D. Chandulal K. Vora & Company Limited & 3 others v Bank of Baroda (K) Limited (Civil Suit 32 of 2014) [2023] KEHC 19183 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 19183 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT 32 OF 2014

DO CHEPKWONY, J

MAY 31, 2023

BETWEEN

D. CHANDULAL K. VORA & COMPANY LIMITED ..... 1ST PLAINTIFF

RAJNIKANT C. VORA ..... 2ND PLAINTIFF

RAJESHI C. VORA ..... 3RD PLAINTIFF

JAYSHREENA D. VORA ..... 4TH PLAINTIFF

AND

BANK OF BARODA (K) LIMITED ..... DEFENDANT

JUDGMENT

1. The 2nd to 4th Plaintiffs are Directors of the 1st Plaintiff herein and jointly vide a further amended Plaint filed on 13th June, 2017, the Plaintiff sued the Defendant to recover allegedly escalated interests which accumulated upto Kshs.19,752,310.08 on account of the Defendant's failure to honour instructions issued by the Plaintiffs in letters dated 20th August, 2011, 6th February, 2012 and various other letters seeking the Defendant to repatriate the sum of GBP331,481/= held by the 2nd 3rd and 4th Plaintiffs at the Bank of Baroda (UK) Limited to offset the Plaintiffs' obligations on an overdraft facility in the sum of Kshs.30,000,000/= advanced by the defendant herein.

2. According to the Plaintiffs, and as pleaded in the further Amended Plaint, the Defendant advanced various facilities the 1st Plaintiff including the overdraft facility of Kshs.30,000,000/= which was secured by among other things, joint and several guarantee of the directors of the 1st Plaintiff and a lien over the above mentioned GBP331,481/=. However, the Defendant failed to comply with the request to repatriate the GBP331,481/= until 4th January, 2013 and as at such time, the Plaintiffs had suffered loss in terms of escalated interest charges and depreciation on exchange loss.

3. In summary, the Plaintiffs avers that the total interest charged on account of the 1st Plaintiff for the overdraft facility is Kshs.39,495,367.00 as at 4th January, 2013 and had the Defendant immediately complied with the instructions to repatriate the GBP331,481/= upon the instructions on 30th August, 2011, the total interests which would have been charged then is Kshs.19,743,056.92. Therefore, the interest which was charged as failure to repatriate the funds on time is Kshs.19,752,310.08.

4. Further, the Plaintiff averred that had the repatriation been made on or about the date of instruction which is 30th August, 2011, the exchange rate would have been Kshs.153.92 for each 1GBP rather the repatriation was made when the exchange was a bit lower, at the rate of Kshs.138.58 per 1GBP thus occasioning the Plaintiffs losses of exchange rate to the tune of Kshs.5,157,644.33.

5. The Plaintiffs thus sought Judgment to be entered against the Defendant in the following manner:-

    a. The sum of Kshs.24,909,954.40;

    b. in the alternative to (a) above, an order of accounts to determine the profits gained as a result of the Defendant's failure to repatriate the sum of GBP331,481/=;

    c. In the alternative to (a) above the sum found to be profits gained pursuant to (b) above;

    d. Interests on (a) or (b) or (c);

    e. Costs of this suit;

    f. Further or any other relief that this court may deem just or expedient.

6. In the further amended statement of defence, filed on 1st February, 2017 the Defendant denied the allegation and claims by the Plaintiff. The Defendant acknowledges that it advanced the 1st Plaintiff an overdraft facility of Kshs.30,000,000.00 but adds that the over facility was fully interchangeable with import letter credit limits' facility in the sum of Kshs.50,000,000.00. In addition to that, the Defendant had also offered various facilities to the first Plaintiff's associated company, Revital Healthcare (EPZ) Limited (which shares the same Directors with the Plaintiff) including an overdraft facility of USD250,000.00 which was fully interchangeable with import letter of credit limits in the sum of USD500,000.00. That among the securities offered for facilities granted to Revital Healthcare (EPZ) Limited was similarly guarantee by its directors backed up by a collateral security by way of a lien in the favour of the Defendant over same sum of GBP331,481.00 held by the 2nd, 3rd and 4th Defendants at the Bank of Baroda (UK) London in a fixed deposit account.

