



REPUBLIC OF KENYA



KENYA LAW
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**Cheruiyot v Kenya Commercial Bank Ltd (Civil Suit 09 of 2018)
[2024] KEHC 16608 (KLR) (31 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16608 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 09 OF 2018
RE ABURILI, J
DECEMBER 31, 2024**

BETWEEN

DR. MIKE KIPKOROS CHERUIYOT PLAINTIFF

AND

KENYA COMMERCIAL BANK LTD DEFENDANT

JUDGMENT

Introduction

1. The plaintiff sued the defendants vide an amended plaint dated 30th April 2019 in which he sought the following orders:
 - a. A declaration that the conversion of the loan facility by the defendant to Kapsabet Chemist Limited 1993 was an illegality hence the interest accrued therein was null and void.
 - b. That the Honourable court to order that the Defendant to revert the loan account to the original company herein christened Kapsabet Chemist Limited loan facility of Kshs. 200,000 all-inclusive upon communication that the account has been regularised.
 - c. That the Honourable courts to order that upon the plaintiff repayment of Kshs. 200,000 the defendant do discharge the loan securities being plot No. Nandi/Kamobo/2464.
 - d. That this Honourable court do declare that the Kapsabet Chemist 1993 Limited formed by Eric Keter and Ambrose Kosgei was null and void since the initial company herein Kapsabet Chemist Limited which both were directors was still in existence and the same has not been wound up.
 - e. That the Honourable court do order the defendant to pay Kshs. 2.5 million being loss of earnings.



- f. Costs of the suit.
2. It was the plaintiff's case that together with 3 other persons, they commenced a company known as Kapsabet Chemist Limited with which they traded normally until 1990 when the business diversified and they started trading assets and put up a commercial building on land parcel No. 1181/111/1.
 3. The plaintiff averred that the aforementioned company had four directors who held shareholding as provided herein:
 - a. Mike Cheruiyot – 30%
 - b. Danson Serem – 28%
 - c. Ambrose Kosgei – 22%
 - d. Erick Keter – 20%
 4. It was the plaintiff's case that he entered into a mutual sale agreement dated 26th October 1991 with one of the directors Danson Serem for the sale of Danson's 28% shares, which purchase was vide installments for 10 months. However, Dr. Serem backtracked on the deal and went on to return some of the cheques.
 5. The plaintiff further averred that instead of Dr. Serem paying for loans of the building, he defaulted but that he continued being a director of the Company despite the plaintiff buying out all shares from him-Dr. Serem and that subsequently, after the business recovered, the defendant started pursuing the company for loan repayment.
 6. The plaintiff averred that after Dr. Serem refused to complete the transfer of shares to him, he, in January 1993, quit the company and being the Chief Pharmacist therein, the company lost its substratum and stared at closure but that in July 1993, the other directors called him and they agreed to voluntarily liquidate the company as he took over the principal loan facility of Kshs. 200,000 from the defendant.
 7. The plaintiff further averred that the other directors subsequently intimated that they wanted to revive the company but did not and eventually, he learnt that the defendant in 1994 irregularly converted the company Kapsabet Chemist Limited Company account into Kapsabet Chemist 1993 Limited and unprocedurally transferred the outstanding loan facility into the new company without the plaintiff's consent and that despite several correspondences from him, the defendant had refused to have the account revert back to its original company thus causing him losses and damages.
 8. The plaintiff averred that the actions of the defendant cost him great loss and he has been unable to secure employment and or retain a job for the last 14 years as a result of the actions and/or inactions of the defendant; that he lost a job where he was earning Kshs. 33,000 due to circumstances related to the unresolved matter of the Kapsabet Chemist Limited and the illegal loan transferred to it by the defendant.
 9. The plaintiff testified in support of his case adopting his witness statement dated 6/3/2018 as his evidence in chief and the list of documents of the even date produced as PEx 1 – 15.
 10. In cross-examination, the plaintiff testified that they as a partnership with his other directors took a loan from the defendant with the security being plot no. Nandi/Kamobo/2464 with interest being charged at 32% together with Penal rate. He admitted that the loan was defaulted and that the defendant reserved the right to set off, combine accounts and consolidate the securities held.



