



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E042 OF 2018

INSTA PRODUCTS (EPZ) LIMITED.....PLAINTIFF

VERSUS

CHASE BANK (KY) LIMITED (IN RECEIVERSHIP).....1ST DEFENDANT

CREDIT REFERENCE BUREAU LIMITED T/A TRANSUNION...2ND DEFENDANT

JUDGMENT

PLEADINGS

The Plaintiff filed a plaint dated **11th June 2018**. On or about **mid 2015** the Plaintiff requested the 1st Defendant to close its Bank Accounts as the Plaintiff had stopped operating the Bank Accounts in **January 2015**. The Plaintiff and 1st Defendant held various meetings, discussions and correspondence with a view to reconciliation and closure of Accounts.

It was then discovered that the 1st Defendant had applied erroneous interest rates on the funds in the Plaintiff's Bank Accounts with the result as at **15th January 2015**, the 1st Defendant owed the Plaintiff **USD. 91,809**. Thereafter, the Plaintiff made several requests to the 1st Defendant, including by a letter dated **2nd September 2015**, for it to credit the Plaintiff with the said sum.

Despite the Plaintiff bringing to the 1st Defendant's attention that it had applied the wrong rates of interest and that the Plaintiff was owed a sum of **USD.91,809**, the 1st Defendant went ahead and listed the Plaintiff with the 2nd Defendant as being a debtor of the 1st Defendant.

The Plaintiff alleges that its listing with 2nd Defendant was actuated by malice and/or bad faith particulars of which are; declining to refund the Plaintiff the sum of **USD.91,809** due and owing to it; listing the Plaintiff with the 2nd Defendant; providing false information to the 2nd Defendant; and declining to withdraw the listing of the Plaintiff with the 2nd Defendant. This caused lost use and reinvestment of USD 91,809, damage and injury to Plaintiff's financial reputation and good standing with several other banks.

By reason of the 2nd Defendant's actions as aforesaid, the Plaintiff has suffered loss and damage particulars of which are the loss of use and/or re-investment of the **USD.91,809** and damage to the Plaintiff's financial reputation and good standing with other banks.

The Plaintiff prays for; -

- a. A permanent mandatory injunction compelling the 1st Defendant to withdraw the erroneous credit listing of the Plaintiff with the 2nd Defendant.
- b. A permanent mandatory injunction compelling the 1st Defendant to make payment to the plaintiff of the sum **USD.91,809** plus interest at commercial lending rates from 15th January 2015 until payment in full.
- c. A permanent mandatory injunction compelling the 1st Defendant to close Plaintiff's bank accounts upon payment of **USD.91,809**

plus interest.

d. A permanent injunction restraining the 1st Defendant from applying any interest or charges against the Plaintiff's bank accounts outside of the rates and charges applicable as against the bank accounts up until **15th January 2015**.

e. A declaration that the 1st Defendant illegally charged erroneous interest rates on the plaintiff's Bank Accounts.

f. A permanent injunction compelling the 2nd Defendant to remove the credit listings in respect of the Plaintiff, with respect to its Bank Accounts with the 1st Defendant.

DEFENCE

The 1st Defendant failed to file a defense. The 2nd Defendant filed Defense and Plaintiff filed Reply to Defense. On **10th August 2018**, the Plaintiff requested for judgment to be entered against the 1st Defendant for failing to file a defense within the prescribed time. An interlocutory judgment against the 1st Defendant was then entered on **27th September 2018** and the matter was fixed for formal proof.

FORMAL PROOF PROCEEDINGS

On **9th September 2020**, the formal proof proceeded with PW1 **Ms. Rhiya Gudka**, the Plaintiff's Finance Manager, who testified on behalf of the Plaintiff. Plaintiff relied on her witness Statement and testified that the Plaintiff sought to close its Bank Accounts with the 1st Defendant and in the process a discovery was made that the 1st Defendant had applied erroneous interest rates on the Plaintiff's facilities.

Immediately, the Plaintiff made a request to the 1st Defendant to furnish it with a reconciliation of the Bank Accounts. The 1st Defendant through Mr Richard Kamunya, submitted its reconciliation of the Bank Accounts and the Plaintiff's Mr Sagar Chandaria acknowledged there was an error resulting to the 1st Defendant owing the Plaintiff a sum of **USD.91,809**. On 25th August 2015, Mr Sagar Chandaria and Mr Richard Kamunya held a meeting. On 1st September 2015, Mr Richard Kamunya sent an analysis and acknowledged the error has been pointed out by the Plaintiff. The copies of e mails exchanged between representatives of both parties are housed at Pg1-17 of Plaintiff's bundle. The Plaintiff wrote to the bank and outlined instructions on how to allocate the excess amount. The bank informed the plaintiff that its Credit Committee had to meet and deliberate on the matter before the Plaintiff's instructions were carried out.

Further, despite the numerous meetings and discussions, the 1st Defendant failed to credit the Plaintiff's USD current account with the sum of **USD.91,809**. The bank failed to address the Plaintiff's concerns, instead the Plaintiff learnt that on unknown date the plaintiff's name was listed with Credit Reference Bureau 2nd Defendant as Loan Defaulter for alleged default of Bank Facilities.

ANALYSIS AND DETERMINATION

Has the Plaintiff proved its claim against the 1st Defendant to the required standard?

Having perused the Plaintiff herein, which is the Plaintiff's claim and in the absence a Defense, the Plaintiffs' claim against the 1st Defendant is unchallenged and the matter proceeded for formal proof hearing.

The Plaintiff in formal proof of proceedings has to prove its claim on a balance of probability under **Section 107-109 Evidence Act**; whether or not the suit has been defended.

