvia & Pallan Advocates v. Tausi Assurance Company Limited***, Civil Appeal No. 280 of 2015; [2017] eKLR with respect to the use of marginal notes in the interpretation of the meaning of the corresponding section of the legislation concerned.

[59] Consequently, words and particularly general words, should not be read in isolation. Rather, their colour and content should be discerned from their context. As such, we find that the following sentiments of Viscount Simonds in ***A-G v. HRH Prince Ernest Augustus of Hanover*** [1957] 1 All ER 49 at 53, HL still remain true:

***“English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words ...”***

[60] At this point, we must address the respondent’s contention that the interpretation that Section 44 of the Banking Act extends to interest rates would be in contravention with the Legislature’s intention to liberalise the interest rate regime by repealing Section 39 of the CBK Act. Section 39 of the Act, as we noted in the preceding paragraphs, gave CBK power, through the Governor, to regulate interest rates charged on loans by specified banks/financial institutions.

[61] In a nutshell, the history of regulation of interest rates by banks/financial institutions by the CBK began as early as the enactment of the CBK Act in 1966. The initial Section 39 of the said Act prescribed that CBK could determine and publish the maximum rates of interest which specified banks/financial institutions could pay only on deposits. It was not until 1980 that the Legislature extended

CBK's power to determine and publish maximum rates of interest charged by banks/financial institutions on loans. This was through Section 9 of the Finance Act No. 10 of 1980 which repealed the initial version of Section 39 and substituted it with the second version of Section 39, which we have set out in paragraph 4 above. This second version was repealed on 18<sup>th</sup> April, 1997 by Section 17 of the CBK (Amendment) Act No. 9 of 1996.

[62] Later on, a third version of Section 39 was introduced by the CBK (Amendment) Act of 2000 (famously known as the Donde Act), which commenced on 7<sup>th</sup> August, 2001. Unlike, the two previous versions of Section 39, the third version specifically set out the maximum rate banks/financial institutions could charge in the following manner:

**“39.**

**(1) The maximum rate of interest which specified banks or specified financial institutions may charge on loans or advances shall be the 91-day Treasury Bill rate published by the Bank on the last Friday of each month, or the latest published 91-day Treasury Bill rate, plus four per-centum:**

**Provided that the maximum interest chargeable under this subsection shall not exceed the principal sum loaned or advanced and provided further that this subsection shall only apply to contracts for loans or advances made or renewed after the commencement of this section.**

...

**(4) A specified bank or specified financial institution which contravenes any of the provisions of this section shall be guilty of an offence under the Banking Act and**

***liable to such penalty as the Minister may prescribe under section 55 of that Act.”***

The above version was later declared unconstitutional by the High Court in ***Kenya Bankers Association and Others v. Minister for Finance and Another*** (2004) 1 KLR 61 in so far as the Donde Act provided for a retrospective commencement date. Nevertheless, the section was later repealed by Section 4 of the CBK (Amendment) Act No. 8 of 2004. The common thread that ran through the said versions of Section 39, particularly the last two versions, was that the regulation of interest rates was through capping of the maximum interest rate that a bank/financial institution could charge.

[63] Subsequently, Section 33B of the Banking Act was enacted through the Banking (Amendment) Act No. 25 of 2016. Of significance, was that Section 33B provided for the maximum interest rate that a financial institution could charge on loans/facilities. The Section read as follows:

**“33B**

**(1) A bank or a financial institution shall set —**

- a) the maximum interest rate chargeable for a credit facility in Kenya at no more than four per cent, the base rate set and published by the Central Bank of Kenya; and***
- b) the minimum interest rate granted on a deposit held in interest earning in Kenya to be at least seventy per cent, the base rate set and published by the Central Bank of Kenya.***

**(2) A person shall not enter into an agreement or arrangement to borrow or lend directly or indirectly at an interest rate in excess of that prescribed by law.”**

[64] Thereafter, Section 33B was amended through Section 64 of the Finance Act, No. 10 of 2018. The amendment was to the effect that the regulation on deposits was entirely removed. However, Section 33B was declared unconstitutional by the High Court in ***Oduor v. Attorney General & another; Kenya Banker’s Association & 2 others (Interested Parties)***, HC Petition No. 413 of 2016; [2019] KEHC 10895 (KLR) (***Oduor Case***). It is instructive to point out that the section was not found unconstitutional on the basis of regulating interest rates on loans/facilities. Likewise, it is apparent from our reading of the repealed Section 33B of the Banking Act that the regulation therein was on the basis of capping the maximum interest rate that a bank/financial institution could charge on a loan/facility.

[65] With the above background in mind, did the repeal of Section 39 of the CBK Act, as the appellant alludes, and Section 33B of the Banking Act liberalise interest rates that banks/financial institutions could charge on loans? We do not think so. To begin with, as we have noted, the primary objective/purpose of the Banking Act is to regulate banking business in Kenya. The High Court (*Tuiyot* (as he then was), *Kamau & Ngetich, JJ.*) in the ***Oduor Case*** observed, and rightly so, that firstly, most countries both developed and developing regulate interest rates. Secondly, the overarching reason for interest rate capping and/or regulation is to protect consumers from exploitative rates, to increase access to finance and make credit affordable. In our view, the effect of the repeal of Section 39 of the CBK Act and Section 33B of the Banking Act did not completely liberalise the interest rates that banks/financial institutions can charge. Rather, it meant that regulation through capped interest rates was no longer in force. All along, the regulation through the capping of interest rate

simply set the parameters within which banks/financial institutions and their customers can negotiate or interact on the issue of interest rate.

[66] Based on our analysis and finding with respect to Section 44 of the Banking Act, the provision plays a different regulatory role yet complementary to that which capped interest rates played. By requiring bank/financial institutions to seek approval of the Cabinet Secretary prior to increase of interest rates, it ensures that there is some check and balance or oversight to ensure that consumers of the loan facilities are not exploited, and that the rates are reasonable. This is quite evident from the Banking (Increase of Rate of Banking and Other Charges) Regulations, Legal Notice No. 34 of 2006, formulated in relation to Section 44 of the Banking Act. The Regulations set out the procedure of seeking the approval envisioned thereunder as well as the process of considering such an application. It provides an elaborate process involving the Governor of CBK and the Cabinet Secretary who are better placed to tell whether the proposed interest rates are in line with the government's policy and the inflation rate amongst other necessary considerations. To hold otherwise as the appellant invites us to do, that is, that interest rates on loans/facilities are completely liberalised and not subject to regulation would be an interpretation that is contrary to the objective of the Banking Act. Furthermore, our finding is supported by the decision of this Court in ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others***, SC Petition No. 26 of 2014; [2014] eKLR, where we opined that a purposive interpretation should be given to statutes so as to reveal the intention of the Legislature and the Statute itself.

[67] Does the foregoing interpretation contradict Section 52 of the Banking Act or otherwise impede on contractual freedom? Section 52 provides that-

**“52.**

- (1) For the avoidance of doubt, no contravention of the provisions of this Act or the Central Bank of Kenya Act (Cap. 491) shall affect or invalidate in any way any contractual obligation between an institution and any other person.**
- (2) The provisions of subsection (1) shall apply with retrospective effect to the Banking Act (now repealed) and the Central Bank of Kenya Act (Cap. 491).**
- (3) This section shall not permit any institution to recover in any court of law interest and other charges which exceed the maximum permitted under the provisions of this Act or the Central Bank of Kenya Act.”**

[68] Looking at the provisions above, we find that our interpretation resonates with Section 52. More poignantly, our interpretation of Section 44 of the Banking Act does not prohibit or prevent banks/financial institutions to bargain and enter into a mutual contract with respect to interest rate that will be applied to loan facilities. However, as we have found herein above interest rates on loans/facilities are subject to the regulation under Section 44 of the Banking Act. This means that while a contract that is mutually agreed by parties might provide the bank with the discretion to alter/vary interest rates on loans, that discretion is not absolute/unlimited due to the objective of bank regulation. Towards, that end we agree and approve the Court of Appeal’s finding in the *Margaret Njeri Case* with regard to the effect of Section 52 as follows:

**“Once interest is agreed upon, and an agreement is entered into which in effect gives a lender the discretion to vary the interest, it is our view that the discretion cannot be exercised willy nilly to charge exorbitant interest.**

...

***We are aware of the provisions of Section 52 (1) of the Banking Act ... Even though under that section a failure to comply with Section 44 of the Banking Act would not, in and of itself, render the contract between the parties void, Section 52 (3) of the Act prohibits financial institutions from recovering interest or other charges which exceed the maximum permitted under the provisions of the Act.”***

[69] Likewise, Anu Arora, ‘Banking Law’ (Pearson, 2014) at p. 204 and 205 recognises that-

***“It is trite law that the banker and customer relationship is based on the principles of contract law, but that relationship is rarely reduced to a single written contract...The banker and customer relationship is, therefore, governed by a variety of written terms under contract law, supplemented by implied contractual terms introduced and developed by the courts, statute and voluntary codes of banking practice.***

...