11. The plaintiff further admitted that the agreement for purchase of shares between himself and Dr. Serem did not involve the defendant and that neither was the defendant a party to the voluntary liquidation but that they notified the defendant who vide a letter dated 25/5/1993, agreed to transfer the loan to him. The plaintiff further testified in cross-examination that he had sued the defendant because he had paid it Kshs. 200,000 but it refused to discharge the security. It was the plaintiff's case that though he had pleaded for Kshs. 2.5 million loss of earnings, he had not filed any proof of earnings.
12. In re-examination, the plaintiff testified that he made the payment of Kshs. 200,000 to the defendant to offset the loan but that the defendant refused to accept the payment and demanded that he pays Kshs. 600,000 so his advocate deposited the cheque dated 7/12/2019 in court.
13. The defendant filed an amended statement of defence dated 3rd July 2019 in which it denied the averments made by the plaintiff and putting him to strict proof thereof. The defendant did not call any witness in support of its case.
14. The parties agreed to file submissions to dispose the suit but as at the time of writing this judgement only the plaintiff's submissions were on record. Nonetheless, submissions are not evidence. They are not substitutes for evidence, except where they are raising pure points of law for consideration. However, as I was making this statement during judgment reading, I was reminded by Ms Otieno counsel for the defendant that she had filed her submissions and send to annextures@gmail.com in word format and that the same were acknowledged. I therefore in proof reading this judgment for uploading have taken into account the submissions of the defendant, as the omission was curable on the court's own motion under section 99 of the *Civil Procedure Act* which stipulates that:

“99. Amendment of judgments, decrees or orders/ Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.[emphasis added]

The Plaintiff's Submissions

15. The plaintiff submitted that he entered into a loan agreement with the defendant sometime in the year 1990 with security being land parcel No. Nandi/Kamoba/2464 and that the defendant proceeded to irregularly, illegally and unprocedurally changed the loan facility from Kapsabet Chemist Ltd to Kapsabet Chemist Limited (1993) and unprocedurally transferred the loan facility into the new account held and owned by completely different persons without the plaintiff's consent or due process a fact that was not disproved by the defendant.
16. It was submitted that he was never notified or served with any document relating to the change in account and that it was the defendant's burden to prove service of the same as was held in the case of *Stephen Boro Gitaha v Nicholas Ruthiru Gatoto & 2 Others 2017*] eKLR.
17. The plaintiff further relied on the case of *Samson M. Aketch & Another v Sidian Bank Limited [2021]* eKLR where the court held that service of statutory notices being a legal requirement, service is a matter of fact to be proved by evidence and, therefore, it cannot be left to conjecture or assumption.
18. The plaintiff submitted that on attempts to settle the loan he noted that the account names were different so he approached the defendant to have the same reverted back and rectified as is evident from the bank statements showing partial payments being directed to a different account other than the account the loan was credited to.



19. It was submitted that the conversion of the loan facility by the defendant to Kapsabet Chemist Limited (1993) was an illegality hence the interest accrued therein was null and void.
20. The plaintiff submitted that the defendant caused a blatant breach of the loan agreement which amounts to the infringement of a contractual right off the plaintiff. Reliance was placed on the cases of *Surya Holdings Limited & 4 Others v ICICI Bank Ltd & Another* [2015] eKLR where it was held that a party cannot unilaterally change the terms of a loan agreement without consent of the other party and that of *Francis Josphe Kamau Icaha v Housing Finance Company of Kenya Limited* [2014] eKLR where the court held inter alia that the defendant (bank) needed to give notice when varying terms of the contract to give the borrower a chance to either accommodate the new terms or bring the contract to an end.
21. The plaintiff submitted that he had proven through the bank statement that when making partial repayments the defendant directed the funds to account no. Kapsabet Chemist 1993 instead of Kapsabet Chemist Ltd, the account in which the plaintiff's company took out the loan.
22. The plaintiff submitted that the defendant's actions affected the loan repayment as was held in the case of *Samson M. Aketch & Another supra*. It was submitted that the defendant refused to accept payment in the form of a cheques of Kshs. 200,000 that he had made.
23. The plaintiff submitted that he suffered loss due to the defendant's various summons requiring him to request frequent work leave in order to sought out the issue leading him to lose his job where he was earning Kshs. 33,000 monthly and that he was unable to secure employment for over 14 years. He further submitted that he stands to suffer indirect damage if the defendant proceeds with auctioning of the loan security. Reliance was placed on the case of *Kwanza Estates Limited v Dubai Bank Kenya Limited* (2013) eKLR where it was held inter alia that a party deprived of his property through an illegal process would suffer irreparable loss and or damage.

