REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. APPLICATION NO. 79 OF 2018

CHELEMEI LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED.....DEFENDANT

JUDGMENT

1. The plaintiff **(CHELEMEI LIMITED)** which is a limited liability Company sued the **(BARCLAYS BANK OF KENYA LIMITED)** defendant a banking institution by an amended plaint pursuant to court order issued on 27th May 2004.

2. In March 1999, the plaintiff's applied for a loan facility of **Ksh 2.5 Million** to finance farming activities on its land within Uasin Gishu District. The plaintiff was required to avail security by supplying an original title to parcel no. **Eldoret Municipality / Block 6/298**, and the defendant's Mombasa branch informed him that the loan would be disbursed immediately. However, by the close of 1999 growing season, the loan facility had not been disbursed even after taking out insurance to the property which had been offered as security.

3. Eventually the plaintiff was informed in October 1999 through its director **JACKSON KIPROTICH KIBPOR (PW1)**, that the title documents had been misplaced/lost. As a result, the plaintiff failed to plant in the year 1999 and 2000. The defendant also failed to assist in processing of another land title, and the defendant is faulted for being negligent in the way they handled his title.

4. The plaintiff prayed for both special and general damages for breach of contract and costs of this suit.

5. The defendant by an amended defence denies the plaintiff's allegations. It contends that in March 1999, the plaintiff approached the bank for an overdraft facility of **Ksh 3,500, 000/= and a guarantee facility of Deutsch Marks 480,000/-** to purchase of three Mercedes trucks from Germany. This was to be secured by a mortgage to be registered against a parcel of land. The plaintiff never availed the original title to parcel no. Eldoret/Municipality/Block 6/298, but instead issued a photocopy certificate of lease, which could not transfer any interest on the land.

A certificate of loss of the original certificate of lease was issued to the plaintiff in-order to facilitate the issuance of a substitute certificate of lease. The defendant urges that the suit be dismissed with costs.

6. The plaintiff's director **Jackson Kiprotich Kibor (PW1)** testified that he used to get a loan every planting season and repay, then get another loan-the repayment depended on when the wheat would be harvested. When he applied for the loan, the defendant assured him that the funds would be deposited in account, but this never happened. Upon being informed by the bank that his title got lost vide a letter dated 30/10/1999, PW1 by a letter dated 8th January 2001, forwarding a copy of the title to the bank, but the copy was rejected. He was not able to plant any crops for two seasons, and lost income for two years. He would harvest 27,000/=bags of wheat which goes for Ksh 2000/-, and as a consequence he has lost Ksh 54,000/= from the year 1999 to date, since

7. On cross-examination by Mr. Mungai counsel for the defendant, he stated that planting season started at the beginning of mid-may and harvesting is between August and September. He applied for a loan through the company but the cash was to be deposited in his account.

In re-exam he stated that the company was involved in various businesses of buying land and transport business.

The defendant offered no evidence.

8. Parties agreed to file written submissions where counsel for the plaintiff pointed out that the plaintiff had sought for a loan facility of Ksh 2.5Million which was secured by a certificate of lease for land parcel No. **Eldoret/Municipality /Block 6/298** deposited with the defendant for valuation to be conducted by **Kwality Property Consultants** before the loan could be granted. The title was initially with K.C.B Bank and a discharge was applied on 25.3.1999. **Kwality Property Consultants** valued the property at **Ksh 17,700,000/-**. The defendant's advocate by a letter dated **8/01/2001** stated that the original certificate of lease had been recovered, and it is contended that this is an admission of having been in possession of the original certificate of lease.

9. That after misplacing the original title document, the defendant was reluctant to release the funds and the plaintiff had to engage the Land Registrar who on **17.12.1999** published in the Kenya Gazette Notice No. 7103 for issuance of a new certificate of lease, so as to continue engaging in business efficiently.

10. The plaintiff reiterates that the defendant was negligent. That the relationship between the bank and the customer was contractual in nature so the bank was expected to exercise reasonable care and skill. Further the defendant was in breach of duty of care on how they handled the certificate of lease leading to its misplacement.

11. The plaintiff submits that the bank-customer relationship is contractual in nature and imposes a duty on the bank to exercise reasonable care and skill in its dealings with the customer. To support this position reference is made to the case of **Karak Brothers Company Ltd v Burden [1972] All ER 1210**, where the Court observed that:

> ***"[A] bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely".***

12. Further, that the bank's duty of care to its customers may also arise concurrently in tort. Thus in ***Selangor United Rubber Estates Ltd v Cradock (No. 3)*** **[1968] 1 WLR 1555**, Ungoed-Thomas J., stated as follows, as regarding a bank's duty of care:

> ***To my mind… a bank has a duty under its contract with its customer to exercise "reasonable care and skill" in carrying out its part with regard to operations within its contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all relevant facts which can vary almost infinitely***.

13. It is argued that the plaintiff had pegged his farming activities to the loan which he intended to use for purchase of seeds, engaging labour, planting, and eventually service the loan from the proceeds made upon harvest, so he seeks damages. He also urges the court to award him special damages in the sum of Kshs 60,000/ which he used to insure the property, Kshs 70,000/ for valuation, and Kshs 25,00 spent so as to secure gazettement of notice for issuance of another lease certificate, and replacing the lost certificate. He also spent Kshs 17,500/ in conducting a search, consent and rent. That there was also the sum of Kshs 1,750 incurred for the discharge of charge.

14. The plaintiff also prays to be awarded for loss of expected income, saying in 1999, he would have harvested 18,000 bags of wheat which was then retailing at an average of Kshs 2000/-, so he would have received Ksh. 36,000,000/-. Further, in the year 2000 he would have received half the income from the previous year, making to Kshs 18,000,000/-

15. The defendant did not file any submissions

16. I note that as a general rule, general damages are not recoverable in cases of alleged breach of contract and that has been the settled position and with good reason. In ***DHARAMSHI vs. KARSAN [1974] EA 41***, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.

17. Also, in ***SECURICOR (K) vs. BENSON DAVID ONYANGO*** & ***ANOR*** **[2008] eKLR.** The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "*had suffered serious damages*" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination.

18. Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent's claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.

19. The claim was one under a contract to lend money, an executory contract the remedies for which available to the borrower are rendered by the learned authors of **CHITTY ON CONTRACTORS** 37th Edition Vol. II, Specific Contracts par 36-208 (p609) as follows;

> ***"If a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. But the borrower can claim damages for the failure to advance the money. The damages will very often be merely nominal, but if expense has been reasonably incurred in procuring the loan elsewhere, that expense is recoverable as special damage provided it was caused by the breach and was within the contemplation of the parties. If the borrower can only procure the loan from other sources at a higher rate of interest than that agreed under the contract, and this was reasonably foreseeable at the time when the contract was made, it seems that the borrower can recover the additional interest he will have to pay as damages from the lender. If the borrower is unable to raise the money from other sources at all, and he is consequently unable to enter into or complete some transaction for which the money is required, the lender may be liable for loss of profit on such a transaction or other consequential loss."***

20. Dr. Harvey McGregor the learned author of McGregor on Damages 18th Ed in the passage at par 25-028 (p982);

"BREACH BY LENDER

21. ***In contracts for the loan of money the normal measure of damages for the lender's failure to provide the money is the amount required by the borrower to go into the market and effect a substitute loan for himself less the amount that the contractual loan had required. It has been said Day J. in Manchester & Oldham Bank v Cook that „nominal damages … are usually given in the case of breach of contract to lend money, for the reason that usually if a man cannot get money in one quarter he can in another. Thus in South African Territories v Wallington, since the claimant gave no evidence showing a loss beyond this, nominal damages were awarded. But the Court of Appeal recognized that the damages could be substantial for failure to provide the loan. Chitty L.J. said that „the damages in such a case may be large or small, or merely nominal, according to the circumstances. They will be nominal if the claimant, as a man of good credit, can readily obtain a loan elsewhere, but, if he cannot obtain the money except at a higher rate of interest, or for a shorter term of years, or upon other more onerous terms, the damages would be greater and might be very substantial. The burden of providing the amount of the loss sustained rests on the plaintiff."***

22. It is thus clear that other than nominal damages – which really represent damages only in name, being in quantum quite negligible – whatever other monies would be recoverable would be in the nature of special damages properly quantified, pleaded and proved. There is a lot of speculation as to what may have been - if only the money had come. No consideration is made with regard to the vagaries of nature and the weather. Nothing about the rate of inflation and the fluidity of the Kenyan currency. No demonstration at attempts to mitigate the purported loss – for instance, did the plaintiff attempt to apply for a loan elsewhere and fail on account of not having any collateral? Was the tittle deed the only security he could present.

23. The mere fact that the bank asked for valuation of the plaintiff's property did not transform into an approval of the loan application, it simply demonstrated that the plaintiff's request was being given serious consideration.

From the chain of events and the correspondence by the defendant, I have no doubt that the plaintiff presented his tittle document to the bank, and the same got misplaced. The defendant's advocate by a letter dated 8/01/2001 stated that the original certificate of lease had been recovered, and I agree that is an admission of having been in possession of the original certificate of lease. The bank had a duty to the title document in safe custody.

24. I will thus echo **Chitty on Contracts** that If a person contracts to lend money, and then, in breach of contract, refuses or fails to advance the money, the borrower cannot sue for the money agreed to be loaned as a debt, for this would be tantamount to an order of specific enforcement, and such an order will not normally be granted for a contract of loan. For this, the plaintiff is entitled to nominal damages at a global sum of Kshs. 20,000/- Twenty thousands only) with interest at court rates from the date of filing suit.

The defendant shall bear the costs of this suit.

Delivered and dated this 27th day of February 2020 at Eldoret

H. A. OMONDI

JUDGE