In **Monica Wangu Wamwere v Attorney General [2019] eKLR** where **Warsame, Kiage & Murgor, JJ. A**, held; -

“.....The learned Judge was discharging his duty while interrogating the facts and the evidence placed before him before coming to a lawful, logical conclusion. This was well put in Gitobu Imanyara & 2 others v Attorney General (supra)

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defense or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

See also: **Mwangi Muriithi (supra) and Mumbi M'Nabea v. David Wachira Civil Appeal No. 299 of 2012.**

Formal proof was defined in the case of **Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR**, Emukule J observed: -

“On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the

other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

In Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR, the Court held: -

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

In this regard, in a formal proof hearing, a party with the onus of adducing evidence must produce such sufficient evidence which must satisfy the Court as to its truth. The Plaintiff adduced evidence of the existence of the said Bank Accounts that it holds with the 1st Defendant Bank.

Among the evidence relied upon by the Plaintiff is a bundle of email correspondences Between the Plaintiff and the 1st Defendant.

On 1st September 2015, the 1st Defendant through Mr. Richard Kimunya, acknowledged the erroneous interest rates on the Plaintiff’s facilities that resulted to the 1st Defendant owing the Plaintiff **USD.91,809**.

In light of the foregoing, the Plaintiff herein produced a summary statement of account (with explanation notes) and the same was elaborated on by PW1, Ms **Rhiya Gudka**, the Plaintiff’s Finance Manager at the formal proof hearing.

Under **Sections 107 and 108** of the **Evidence Act Cap 80 Laws of Kenya**, the person who alleges is under a duty to prove all allegations as contained in their claim against the Defendant, on a balance of probabilities, as was held in **Kirugi & Another Vs Kabiya & 3 Others [1987] KLR 347** where the Court of Appeal held:

“The burden was always on the Plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

The various emails exchanged between parties Mr Sagar Chandaria and Mr Richard Kamunya are as follows;

- a) Email of 15th November 2017, the 1st Defendant admitted some error in the Accounts.
- b) Email of 26th August 2015, the Plaintiff reviewed the Accounts and found Credits and debits were repeated twice.
- c) Email of 25th August 2015, the plaintiff attached Complete calculation with both scenarios and sought meeting(s) with 1st Defendant.
- d) Email of 1st September 2015, the Plaintiff wrote seeking updated model from 1st Defendant.
- e) Email of 2nd September 2015 1st Defendant sent updated model for review by Plaintiff.
- f) Email of 28th August 2015, 1st Defendant considered 2 options;
 1. *‘Harmonize the models and see why figures disagree (Check your 1st Debit interest, it may hint error in your formula)*
 2. *Agree on how to treat set off noting that it affects Loan Principal and ultimately amounts disbursed. The excess in the USD Account was as a result of loan disbursement, so we cannot reapply it to reduce principal amount.’*
- g) Email of 22nd September 2015 1st Defendant promised to present the case before Credit Committee for approval.
- h) Email of 24th September 2015 1st Defendant promised to advise once they got approval by Thursday [following] week.
- i) Email of 5th October 2015, the 1st Defendant stated it was closely following up the issue to ensure closure.
- j) On 2nd September 2015. Mr Sagar Chandaria wrote to Mr James Mwaura Assistant General Manager, Chase Bank Outlining Plaintiff’s claim, the various accounts held with the Bank, the balances and the variance. Grand Total was/is USD 91,809. The Plaintiff sought acknowledgement of the outstanding amount by the 1st Defendant’s Manager signing the letter. The letter was not signed.
- k) The Plaintiff’s advocate wrote to the 1st Defendant demand letter on 11th December 2017 again outlining Plaintiff’s claim which was received as per the 1st Defendant’s Stamp.
- l) The Plaintiff filed bank statements Pg 30 -110 and summarized statement of Account with explanation Notes.

The totality of the oral and documentary evidence on record confirms on a balance of probability that 1st Defendant through Mr. Richard Kamunya that there was an error as outlined by Mr Sagar Chandaria of the Plaintiff. Each prepared models with tabulations and reviewed the same in meetings where Mr Kamunya agreed to a setoff whose figure was subject to approval by the Credit Committee before payment. From there the 1st Defendant went silent to date 4 years later.

In the absence of any controverting evidence and/or any evidence by 1st Defendant for this Court to consider in relation to the Plaintiff's claim; the fact of various emails exchanged between the parties discussing the amount erroneously claimed from the Plaintiff by the 1st Defendant culminating with the letter of 2nd September 2015 setting out the basis of Plaintiff's claim and tabulating it to arrive at USD 91,803 confirms the Plaintiff's claim against the Defendant. The Defendant remained silent and it is 4 years since then. An Interlocutory judgment was entered in default of appearance and defense in this case; this Court finds in favour of the Plaintiff's claim as it has established *prima facie* established from the evidence on record.

DISPOSITION

In view of the foregoing, the Plaintiff has proved its claim against the defendant to the required standard. Having proved its case, the Plaintiff's prayers are as follows; -

- i. The injunctions and other prayers of preservation against the 1st Defendant with regard to the 2nd Defendant were overtaken by events.**
- ii. Judgment is entered in favour of the Plaintiff against 1st Defendant for USD 91,803 with interest and costs at court rates.**
- iii. The outstanding amount of USD.91,809, was proved through emails bank statements and summary statement of account (with explanation notes) that were produced in evidence and the same was corroborated by the testimony of PW1, Rhiya Gudka, the Plaintiff's Finance Manager.**

DELIVERED SIGNED DATED IN OPEN COURT ON 15TH FEBRUARY 2021 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MS MISIRE FOR THE PLAINTIFF

OSAMBA OTIENO & CO. ADVOCATES FOR DEFENDANT- N/A

COURT ASSISTANT - TUPET