Analysis & Determination

24. I have considered the pleadings herein, the testimonies given in court and the submissions filed by the plaintiff's counsel and in my view, the issue for consideration is whether the plaintiff proved his case to the required standard of balance of probabilities to warrant grant of the orders sought.
25. It is not disputed that the defendant did not call any witness in support of its case. In *Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu* (2012) eKLR, Odunga, J (as he was then) held as follows on the consequences of failure by a party to call evidence: -

“What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* Justice Lesiit, citing the case of *Autar Singh Bahra and Another vs. Raju Govindji*, HCCC No. 548 of 1998 stated: -

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

26. Again, in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No. 1243 of 2001* the court citing the same decision stated that it is trite that where



a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

27. Be that as it may, the standard of proof still lies on the plaintiff to prove his case on a balance of probabilities before the court can make any favorable orders on his behalf.
28. The plaintiff's case is that the conversion of the loan facility from Kapsabet Chemist Ltd to Kapsabet Chemist Limited (1993) was an illegality hence the interest accrued therein was null and void. The plaintiff admitted that his company had secured a loan of Kshs. 200,000 from the defendant sometime in the year 1990 and he was settling the said loan only for the defendant sometime in 1994 to direct the repayments into a different account other than the one that was used to take out the loan. The plaintiff's averments were supported by documentary evidence adduced in court as well as the plaintiff's own testimony. Additionally, from the evidence adduced, the plaintiff and his co shareholders in the company had agreed to voluntarily liquidate the company as he took over the principal loan facility of Kshs. 200,000 from the defendant and before the process was concluded, the defendant converted the loan to the account of a company formed by the plaintiff's co shareholders in the previous company.
29. The plaintiff further testified and it was not in contention that the other directors subsequently intimated that they wanted to revive the company but did not and eventually, he learnt that the defendant in 1994 irregularly converted the company Kapsabet Chemist Limited Company account into Kapsabet Chemist 1993 Limited and that the conversion was unprocedurally done.
30. From the evidence, it appears that the co-directors/shareholders in the Kapsabet Chemist Ltd, following the agreement to voluntary winding up, formed their own company and therefore there is no way the plaintiff could have used the wound up company name to sue the defendant herein for converting the loan account.
31. Further, from the agreement for winding up, with 50% of the liabilities being allocated to the plaintiff herein personally and not in a company's name, only the plaintiff could sue and or give consent for conversion and in the absence of any consent transferring the loan to the new company, I find that the defendant had no authority to transfer the said loan.
32. Taking all the aforementioned into consideration, including the plaintiff's testimony that he was indebted to the defendant, and the defendant's interest being the repayment of the loan advanced, I find that indeed the defendant altered the terms of the loan agreement with the plaintiff's former company unilaterally to the detriment of the plaintiff and without his consent contrary to the provisions of Article 46(1)(b) and (c) of the Constitution which provides for the rights to the information necessary for consumers of goods and services to gain full benefit from goods and services and to the protection of their health, safety, and economic interests.
33. Accordingly, from the evidence adduced by the plaintiff, I have no hesitation in reaching the conclusion that in the circumstances of this case, the Defendant illegally and unprocedurally redirected the funds for the loan repayment to a different account for Kapsabet Chemist 1993.
34. I reiterate that from the evidence adduced, the aforementioned redirection was done without the consent of the plaintiff who was responsible for settling of the loan as agreed with the other



shareholders. In *Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999*, it was held:

“Parties only bind themselves by the terms contracted and executed and not anything else e.g. charging interest rates not in accord with what was covenanted cannot make a total figure a chargee considered having fallen in default and therefore entitling it to exercise its statutory power of sale... Courts are not fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract.”

