



Gulf of African Bank Limited v Mumtaaz Enterproses Limited & 2 others (Commercial Appeal E729 of 2023) [2024] KEHC 13660 (KLR) (Commercial and Tax) (31 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13660 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E729 OF 2023
RC RUTTO, J
OCTOBER 31, 2024**

BETWEEN

GULF OF AFRICAN BANK LIMITED APPELLANT

AND

MUMTAAZ ENTERPROSES LIMITED 1ST RESPONDENT

ABDULLAHI MOHAMMED ABDI 2ND RESPONDENT

HASSAN ISMAIL ABDULLAHI 3RD RESPONDENT

(Being an Appeal from the Judgment/ Decree of the Hon. Bernard Kasavuli (Mr.) Senior Principal Magistrate in Milimani Commercial MCCC No. E 12625 of 2021 dated 12th July, 2023)

JUDGMENT

Introduction

1. This is an Appeal seeking to set aside the decision of the trial court that dismissed the appellant's claim on the basis of misrepresentation and irregularities.
2. The Appellant's claim is for the failure to repay loan amounts advanced to the 1st Respondent. The facts of the case as stated in the plaint are as follows; by a letter of offer dated 22nd December, 2016 and a Variation dated 18th October, 2017 the Appellant extended to the 1st Respondent a Murahaba finance facility to a maximum principal sum of Kshs.5,000,000/- which was used to finance working capital requirements while the Tawarruq facility was used to restructure the then existing Murahaba facility.
3. Pursuant to the letter of offer, the Facility was to be secured by a Guarantee and Indemnity entered into between the Appellant and the 2nd and 3rd Respondents dated 29th December, 2016 for the sum of



Kshs. 5,000,000/= and an all-asset debenture entered between the Appellant and the 1st Respondent for Kshs. 5, 000,000/= dated 2nd February, 2017.

4. In response to the claim, the Respondents filed a defence and counter claim dated 14th December, 2021 partly admitting averments by the Appellant. The Respondents admitted being advanced the loan of Kshs.5,000,000/= and pleaded misrepresentation and breach of contract.
5. The Respondent stated that, as per the letter of offer, an insurance cover was to be taken through GAB Takaful Insurance Agency. The insurance cover was in respect of stock and assets and the payment was to be debited from the Respondent's account. That the Appellant debited its bank account for the facility's insurance premium and in respect of debentures, but when presented with an insurable interest, the Appellant neglected, failed and or/refused to disclose if the claim had been paid for purposes of set-off of the loan facility or replacement of insured stock.
6. The Respondents also stated that they had overpaid the loan account and sought that the court declares that they are entitled to the amount in excess of the monies paid in respect to the loan facility and the insured claim; damages for breach of contract as well as costs and interest.
7. Upon the trial court hearing parties, in a judgment delivered on 12th July 2023, set out the following four issues for determination namely; whether the 1st respondent was in breach of the loan agreement; whether there was any misrepresentation and irregularities by the Appellant to the Respondents; whether the appellant was entitled to the relief sought and who bears the costs of this litigation.
8. The trial court proceeded to hold that the insured risk having occurred, the 1st respondent cannot be called upon to pay unless it is demonstrated that the insured risk has not been fully paid. The trial court also held that there was misrepresentation by the appellant which affected the respondents' ability to make sound decision to cover their interest during the pendency of the loan facility. The counter claim was found to be premature in view of the fact that the insurer was yet to settle the insured risk. Ultimately the trial court, proceeded to decline the Appellant's case with no orders as to costs.
9. The Appellant being aggrieved by the above decision lodged this appeal on the following grounds; that the trial court erred in law and in fact;
 - i. by finding misrepresentation on the part of the Appellant.
 - ii. by rewriting the contract between the parties herein.
 - iii. when he failed to take into account, properly consider, scrutinize, evaluate and analyse the Appellant exhibits/ evidence as regards loan letter of offer clauses thereby arriving at a wrong decision or judgment.
 - iv. by misdirecting himself on the Appellant's Authority to debit the 1st Respondent's account.
 - v. by misdirecting himself on the 1st 2nd and 3rd Respondents not being aware of the Contract clauses despite them having 30 days to peruse and sign the offer letter.
 - vi. in failing to consider the evidence before including admissions of indebtedness by the Respondents.
 - vii. in failing to consider relevant authorities and submissions by the Appellant.
 - viii. That the Appellant was denied a right to a fair hearing



10. The Appellant therefore prayed that the appeal be allowed, the decision delivered on 12th July, 2023 be quashed and set aside and substituted with the judgment in favour of the Appellant as prayed in the Plaintiff dated 17th November, 2021 as well as costs of the appeal.
11. This Appeal was canvassed by way of written and highlighting of submissions. The Appellant submissions were dated 21st May, 2024 while the Respondents' submissions were dated 27th May, 2024.