7. The Defendant also admits having received the letters by the Plaintiffs seeking repatriation of the funds held in Bank of Baroda (UK) Limited but avers that it could not repatriate the said funds as at that time because the funds were also forming part of the securities for facilities extended to Revital Healthcare (EPZ) Limited. Further the letters requesting repatriation were mere proposals to the Defendant to amend the credit facilities advanced to the 1st Plaintiff and or delink the 1st Plaintiff from the facilities of Revital Healthcare (EPZ) Limited. In addition to that, the facilities of the Plaintiff were not reduced by depositing USD500,000.00 or equivalent amount of Kshs.40,000,000/= so that the Defendants security coverage would not be diluted upon the repatriation.

8. Nonetheless, the Defendant avers that it agreed to comply with the request for repatriation on 20th November, 2012 after the loan account for Revital Healthcare (EPZ) Limited had been taken over by I & M Bank meaning that the securities which cross shared by the two companies were now exclusively securing the facilities of the Plaintiff. The Defendant added that at no point did it have issues with the monies held in the fixed account in the Bank of Baroda (UK) Limited being transferred to its branch in Mombasa provided that the account holders (the 2nd, 3rd and 4th Plaintiffs) issued a duly signed request

to the Bank of Baroda in the UK for such Transfer. In that case, the Defendant denied being in breach of any fiduciary duty as alleged as well as the allegations of the losses suffered by the Plaintiffs.

9. On 12th April 2021, Rajnikant C. Vora, the 2nd Plaintiff herein testified as PW1. He testified that he was a Director of the 1st Plaintiff herein as at the time they were granted the facilities but had ceased to hold that office to focus on chairmanship of Revital Healthcare (EPZ) Limited. He adopted his witness statement and supplementary statements dated 17th March, 2014 and 29th August, 2016 respectively as part of his evidence in-chief. However, he confirmed that the Defendant had issued the Plaintiff with among other facilities, the overdraft for Kshs.30,000,000/= which were secured by among other securities the lien over the deposits of GBP331,481/= held in Bank of Baroda (UK) Limited and other securities totaling to Kshs.655,000,000/=. These securities included Plot 281 owned by the 1st Plaintiff valued at Kshs.100,000,000.00, 4 bedroom apartment at Ambalal Apartment valued at Kshs.15,000,000/=, debentures for Revital Healthcare (EPZ) Limited and the 1st Plaintiff valued at Kshs.200,000,000/= and Kshs.300,000,000/=. The total facilities advanced to the first Plaintiff and Revital Healthcare (EPZ) Limited were Kshs.120,000,000/= and USD.2.3 Million respectively.

10. He added that there was a discussion to accommodate an investor who wanted to purchase 40% shares in Revital Healthcare (EPZ) Limited for USD2.7 Million and it was agreed that the accounts under the loan facilities for the 1st Plaintiff and Revital Healthcare (EPZ) Limited would be separated. It was his evidence that as from 30th August, 2011 he wrote a total of fourteen (14) letters to the Defendant seeking the repatriation, but the Defendant chose to comply sometimes in January, 2013. The bank attached extraneous conditions by undertaking to repatriate on condition that USD500,000/= which had been awarded to the 2nd Defendant by a Ugandan Court be given to the Defendant bank. However, the Plaintiffs turned down the proposal citing that the term was new and not contained in the initial offer letter under which the facilities were issued.

11. In his view, the reasons advanced by the bank for not repatriating the funds, more specifically that the reason that the funds were cross securities for facilities advanced to Revital Healthcare (EPZ) Limited was not justifiable. He avers that the accounts Revital Health Care (EPZ) Limited had sufficient credit balance including the USD2.7 Million deposited by the Investor in September, 2011 and the same was sufficient to cater for securities for the loans. Therefore there was no need to wait for the taking over of the facilities by I & M Bank and at no point was he informed that there was the need of all holders of the fixed account signing the instructions to repatriate the funds. He however acknowledges that the Defendant wrote to Bank of Baroda (UK) Limited seeking repatriation of the funds.

12. Lastly, PW1 testified that the overdraft amount was Kshs.120,000,000/= and had the GBP331,481/= (equivalent to Kshs.51,000,000/=) been repatriated on 30th August, 2011 as instructed, then interest would have been charged on Kshs.70,000,000/= instead of Kshs.120,000,000/=.