35. In *Spares & Services & 2 Others vs. Trans-National Bank Kisumu HCCC No. 439 of 1994*, the Court pronounced itself as follows:

“Having considered the documents filed, the Court is of the firm view that the contract between the parties is the charge: It is the one which spelled out the terms and conditions which the parties were obliged to adhere to during the existence of their relationship. In the said contract the rate of interest was certainly agreed to be 18%; but there was a rider that that rate of interest could be varied (either increased or reduced) at the sole discretion of the lender. The expressed factor which was to precipitate the agreed variation of the rate of interest by the lender, was the desire by the lender to conform to the prevailing economic trend in regard to the “rate of interest commonly chargeable in Kenya having regard to the circumstances as the lender considers to be relevant from time to time... First the borrower had to be served with one months’ notice by the lender to the effect that the rate of interest would be changed. A natural construction of the clause in question makes it clear that the borrower was certainly to be served with at least one month’s notice before the rate of interest could be varied. Any other interpretation to that clause would defeat the purpose for which it was entrenched in the contract between the parties... The parties herein had expressly agreed that a notice of not less than one month must be sent to the borrower before a new rate of interest is applied to the loan. The bank has failed to manifest real proof that the requisite notices were sent to the plaintiff... Consequently, the rates of interest other than that of 18% were not lawfully applied to the loan.”

36. Therefore, in the absence of any evidence that the Plaintiff was given the contractual notice, I have no hesitation in finding that the variations of the account for loan repayment to account No. Kapsabet Chemist 1993 instead of Kapsabet Chemist Ltd, the account in which the plaintiff’s company took out the loan and which was voluntarily wound up, leaving the plaintiff to be responsible for loan repayment, was illegal.

37. That said, it is undisputable that the plaintiff was in arrears of the loan agreement that his company which had since been voluntarily wound up had entered into with the defendant prior to the year 1994 when the loan repayments were redirected to the account Kapsabet Chemist 1993. There is therefore need for the parties herein to reconcile the accounts to determine the arrears, if any that are due to the defendant, for the plaintiff to settle. That said, the record shows that it was the defendant who refused to accept the cheque issued into the account for settling the loan by the plaintiff, upon which the court directed that the cheque be deposited in court. The said cheque is held in this court file but is stale. The plaintiff cannot be penalized for no fault of his. He showed good faith of repaying the



loan but the defendant made it impossible for him to do so. It follows that the plaintiff cannot pay, upon reconciliation of accounts, accrued interest from the date when he issued a cheque which was rejected by the defendant.

38. As to whether the plaintiff is entitled to compensation for loss of earnings that he pleaded being Kshs. 2.5 million, I note that save for pleading and submission that as a result of the constant summons from the defendant, he lost his job where he was earning Kshs. 33,000 monthly and that he remained unemployed for 14 years, there was proof of such loss.
39. In the case of Cecilia W. Mwangi & Anor. vs Ruth W. Mwangi NY CA Civil Appeal No.251 of 1996 (1997) eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”
40. I reiterate that the plaintiff herein never made any attempt in to prove the special damages. In the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
41. This court finds that in order to succeed, special damages must first be pleaded with specificity before discharging the burden of proving them through evidence. It is this court’s finding that the plaintiff did not prove the claim to the required standard. The claim for special damages is accordingly dismissed.
42. On the prayer that the Honourable court to order that upon the plaintiff repayment of Kshs. 200,000 the defendant does discharge the loan securities being plot No. Nandi/Kamobo/2464, being security for the loan advanced discharge can only be effected upon repayment of the loan facility and in this case, there was an outstanding balance unpaid. Upon reconciliation of accounts, the plaintiff settling the balance, it follows that the security will be discharged. For that reason, that prayer is premature at this stage. It is declined.
43. The upshot of the above is that the suit is partially successful in the following terms:
 - a. A declaration is hereby issued that the conversion of the loan facility by the defendant to Kapsabet Chemist Limited 1993 was an illegality and therefore void for all purposes.
 - b. An order is hereby issued directing the Defendant to revert the loan account to the original company herein christened Kapsabet Chemist Limited to allow the plaintiff to settle the same.
 - c. That the parties herein reconcile the accounts No. Kapsabet Chemist Limited and the funds paid to the illegal account Kapsabet Chemist 1993 prior to the year 1994 to establish any arrears, if any, due to the defendant for purposes of settlement.
 - d. The plaintiff is awarded the costs of this suit
44. Mention before the Deputy Registrar on 17/2/2025 to confirm the reconciliation of accounts by the defendant and the filing of the bill of costs for assessment.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