Appellant's submissions

12. The Appellant identified and submitted on five issues for determination namely whether there was financial advancement by the appellant to the 1st respondent and guaranteed by the 2nd and 3rd respondents; whether there was misrepresentation and irregularities by the appellant in the Murabaha facility; whether the trial court erred in rewriting the contract between the parties; whether the trial court erred in dismissing the appellant's claim and who is liable for the costs.
13. On the first issue the Appellant submitted that it is not disputed that Kshs 5,000,000/= was received by the 1st respondent, secured by a debenture against the 1st respondent's assets and guaranteed by the 2nd and 3rd respondent. Further, that payment was agreed at a profit of 14% comprising of 10% Central Bank rate and 4% bank margin. Reference was made to the case of Selkel T/A Masco Enterprises v Delphis Bank [2004] eKLR to urge the court to protect the intention of the parties so that every party adheres to their contractual duty.
14. On the second issue, the Appellant submitted on two points. The first point is on the opening of two different accounts relating to Tawaruq and Qard for a Murahaba facility and allege that the trial court erred by misinterpreting banking financial facility procedures where different loan accounts are opened for each. They submitted that every financial advancement and banking institutions are at liberty to debit the said accounts in realization of any monies owed as stated by the Court of Appeal in the case of Nicholas Mahihu Muriithi v Barclays Bank Kenya Limited [2018] eKLR as follows;

“ 38. Thus, in the circumstances where a bank has a loan account and also a current account in credit with the same customer and holds security for the ultimate balance, the banker is at liberty to combine and consolidate the accounts and set off the accounts...”
15. Also relied upon was the case of Nkoloma v NBC Holdings Corporation Tanzania Civil Appeal No 44 of 1997 (2000) 1 EA 187 to the effect that the courts should not be used to assist individuals who want to take undue advantage of the credit system.
16. The Appellant submitted that the 1st Respondent took a facility and vide letter of offer dated 22nd December, 2016 identified as deal 157/ 2017. They defaulted on deal 157/2017 and requested for a restructure. The restructure deal acted as the second facility used to clear the principal and profit of an initial facility in this case deal 157/2017. This led to opening of two further loan accounts being Taawaruq deal 192/2017 and Quard deal 193/2017. That the Taawaruq deal was used to credit the 1st Respondent's account and clear the principal of the facility in default while the Quard which is a zero-rated facility was used to clear the outstanding profit due.
17. The Appellant therefore submitted that on this basis it is not factual that the Appellant did not adduce evidence that the 1st Respondent was not aware of certain transactions relating to the restructure as stated in paragraph 12 of the judgment.