13. On cross-examination, PW1 conceded that the GBP331,481 were kept at the Bank of Baroda (UK) Limited which is an entity separate from Bank of Baroda (K) Limited. It was PW1's contention that at some point he applied for the Defendant to revise the credit facilities, but conceded that it is within the bank's rights to impose conditions on such a request. He also conceded that it was within the bank's right to accept the request to repatriate the funds and in any event, the letter seeking such request was merely intended to amend the letter of offer dated 10th March, 2010 with which the facilities were offered. That, upon making the request for repatriation, one of the conditions given by the bank was for PW1 to avail audited accounts but he could not comply owing to the crush on his computers. However, he provided the said statements later.

14. Further, PW1, conceded that he had informed the Defendant of the USD500 he had won in a case at a Ugandan Court and although the Defendant had imposed a condition that the said USD500 be

transferred to the bank in conjunction with the funds sought to be repatriated, PW1 refused to sign the offer. When questioned about the letter dated 27th March, 2012 which PW1 had addressed to the Bank Manager Bank of Baroda (UK) Limited with respect to the repatriation, he admitted that the said letter was never delivered to the Bank Manager Bank of Baroda (UK) branch but was instead delivered to Bank of Baroda (K) Limited, the Defendant herein. He further admitted that although the other accounts held with the bank had monies sufficient to settle the facilities, they had no connection at all and no such offer had been tendered.

15. On re-examination, PW1 reiterated that the claim herein is founded on the letter dated 30th August, 2011 but not the failure to amend the terms of offer in the letter dated 10th March, 2010. He stated that in the letter dated 30th August, 2011 he made several requests including the request to amend the facilities and the request to repatriate GBP331,000 and the latter forms the gist of his claim. PW1 was however of the view that the audited accounts ought not to have been sought prior to transferring the funds from London. And in any event the letter of offer dated 10th March, 2010 provided a room of six (6) months to provide audited accounts. PW1 added that although the Bank of Baroda (UK) Limited was a separate entity from the Defendant herein, the Defendant had caused him to fill a form dated 1st October, 2010 to enable the defendant open up the fixed account and he (PW1) was advised that going forward, he would be dealing with the Defendant with respect to the London account. He thus asked the Defendant to repatriate the funds the same way the Defendant had opened the fixed account. PW1 clarified that his reason for refusing the offer by the Defendant with regard to repatriation was because he deemed the terms therein as not being favorable.

16. Navin Kumar Choubeg, the Chief Financial Controller of the 1st Plaintiff testified as PW2. Besides adopting his witness statement dated 6th April, 2021 and that of Sai Mrali dated 28th September, 2016 as his evidence in-chief, PW2 added that the claim by the Plaintiff was twofold. The first being the claim on the escalated interest charged against the 1st Plaintiff owing to the Defendant's failure to repatriate the funds upon request. According to PW2, the request was made on 30th August, 2011 but the funds were repatriated on 4th January, 2013, that is after a period of one (1) year three (3) months and three (3) days. That for that period, the Defendant charged interest in the total of Kshs.39,495,367/=, yet had the funds been repatriated on 1st September, 2011 when the request was made then the Defendant would have charged Kshs.19,743,050/= as interest instead of the escalated amount of Kshs.19,752,310.108.

17. The second part of the Plaintiff's claim is based on the change in the forex exchange rate between the time the request for repatriation was made and the time the funds were repatriated. According to PW2, as at 1st September, 2011 when the request was made, the exchange rate was Kshs.153.92 against each 1 GBP and on 4th January, 2013 when the repatriation was made, the forex rate was Kshs.138.58 against each 1GBP. Owing to the late repatriation, the 1st Plaintiff lost Kshs.15.54/= on each 1GBP totaling to a loss of Kshs.5,157,644.33. Further, that although the audited accounts were not available at the time they were requested for, they were submitted to the defendant on 31st May, 2011.

18. On cross-examination, PW2 was vivid that he is a qualified Accountant and had only worked for the 1st Plaintiff for a period of three (3) months. He admitted that the request to repatriate could have been subjected to conditions or accepted by the bank as it was. However, he stated that the Plaintiffs turned down the offers by the Defendant as conditions to repatriate the funds and the Defendant only agreed to the request in November, 2012 after the facilities of Revital Healthcare (EPZ) Limited were taken over by I & M Bank.