***While the mandate, or contract, will contain some of the terms of the legal agreement, such terms do not attempt to exhaustively define the features of the banker and customer relationship...*** [Emphasis added]

[70] In conclusion on this issue, we find that interest rates on loans and facilities advanced by banks/financial institutions are subject to the regulatory process under Section 44 of the Banking Act. In addition, that such banks/financial institutions are required to seek the Cabinet Secretary’s approval under Section 44

of the Banking Act prior to increasing interest rates on loans and/or facilities advanced to its customers.

**ii. What orders should issue?**

[71] Based on our finding herein above, we find that the two superior courts below were correct in holding that the appellant required to seek the Cabinet Secretary's approval prior to increasing rate of interest on the facilities advanced to the respondent. Nonetheless, where we depart with the two superior courts below is on their finding that the capped interest rate of 16.5% per annum as prescribed by Gazette Notice No. 1617 of 1990 was applicable to the facilities advanced to the respondent.

[72] It is worth reiterating that the foregoing Gazette Notice was revoked by Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991. The meaning of revocation was a cancellation of the Gazette Notice which no longer had any effect. See *Black's Law Dictionary* 8<sup>th</sup> Edition (2008) p. 4116. On its part, the High Court got it right by finding that Gazette Notice No. 1617 of 1990, which prescribed capped interest rate of 16.5% per annum, was properly revoked by Gazette Notice No. 3348 of 23<sup>rd</sup> July, 1991. The court went on to correctly find that Section 39 of the CBK Act which gave the Governor discretion to cap interest rates also entailed the power not to set any limits on interest rates. As to why it later found the very same capped rate of 16.5% was applicable to the facilities which were advanced between 1993 and 1997, after the said revocation, is not clear. It is our finding however that contrary to the respondent's argument, once the capped rate of 16.5% was revoked, and no other capped rate was provided despite Section 39 of the CBK Act being in force, meant that the said rate of interest was not applicable and so to speak there was no capped rate of interest by the Governor of CBK.

[73] Pertaining to the refund of the amount awarded to the respondent, which has since been paid by the appellant, we note that the award of the sum of Kshs. 10,499,411.74 was based on the contractual computation by Interest Rates

Advisory Centre Ltd. (IRAC). Both superior courts below considered the report as well as the evidence of the consultant who prepared the same and they found that the respondent had established the overcharged interest based on the contractual computation. Those concurrent findings by the said courts were based on evidence, which we, while wearing our appellant jurisdiction hat under Article 163(4)(b) of the Constitution, cannot delve into. Besides, nothing has been put forth by the appellant to warrant us to find otherwise. Consequently, the prayer for refund of the award granted to the respondent fails.

#### **E. COSTS**

[74] Bearing in mind the circumstances of the matter at hand and the principles on the award of costs enunciated in ***Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai Estate of & 4 Others***; SC Petition 4 of 2012; [2013] eKLR, we find that due to the public interest nature of this matter each party should bear their own costs.

#### **F. ORDERS**

[75] In the premise, we issue the following orders:

***a) A declaration do hereby issue that interest rates on loans and facilities advanced by banks/financial institutions are subject to the regulatory process under Section 44 of the Banking Act. In that, such banks/financial institutions are required to seek the approval of the Cabinet Secretary responsible for matters relating to Finance prior to increasing interest rates on loans and facilities advanced.***

***b) The appellant's appeal dated 1<sup>st</sup> March, 2023 and filed on 2<sup>nd</sup> March, 2023 is hereby dismissed.***

***c) The respondent's cross appeal dated 22<sup>nd</sup> March, 2023 and filed on 31<sup>st</sup> March, 2023 is hereby dismissed.***

***d) Each party will bear their own costs of the appeal and cross appeal before this Court.***

***e) We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the appellant.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of June, 2024.**

.....  
**M. K. KOOME**  
**CHIEF JUSTICE & PRESIDENT OF**  
**THE SUPREME COURT**

.....  
**P.M. MWILU**  
**DEPUTY CHIEF JUSTICE &**  
**VICE PRESIDENT OF THE**  
**SUPREME COURT**

.....  
**M. K. IBRAHIM**  
**JUSTICE OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR**  
**SUPREME COURT OF KENYA**