18. On the second limb, the Appellant submitted on the position of Takaful Insurance Agency and Geminia Insurance Company. It was their submission that the letter of offer required that the 1st Respondent takes up an insurance cover through Takaful Insurance Agency. The insurance cover was subsequently issued by Geminia Insurance Company. That the trial court misinterpreted the distinction between an insurance agency and insurance business/company and came to a wrong conclusion that the Appellant misrepresented information to the Respondent. Reference was made to the [Insurance Act](#) which provides the definition of the two terms.
19. The third issue submitted by the Appellant was whether the trial court erred in law and in fact by rewriting the contracts between the parties herein. The Appellant submission was that the trial court erred by rewriting the contract between the two parties by misunderstanding the difference between insurance agency and insurance company. According to the Appellant the goods were insured by Geminia insurance company as indicated in the insurance certificate. Consequently, the trial court erred in finding that the goods were to be insured by Takaful insurance Agency which is not an insurance company / business but an agency as defined by the [Insurance Act](#).
20. The Appellant cited [Centurion Engineers & Builders Limited v Kenya Bureau of Standards \(Civil Appeal E398 of 2021\)](#) [2023] KECA 1289 in which the Court of Appeal stated that parties are bound by the terms of their contract unless coercion fraud or undue influence are pleaded or proved.
21. On the fourth issue, the Appellant submitted that the 1st Respondent confirmed their indebtedness in their pleadings as well as during the hearing of the main suit. They contended that about Kshs.2,800,000/= of the loan still remains unpaid.
22. The Appellant also faults the trial court for dismissing the case and indicating that they should seek compensation from the insurance company but since they did not file the insurance claim with the insurance company this shall be a superfluous/ academic exercise. The Appellant submitted that they only discovered the alleged burglary after being served with the Respondents' defence. They fault the Respondents for not providing evidence in the trial court of communication or any attempt to seek assistance from the insurance agency or the Appellant and therefore a deliberate attempt to evade payment of the monies owed. The Appellant relies on Supreme Court Case Petition No. 12 of 2019 Dr. Samson Gwer and 5 others v Kenya Medical Research Institute and 3 others [2020]eKLR.
23. The Appellant argued that it was the duty of the Respondents to read and understand the agreement and to seek independent counsel. They relied on Court of Appeal Civil Appeal No. 39 of 2002, Mrao Ltd v First American Bank of Kenya and two others.
24. On the fifth issue of who bears the cost of the Appeal, the Appellant submitted that costs should be awarded in their favor so as to return them to the position they were in. They urged the court to allow the appeal as prayed.

Respondents' submissions

25. The Respondents also considered the same issues as raised by the Appeal. On the first issue, Whether the there was a financial advancement by the Appellant to the Respondents. The Respondent admits that there is no dispute as to the disbursement of the loan. However, the Appellant grossly misrepresented the terms and conditions of the contract that greatly undermined the contractual obligations. According to the Respondents the issues in contest and which amount to vitiating factors are; first, not being offered an opportunity to seek independent legal advice. That the bank settled on its lawyers to prepare debentures and guarantees and their role was to execute the documents. Second,



- not being allowed to procure insurance cover independently. This stifled the Respondents' right to make claims should risk occur.
26. On the second issue, whether there was misrepresentation and irregularities, the Respondents referred to their pleadings as well as oral and documentary evidence before the trial court and pointed to the particulars of misrepresentation and breach by the Appellant. In particular, that it was a condition precedent that the financing was insured against (peril insurance) against fire, and burglary over stock and business assets would be from Gulf of African bank (GAB) Takaful Insurance Agency with the Banks Interest as financier and first loss payee noted.
 27. The Respondents submitted that they were misled on various fronts as follows; firstly, that one of the requirements to get a loan facility was to get an insurance cover for the stocks beforehand. They were not given an opportunity to be provided with a list of insurance companies to choose from and were informed that it was the bank that would process the insurance cover and share the details with the Respondents. The same were not shared until after the suit before the trial court was filed. Also, that the Appellant made several debits from its bank account with respect to paying for insurance premium and for debentures.
 28. It was the respondents' submission that it lost stock that was insured. A report was filed at Embakasi Police Station for the loss of gas cylinders worth approximately Ksh 5,136,000/=. The police abstract and Occurrence Book extract was shared with the Appellant who provided records of an insurance firm known as Geminia Insurance Company which was different from what was known to the Respondents. Further, that the insurance certificate by Geminia Insurance Company indicated that the insured was comprehensively insured and that the bank's interest had been noted in the policy. Consequently, the bank would be a beneficiary of a claim to that effect, and should have pursued the claim with the insurance.
 29. On the issue of different loan accounts, the Respondents submitted that as per the letter of offer referenced GAB/CR/757/17/H1 dated 28th July, 2017, the terms and conditions would remain unchanged, yet the Appellant continued debiting its account without their consent. A request for the itemized loan statement detailing the total loan facility advanced and schedule of payments had been made but information in the request was not provided.
 30. As to Whether the trial magistrate erred in rewriting the contract between the parties herein. The Respondents maintains that the trial magistrate did not rewrite the contract between the parties. That the terms of a contract ought to be plain and unambiguous. The Respondents referred to the provisions of the letter of offer at clause 7.3 which provides adequate insurance cover shall cover the stock and customer's assets would be through the Gulf of African Bank Takaful Insurance Agency while noting the bank's interest as financier and the first loss payee. They urged that the Respondents were under the belief that Takaful Insurance agency was an insurance company and at no point was Geminia Insurance Company mentioned in the contract.
 31. It is the Appellant's submission that as per the contra proferentum rule any ambiguity in the contract can only be interpreted against the Appellant who drew the contract. It is acknowledged by the Respondents that the court cannot interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to procedural abuse during formation of the meaningful choice of the other party.
 32. As to whether the trial magistrate erred in dismissing the Appellant's claim, the Respondents submission was that the financial advancement agreement was handled with lack of transparency, misrepresentation and irregularities by the Appellant. That they did not breach any clause/provision no particulars of breach were pleaded in the Plaintiff.



