REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 7 OF 2017

CENTRAL FURNITURE SHOP LTD.....1ST PLAINTIFF

TAJINDER SINGH PANDHAL.....2ND PLAINTIFF

VERSUS

IMPERIAL BANK LTD (IN RECEIVERSHIP).....DEFENDANT

JUDGMENT

1. By a plaint dated and filed in court on the 24.01.2017 the plaintiffs plead that the 1st plaintiff having been a customer of the defendant was afforded financial accommodation by the defendant and secured by sums held in various fixed deposits by the defendant which stood at Kshs 175,886,556.65 by the time the defendant was placed under receivership. By a letter of continuing loan facility dated the 11.08.2010, the parties agreed and covenanted that the defendant would reserve the right, at any time and from time to time, to set off the amounts due and owing by the 1st plaintiff to the defendant against the said deposits.

2. As at the 12.10.2016, the plaintiff's indebtedness stood at kshs. 32,147,238.71 while the deposits aggregated at the sum aforesaid. It was pleaded that in terms of the contract between the parties, the defendant was bound to offset the sums due and to release the plaintiff from the debt by release of all the log books financed by way of hire purchase. The plaintiffs' complaint is that the defendant failed to comply with the terms of the contract and opted to demand from the plaintiffs claiming the debt due which they posit expose the inadequacy of the receiver to manage payment scheme to the depositor including the plaintiffs. In support of such pleadings the plaintiffs file a witness statement by the 2nd plaintiff dated 24.01.2015 together with a list of documents of the same day and a supplementary list of documents dated19.04.2017. On the basis of such grievances, the plaintiff prayed to court for orders of permanent injunction restraining repossession of the financed chattels; a declaration that the defendants claim for payment from the plaintiff was contrary to law and amounted to mismanagement of receivership; orders for accounts of all sums held in deposit accounts and an order for payment thereof; general damage, interests as well as costs of the suit.

3. When served the defendant filed a statement of defence which generally traversed all the allegations in the plaint denying all the prayers as undeserved and invited strict proof. There was also filed on behalf of the defendant a bundle of some 23 documents

4. By consent, parties agreed that the matter proceeds by way of case stated and framed some six issues for resolution by the court. The issues identified were:-

i. Whether the plaintiff held fixed deposit accounts with the defendant in the sum of kshs 175,886,556 as at 12.10.2015?

ii. Whether there was an agreement to offset the same to settle any credits extended to the plaintiff?

iii. Whether the aggregate amount advanced to the plaintiff amounted to Kshs 32,147,228.71 as at 12.10.2015?

iv. Whether any surplus after offset is due for payment to the plaintiff?

v. Whether the plaintiff is entitled to an injunction after the offset is effected?

vi.What orders should be made as to costs?

5. Based on those issues, there was an agreement on the documents to be relied upon by the court including settlement and filing of agreed issues and written submissions within set timelines. Despite the agreements and directions by the court, no agreed issues were filed save that the defendant did file own issues on the 15.03.2018. With hindsight however, once the issues were isolated by consent, it was superfluous to

settle other issues with the potential to deviate from the parries' agreement.

Submissions were however filed by the plaintiffs on the 31.05.2018 and by the defendant on the 17.09.2018.

6. I have had the benefit of perusing the pleadings documents filed and submissions on record in line with the settled issues and I will now seek to determine the issues as isolated by consent. In doing so, I will keep reminded that this is a transactional dispute where documentation is key. That being the position, and the documents on record being common between the parties, no much arguments may be necessary because in law no parol or extraneous explanation is permissible to add, subtract or explain a written document

Whether the plaintiff held fixed deposit accounts with the defendant in the sum of kshs 175,886,556 as at 12.10.2015?

7. That the plaintiff held accounts with the defendant is not in dispute but agreed. Even that the said accounts had credit balances is not in issue. The issue is how much was in such credit. The plaintiff using the documents from the defendant posits that the aggregate credit balance was Kshs 175,886,556.65 while the defendant maintains that the sum was in fact 171,952,237.14. The defendant in attempt to reconcile the variance quotes the difference in the figures used but fails to disclose its source. As said before, this is a documentary case and the defendant must be deemed to have special knowledge of the balances held in customers' accounts being the custodian thereof. I understand this to be the evidentiary obligation upon the defendant imposed by section 112 of the evidence Act. Being the custodian and failing to explain away the bank statement issued by the defendant to the plaintiffs, the assertion cannot be taken seriously rather I draw the inference that there is nothing to contradict the bank statements relied upon by the plaintiffs. Accordingly I do find that as at 12.10.2015.

Whether there was an agreement to offset the same to settle any credits extended to the plaintiff?

1. Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited [2017] eKLR

8. Having read the submissions by the respondent intended to counter those by the plaintiff, there is clearly a concurrence that indeed there was the letter of offer dated 29.10.2009 which unequivocally provided for setoff. That same covenant was reiterated in subsequent letters of offer dated 11.02.2011, 31.05.2011 and that of 24.08.2015. All the letters of offer, to be found in the defendant's list of documents, demanded continuous personal guarantee of the directors including the 2nd plaintiff and one Mrs. Pritam Kaur Pandhal. The two did execute two separate joint guarantee dated14.02.2013 and 24.08.2015. Clause 9 in both said guarantees reserved upon the defendant the right to set off, without any notice to the guarantors, any sums held to the credit of the guarantor, whether in Kenyan or any other currency towards the recovery of any money that would be payable to the defendant. On the concession by the defendant which sits pretty in tandem with the document filed, I do find that there was an agreement to offset any sums held in fixed deposits to settle the indebtedness to the defendant.

Whether the aggregate amount advanced to the plaintiff amounted to Kshs 32,147,228.71 as at 12.10.2015?

9. Both parties agree, based on the document authored by the defendant that the sum due as the date the bank was places under receivership was not the pleaded sum of Kshs. 32,147,228.7i. While the plaintiff computes the figure at Kshs. 20,656,652.36, the defendant comes to the sum of Kshs. 20,616,585.78. The variance of Kshs 40,066.58 is explained by the defendant to be as a result of the different exchange rate adopted by the plaintiff. While that may be true, both sides have addressed the sum as at the date the receivership was set in motion and I am prepared to accept the computation by the plaintiff on the basis that it is grounded upon the documents provided by the bank at the material time including the demand letters addressed to the plaintiff dated 30.05.2016. In addition there has not been exhibited to court any documents to ascertain that the exchange rate adopted by the bank was the reigning rate as at the material time. I do thus find and hold that as at the date the bank went into receivership, the plaintiffs owed Kshs 20,656,652.36 and not Kshs. 32,147,228.71. It is therefore this sum of kshs 20,656,652.36 the defendant was under an obligation to offset at the earliest moment. I hasten to say that, the recovery of the debt, by way of offset, ought to have been effected as soon as the receiver took office so as to fulfill one of the objectives of the receivership.

Whether any surplus after offset is due for payment to the plaintiff?

10. From the determinations of issues 1 and 3 above, it is not in dispute that the sums held by the defendant to the credit of the plaintiffs far exceeded the sums advanced to the plaintiffs and therefore the contractual offset when effected on the due date would logically leave a surplus as due and payable to the applicant. The question for the court to answer is whether that sum is payable forthwith or subject to the discretion of the receiver. This determination has led me to study the powers of the corporation outlined under section 50 of the Act. Of interest for this determination is section 50(2) which provides:

> **50 (2) For the purposes of discharging its responsibilities as receiver, the Corporation shall have power to declare a moratorium on the payment by the institution to its depositors and other creditors and the declaration of the moratorium shall-**
>
> **(*a*) be applied equally and without discrimination to all classes of creditors:**
>
> **Provided that the Corporation may offset the deposits or other liabilities owed by the institution to any depositor or other creditor against any loans or other debts owed by that depositor or creditor to the institution;**
>
> ***b*) limit the maximum rate of interest which shall accrue on deposits and other debts payable by the institution during the period of the moratorium to the minimum rate determined by the Central Bank under the provisions of section 39 of the Central Bank of Kenya Act or such other rate as may be prescribed by the Central Bank for the purposes of this section:**
>
> **provided that the provisions of this paragraph shall not be construed so to impose an obligation on the institution to pay**

interest or interest at a higher rate to any depositor or creditor than would otherwise have been the case;

c. suspend the running of time for the purposes of any law of limitation in respect of any claim by any depositor or creditor of the institution; or

d. cease to apply upon the termination of the Corporation's appointment whereupon the rights and obligations of the institution, its depositors and creditors shall, save to the extent provided in paragraphs (b) and (c), be the same as if there had been no declaration under the provisions of this subsection.

11. I read the provision to vest the corporation, as a receiver of an institution under the Act, with powers to declare a moratorium and decree cessation of payment of depositors, fixing the maximum limit of interest rates payable to depositor and to suspend the running of time for purposes of limitation. I interpret the provision to mandate that cessation of payment of deposit shall be operationalized by a declaration and not before. In **Chase Bank (K) Ltd v Peter Karuga Kariuki [2019] eKLR** the court in commenting on the provisions of section 50(2) of the Act had this to say:-

"In the present application, the applicant failed to attach to its affidavit a notice to prove that a moratorium was in existence to cushion it against making good monies owing to third parties".

12. That interpretation by Njoki Mwangi j seems to have answered the question as to the purpose and efficacy of a moratorium as a tool in receivership without stating so. However, Tuiyot J, in **Thomas & Piron Grands Lacs Limited v Lighthouse Property Company Limited; Chasebank Kenya Limited (In Receivership) & another (Interest Parties) [2019] eKLR w**as more explicit on the intension of the legislature for the insertion of the provision on declaration of moratorium and its purpose and purport. He said:-

" If the challenge is one of solvency, liquidity or capitalization (I use these words in their loose meaning), then an institution under receivership may require some protection. That protection is, in my view, available by means of a moratorium on the payment to depositors and other creditors. Kenya Deposit Insurance Corporation…

From the language of Section 50(2), a moratorium is applied equally and without discrimination to all classes of creditors. So, secured or unsecured creditors, creditors with vested or contingent interest are all treated equally. This can be on a very effective way of protecting an institution under receivership. I would think that having appreciated that institutions can be placed under receivership for different reasons and that the device of a moratorium adequately insulates those that require some respite, the legislature did not think it necessary to extend provisions of stay of proceedings under Section 56 to receivership.

Perhaps I need to add that while proceedings against an institution under receivership can be commenced or continued without the necessity of court sanction, a decree holder will not be able to reach the assets of the institution if it is shielded by a moratorium under the provisions of Section 50(2)".

13. Prior to agreeing to proceed by way of case stated, on the 27.06.2017, counsel for the defendant indicated to court that a moratorium had been declared with had a bearing and impact on the suit. The matter was stood over to another date for the counsel to confirm to court the impact of the moratorium on the suit and the defendant's status. When parties were next in court, no mention was made of the moratorium and no document was availed to court to evidence that any moratorium had been declared. Instead, parties dictated to court the issues both desired the court to resolve for them.

14. I interpret the powers so granted under section 50 of the Act to provide wide latitude upon the receiver to maximize on the probable benefits of receivership. In my opinion therefore, had there been a moratorium declared, such would have been in possession, control and special knowledge of the defendant who then had the duty to avail same to court to enable the court determine the question if any surplus was due for payment to the plaintiff as a depositor. There having been no evidence that a declaration of a moratorium had been made and ceasing payment to depositors, I do find that nothing stands of the way of such deposits being paid out and accordingly I do direct that the surplus, (kshs 175,886,556.65 less the outstanding debt of Kshs 20,656,652.36) being Kshs 155,229,904.29 be paid to the plaintiffs in settlement of the sums due to them on account of deposits with the bank. Based on this determination I do enter judgment for the plaintiff in that sum. That sum shall attract interests at the current Central Bank recommended interests on deposits, from the date of the suit till payment in full.

Whether the plaintiff is entitled to an injunction after the offset is effected?

15. The injunction sought in prayer **(a)** was intended and expressed to target restraint against repossession of some 4 motor vehicles and their trailers. The need for that remedy was informed by the demand that the plaintiff pay the loan advanced towards the purchase of the motor vehicle rather that making the recovery by way of offset. I have found and held that the defendant was contractually empowered to effect the offset at any time and without recourse to the plaintiffs. I have equally found and determined that the offset ought to have been effected at the earliest opportunity. With those determinations, including the resolution of how much was due for offset and the surplus thereof, I do find that there would be no justification at all for the defendant to seek to repossess. In fact good faith would demand that once recovery of the debt is effected all the security held be released. This would demand the discharge of the log books and release to the plaintiffs. I however note from these proceeding that the defendant has not been eager to obviate avoidable disputes. I do find that the plaintiff being not obligated in any debt to the defendant upon this judgment, they are entitle to quiet and peaceable possession and enjoyment of the chattels and I therefore grant a permanent injunction against the defendant and restraining it from repossession or interfering with the plaintiff possession and enjoyment of the four suit motor vehicles and their trailers. I further order that the log books to the said vehicles be forthwith released to the plaintiffs.

16. On costs, the same must follow the event of success by the plaintiffs. The defendant shall pay costs of the suit to the plaintiff as may be

agreed or taxed by the court.

Dated and signed this 29th day of March, 2020.

P. J. O. Otieno.

Judge

Read and delivered in open n court this 23rd day of April, 2020

E. Ogola

Judge