19. Stephen Kamau Mwangi testified as DW1 in behalf of the Defendant. He adopted the witness statement dated 31st January, 2017 as evidence in-chief. He went on to testify that the funds sought

to be repatriated were securities to facilities advanced to both the 1st Plaintiff herein and Revital Healthcare (EPZ) Limited. Therefore, the funds could not be released to one account and leave the other exposed. Nonetheless, after the facilities for Revital Healthcare (EPZ) Limited were taken over by I & M Bank on 8th November, 2012, the Defendant communicated its approval to repatriate the funds on 20th November, 2012 to the Plaintiffs. That on 28th December, 2012, the account holders sent a request to the Bank of Baroda (UK) Limited to repatriate the funds and on 29th December, 2012 the Defendant issued its consent for repatriation taking into account that the funds were on lien.

20. It was DW1's evidence that on 3rd January, 2013 the Bank of Baroda (UK) Limited transferred the funds to the Defendant and the Defendant consequently appropriated the same to the 1st Plaintiff's account on 4th January, 2013 in the sum of Kshs.47,728,724.27. In his view, the claim by the Plaintiffs is not justified because the terms under which the facilities were advanced were not satisfied. As per the request to repatriate, DW1 testified that the same was subject to being accepted or declared by the Defendant. And in any event, it was supposed to undergo a process of the request being forwarded to the Head Office first, for onward transmission.

21. On cross-examination, DW1 maintained that the banks failure to repatriate the funds as requested was first because the request was subject to approval hence there was the need to review the accounts to establish the status of the unliquidated securities and whether they were sufficient in the circumstances. That, further delay was occasioned by the Plaintiff's failure to avail audited accounts which were supplied to the Defendant on 25th September, 2012.

22. Upon the close of the parties' cases, directions were issued that each party files submissions in support of its respective case. The parties complied with the Plaintiff filing two sets of submission on 13th May, 2021 and 1st July, 2021 whilst the submissions by the Defendant were filed on 29th June, 2021. I have read and considered the submission which are a reiteration of the parties evidence as summarized hereinabove, that I do not wish to reproduce it here but will consider the same alongside the analysis and determination.

Analysis and Determination

23. This Court has considered the pleadings filed by the parties, the evidence adduced and documents each relied upon in support of their respective cases, alongside the submissions filed as well as the authorities cited by either party. It is this Court's considered opinion that the following issues arise for determination herein:-

    a. Whether the request by the 1st Plaintiff to repatriate the GBP331,481.00 was a mandate to execute specific instructions or a mere proposal to amend the terms facilities advanced to it;

    b. Whether the Defendant breached its fiduciary duty by failing to repatriate the funds as requested by the 1st Plaintiff;

    c. Whether the Plaintiffs are entitled to the Prayers sought in the Plaint.

24. On whether the request by the 1st Plaintiff to repatriate the sum of GBP331,481.00 was a proposal or clear instructions to the bank, this Court has read through and considered the evidence and submissions tendered by both sides. According to the Plaintiff in its evidence, it instructed the Defendant vide letters dated 30th August, 2011 and 6th February, 2012 to repatriate GBP331,481.00 but the Defendant failed to do so immediately and waited until the 4th January, 2013 to comply, which was after a delay of one year and four months. According to the Plaintiffs, their use of the word "requested" in their letters in seeking the repatriation was meant to convey, the request in a polite language and in formal communication.

25. Notwithstanding the foregoing, the Plaintiff submitted that the Defendant pleaded not to have any issues with the request to repatriate the funds and indeed accepted to repatriate the funds vide the offer letter dated 12th March, 2012 which contained other extraneous terms not agreeable to the Plaintiff. It was the Plaintiff's further submission that it was not necessary to sign the offer letter dated 12th March, 2012 for the funds to be repatriated since the funds were eventually repatriated without the 1st Plaintiff signing the said letter.

26. On the other hand, the Defendant maintains that it had offered the 1st Plaintiff facilities by virtue of the offer letter dated 10th March, 2010 and the terms for repayment were dictated therein. It averred that none of those terms entailed the request made by the Plaintiffs in their letters dated 30th August, 2011 and 6th February, 2012 respectively and as such there was no obligation by the Defendant to accept the request.

27. I have, as the court, had the opportunity to read through the letter dated 30{{^th} August, 2011 in which the Plaintiffs allege to have first issued the instructions for the funds held in a fixed account with Bank of Baroda (UK) Limited to be repatriated, and I find that in the said letter, authored by Revital Healthcare (EPZ) Limited, various suggestions were addressed including the Request to delink Revital Healthcare (EPZ) Limited from the 1st Plaintiff herein and for slight amendments to the securities by Revital Healthcare (EPZ) Limited. Further, the letter requested for amendment of credit facilities of the 1st Plaintiff herein which then totaled to a sum of Kshs.120,000,000/= by seeking to avail GBP331,481 initially offered as security to the facilities to liquidate the outstanding facility. It is in the letter dated 6th February, 2012 that the 1st Plaintiffs requested that the said GBP331,481/= be specifically applied to reduce the 1st Plaintiff's overdraft facility.

28. It would be imperative to consider the sequence of events which led to relationship between the parties herein. In that regard, it is common on the parties that the 1st Plaintiff and the associated company namely Revital Healthcare (EPZ) Limited approached the Defendant bank sometimes in the year 2010 seeking loan facilities. The two Companies had existing facilities with Barclays Bank but the same were taken over by the Defendant herein. Nonetheless, the Defendant offered to accommodate the Plaintiff on facilities amounting to Kshs.164,000,000/= whereas for Revital Healthcare Limited, the Defendant offered facilities upto USD2,300,000/=. The relationship was sealed up in letter of offer dated 10th March, 2010 wherein the facilities were secured by among other things the lien over the deposit held with Bank of Baroda (UK) Limited in the sum of GBP331,481/=. The Plaintiffs accepted the terms of offer by signing the letters dated 10th March, 2010.

29. In this Court's humble opinion, in so far as the loan facilities for both the Plaintiff and Revital Healthcare (EPZ) Limited are concerned, parties had bound themselves to be governed by terms in the offer letter dated 10th March, 2010. It is then not in dispute that the letter dated 10th March, 2010 indicated that the lien created over the above-mentioned sum of GBP331,481/= was security for facilities advanced to both the 1st Plaintiff and Revital Healthcare (EPZ) Limited. The terms of repayment of the facilities were also dictated therein. It then follows that any other suggestion besides what was initially agreed upon by parties in the letter dated 10th March, 2010 is a proposal for which either party would approve or decline. Therefore, were this court to hold the parties to the obligations other than what is contained in the letters of offer dated 10th March, 2010, then it would amount to the court descending into re-writing the agreement by the parties.

30. That having been said, it is this Court's view that the defendant bank was at liberty and well within its rights to accept or reject the requests made by the Plaintiffs vide their letters dated 30th August, 2011 and 6th February, 2012. By these, the Plaintiffs were essentially inviting the defendant bank to consider

a repayment term to liquidate the facilities in which the Plaintiff considered favourable to them, and it was likewise open for the defendant bank to accept the term as suggestion as it was or reject it with reasons advanced thereof.

31. This court has also considered the reason advanced by the defendant bank in rejecting the Plaintiffs' suggestion and more specifically the reason that the amount sought to be repatriated was a cross security for facilities advanced to both the Plaintiff and Revital Healthcare (EPZ) Limited and that the bank would be exposed if it were to accept the suggestion as represented. This Court finds the explanation by the Defendant bank reasonable. Thus, in this Court's view, all the subsequent correspondences between the parties were mere negotiations culminating to the banks final decision to approve the repatriation after the facilities by Revital Healthcare (EPZ) Limited were taken over by I & M Bank. Therefore, the bank was properly justified to safeguard and negotiate its rights before acting on the request.

32. However, thus Court is alive to the submissions by the Plaintiffs that once an account is opened with a bank, the bank is obliged to always act on the instructions of the customer. Thus, according to the Plaintiffs, the Defendant bank was not justified in failing to repatriate the funds as instructed by the customer (the 1st Plaintiff herein). Whereas this Court agrees with the submissions that the bank is under a duty to comply with instructions by its customer save for where the bank is precluded by extraneous factors, in this case, the Plaintiff qualified the right to issue such instruction having created a lien over the funds held with the bank. This is so because before any instruction could issue, the Plaintiff had to first seek consent of the Defendant by virtue of the lien it had exercised.

33. In the resultant, having found that the request to repatriate the funds was a proposal subject to approval by the bank by virtue of the lien created as security for facilities advanced to the 1st Plaintiff, this Court is persuaded that the present suit is misguided and lacks merit, so that venturing into discussion of the other issues which were set out for determination would as well be tantamount to an academic exercise.

34. The upshot is that the claim by the Plaintiffs fails and the same is hereby dismissed but with no orders as to costs.

35. Each party shall bear its own costs.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THI 31ST DAY OF MAY 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Oluga counsel for Plaintiff

M/S Omange counsel for Defendant