33. The Respondent also submitted that Appellant failed and /or refused to provide the loan account statement thereby infringing on the Respondents right to Access to information under Article 35 of *the Constitution*.
34. It was the Respondents' submissions that the Appellant had not proved its case on a balance of probability on the basis that he was advanced Kshs.5,000,000/=while the Appellant's claim is for Kshs.5,517, 499.08 giving the impression that they never paid a single shilling towards the loan facility. They urged the court to dismiss the Appeal with costs.

Issues for determination

35. Being a first appellate court, this court is guided by the dictum in the case of *Selle vs. Associated Motor Boat Co. Ltd.* [1965] E.A. 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the circumstances. Having considered the record of appeal, grounds of appeal, the submissions and the authorities relied on by the respective parties, I opine that the main issue for determination is whether the trial magistrate was correct in dismissing the claim. In doing so I shall consider the attendant issues as to the extent to which the alleged debt came about and circumstances leading to the appellant's claim before the trial court.
36. As it is now settled, it is not for the court to interfere with any contract between parties and in this case the appellant on one hand and the respondents, respectively on the other hand. While the court does not shy away from interfering with unconscionable terms (see *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] KECA 152 (KLR) and *Kenya Commercial Finance Company Ltd vs Ngeny & Another* [2002] 1KLR) this is not what we have been called upon to do in this case.
37. It is common that the appellant advanced as sum of Kshs.5,000,000/= towards expanding the 1st respondent's business. The advance was secured by the personal guarantees of the 1st and 2nd respondent. As a further term of the borrowing, the borrower was to take out suitable insurance cover for inter alia theft and burglary of its stock. This cover was to be processed through the appellant's insurance agency. To effect this, the 1st respondent's bank account held by the appellant was debited with an insurance premium amount. Of note is that the insurance cover had noted the appellant's interest in the cover. This means that if the risk attached crystalized, the appellant would have the first right to be paid the insured sum to recover its outstanding balances.
38. However, as fate would have it, the respondent's business fell victim to burglary and lost its stock, an incident that had been insured. This portended two challenges. The appellant expected the repayment of the loan on the one hand as if the business was still in operation and the 1st respondent expected the insurance to pay for the loss arising from the occurrence of the insured risk thereby offsetting the loan obligation.
39. The Respondents are adamant that they reported the burglary incident. This has not been controverted. If anything, it is upon the filing of the report to the appellant by the Respondent that it turned out, by the information given by the appellant, that the appellant's insurance agency was not the ultimate underwriter of the risk but Geminia Insurance. Inevitably, the loan was not being serviced as contracted.
40. In my view, it was on the appellant to at least demonstrate the steps taken towards pursuing the insurance claim after being aware of the burglary. It would be different if the payment was made and the appellant was asking for the surplus. For the appellant to accuse the respondents of breach of contract



or misrepresentation under the circumstance is in my view not persuasive. This is buoyed by the fact that the underwriter was obtained by the respondents at the instance of the appellant.

41. As the circumstances leading to the claim by the appellant forms the crux of the appeal and having found as I have, I see no reason to belabor the arguments further. In the end and without the need to make any specific findings on the agreed terms of contract between the parties herein, I am not satisfied to interfere with the finding of the trial court and hold that the appeal is for dismissal.

42. The upshot of the above is that the appeal is dismissed with costs.

43 Orders accordingly

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 31ST DAY OF OCTOBER 2024

For Appellant:

For Respondents:

Court Assistant:

