



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 371 OF 2015**

**BETTAL SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**CROSS CONTINENT VENTURES LIMITED.....DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. By a Plaintiff dated 28<sup>th</sup> October 2015 and filed on 4<sup>th</sup> November 2015, the Plaintiff sought the following reliefs against the Defendant herein:-

**1. Kshs 9,334,166/= with interest at the rate of 15% per month from February 2013 until payment in full.**

**2. Costs**

2. The Defendant entered appearance on 8<sup>th</sup> March 2016. On 17<sup>th</sup> March 2016, it filed a Statement of Defence, List of Witnesses and its List and Bundle of Documents all dated 14<sup>th</sup> March 2016.

3. The Plaintiff filed its Reply to Defence dated 30<sup>th</sup> March 2016 on the same date. It also filed its Statement of Issues dated 23<sup>rd</sup> August 2016 on even date. Pursuant to court directions of 16<sup>th</sup> July 2019, it also filed a fresh Witness Statement dated 25<sup>th</sup> July 2019 and filed on the same date cross referencing its bundle of documents. The Defendant's fresh Witness Statement cross-referencing its bundle of documents was filed on 1<sup>st</sup> August 2019.

4. The witnesses adopted their respective Witness Statements as their evidence-in-chief. After the close of their respective cases, the Plaintiff filed Written Submissions dated 6<sup>th</sup> March 2020 on 9<sup>th</sup> March 2020. The Defendant's Written Submissions were dated 6<sup>th</sup> July 2020.

5. Parties asked this court to deliver its Judgment based on their respective Written Submissions, which they relied upon in their entirety.

**THE PLAINTIFF'S CASE**

6. The Plaintiff's case was that at the request of the Defendant, it advanced the Defendant a sum of Kshs 1,984,997/=. The same was to be payable at the rate of fifteen (15%) per cent per month. Subsequently, both parties entered into an Agreement dated 12<sup>th</sup> September 2014 whereupon it was agreed that the Defendant would pay a sum of Kshs 4,500,000/= and if there was a default, they would revert to the original agreement. However, the Defendant only paid a sum of Kshs 1,600,000/= as a result of which they reverted to the original agreement.

7. This position was reiterated in the testimony of Benjamin K. Kibiego, the Plaintiff's Director (hereinafter referred to as "PW 1"). His evidence was that the Defendant's cheque of Kshs 200,000/= was returned with remarks "Refer to Drawer".

8. His evidence was that the Plaintiff was entitled to the sum of Kshs 9,334,166/= made up as follows:-

**Principal loan**

**Kshs 1,984,997/=**

Cumulative interest

Kshs 7,349,169/=

**Together with interest thereon at the rate of fifteen (15%) per cent with effect from 17<sup>th</sup> February 2014 until payment in full.**

9. The Plaintiff therefore asked this court to grant it the prayers it had sought in its Plaintiff.

### **THE DEFENDANT'S CASE**

10. The Defendant's Managing Director, Hellen J. Kemboi (hereinafter referred to as "DW 1") testified on behalf of the Defendant herein which admitted having been advanced the aforesaid sum of money on or about 16<sup>th</sup> February 2013. It denied that the amount was to be repaid with an interest of fifteen (15%) per cent per month.

11. It advanced postdated cheques in the sum of Kshs 2,625,158/= to the Plaintiff as collateral on the understanding that it was in full settlement of the loan. On realising that the Plaintiff had not banked the said cheques, it entered into an agreement dated 10<sup>th</sup> September (sic) to pay a sum of Kshs 4,500,000/= a sum it said was due and owing to the Plaintiff.

12. It was categorical that the Plaintiff had no authority from Central Bank of Kenya (CBK) to charge it illegal and exorbitant interests and thus urged this court to dismiss the suit herein.

### **LEGAL ANALYSIS**

13. It appeared to this court that the issues that had been placed before it for determination were:-

**1. Whether or not the Plaintiff at the request and instance of the Defendant advanced the Defendant a sum of Kshs 1,984,997/= which was payable with interest at the rate of fifteen (15%) per cent until payment in full?**

**2. What were the terms of the Agreement?**

**3. Was there a variation of the Agreement between the Plaintiff and the Defendant?**

**4. If so, what were the terms of the Agreement?**

**5. Did the Defendant breach the terms of the Agreement?**

**6. If so, what sum was the Plaintiff entitled?**

**7. Who is to pay the costs of this suit?**

14. The court deemed it prudent to address the issues under the following heads.

#### **I. AGREEMENT**

15. Issue Nos (1) and (2) hereinabove were dealt with together as they were related.

16. The Defendant argued that the Letter of Commitment dated 12/2/2013 and Agreement Form dated 16/2/2013 did not culminate in a binding contract between it and the Plaintiff herein. It argued that there was no meeting of minds. In this regard, it placed reliance on the case of **Vincent M/ Kimwele vs Diamond Shield International Ltd [2018] eKLR.**

17. On its part, the Plaintiff submitted that the Defendant did not offer any evidence to demonstrate its incapacity to enter into the agreement with it.

18. In Paragraph 10 of her Witness Statement, DW 1 stated as follows:-

**"THAT the recital to the said Agreement was clear as to the status quo i.e. Kshs 4,500,000/= was due and owing to the Plaintiff as at the date of the Agreement. The company is unaware of any other original position."**

19. In Paragraph 2 of her Witness Statement, DW 1 also admitted that the Defendant was advanced a sum of Kshs 1,984,997/= on or about 16<sup>th</sup> February 2013.

20. An analysis of the evidence that was adduced by both PW 1 and DW 1 showed that both the Plaintiff and the Defendant entered into an Agreement dated 16<sup>th</sup> February 2013 in which at the request and instance of the Defendant advanced the Defendant a sum of Kshs 1,984,997/=. The terms of the Agreement were contained in the Letter of Commitment dated 12<sup>th</sup> February 2013 where the Defendant acknowledged that the aforesaid amount would attract compound interest of fifteen (15%) per cent per month until payment in full. The Defendant undertook to honour the commitment without fail.

21. The Defendant could not approbate and reprobate. It could not purport that it did not enter into any agreement with the Plaintiffs when it did not explain what was meant by reverting to the original position. It could also not purport that it did not have capacity to enter into any agreement with the Plaintiff for the reason that it did not demonstrate that there was no meeting of mind, that it entered into the said Agreement by mistake or under duress and/or that there was any misrepresentation by the Plaintiff.

22. This court therefore found and held that the Agreement dated 16<sup>th</sup> March 2013 was a valid and binding Agreement between the Plaintiff and the Defendant herein.

## **II. VARIATION OF THE AGREEMENT**

23. Issue Nos (3) and (4) were also dealt with together as they were both related.

24. In a Loan Repayment Agreement dated 12<sup>th</sup> September 2014 entered into between the Plaintiff and the Defendant herein, the Defendant acknowledged having been indebted to the Plaintiff to the tune of Kshs 1,800,000/=. It was agreed that the principal sum had accrued interest and other charges and now stood at Kshs 4,500,000/=.

25. The salient terms of the Agreement were that:-

- 1. The Defendant would pay a sum of Kshs 1,600,000/= in eight (8) equal weekly payments of Kshs 200,000/= on Friday of each week in the form of postdated cheques.**
- 2. The balance of Kshs 2,700,000/= would be payable within forty five (45) days after the last payment of the instalments above.**
- 3. In the event of default by either party to fulfil its obligations under the said Agreement, they would revert to the terms of the Agreement of 16<sup>th</sup> February 2013.**

26. There was no value to be added in analysing if there was a variation of the agreement, as these terms were not disputed by the parties.

## **III. BREACH OF THE AGREEMENT**

27. It was evident from the aforesaid Agreements of 16<sup>th</sup> February 2013 and 10<sup>th</sup> September 2014 that the Defendant breached the terms of the Agreement. As seen hereinabove, as at 10<sup>th</sup> September 2014, the Defendant admitted to having been indebted to the Plaintiff to the tune of Kshs 4,500,000/= comprising of interest and other charges. This was contained in Paragraph (5) and (10) of DW 1's Witness Statement.

28. It was clear from the evidence that having breached the Agreement of 10<sup>th</sup> September 2014, parties reverted to the original terms of the Agreement of 16<sup>th</sup> March 2013, which had been breached in the first instance.

## **IV. MONIES OWED TO THE PLAINTIFF**

29. As can be seen hereinabove, the Plaintiff claimed a sum of Kshs 9,334,166/= from the Defendant herein. As at 10<sup>th</sup> September 2014, the Defendant had admitted being indebted to the Plaintiff to the tune of Kshs 4,500,000/=. However, as the parties reverted to the original Agreement, the court was being called upon to determine if the Plaintiff was entitled to the aforesaid sum of Kshs 9,334,166/=.

30. The Plaintiff relied on the documentary evidence to demonstrate that the Defendant was indeed indebted to it in the said sum. On the other hand, the Defendant submitted that the Plaintiff failed to particularise its claim and that it was unconscionable for the Plaintiff to demand such amount of money from February 2013.

31. This court noted that the Plaintiff acknowledged that the Defendant paid it a sum of Kshs 1,600,000/=. In his testimony, PW 1 stated that the Defendant paid the Plaintiff the said sum in instalments. It did appear from his evidence that the cheques in the sum of Kshs 2,625,158/= that the Defendant had issued the Plaintiff were unpaid as he informed the court that the Plaintiff did not bank the same upon the request of one Ayub Angatia, one of the Defendant's directors, not to bank the said cheques.

32. Despite DW 1 having admitted that the Defendant had admitted in Paragraph 8 of its Defence that it owed the Plaintiff Kshs 4,500,000/=: the court could not adopt this amount as the one that was due and owing for the reason that the Plaintiff was categorical that upon default by the Defendant to pay the said sum, parties reverted to the original Agreement. The court could not adopt the sum of Kshs 4,500,000/= as the sum that was due and owing to the Plaintiff it was emphatic that the Loan Repayment Agreement dated 10<sup>th</sup> September 2014 ceased to exist immediately the Defendant defaulted on the same. Accordingly, as there was a variation of the Agreement, this court could only work with the sum of Kshs 1,984,999/= that had been advanced as per the Agreement 16<sup>th</sup> February 2013.

33. The court was thus being called upon to determine whether or not the Plaintiff was entitled to the sum of Kshs 9,334,166/=. Right at the outset, this court found and held that it was unconscionable for the Plaintiff to have demanded the sum of Kshs 9,334,166/= on four (4) grounds.

34. The first ground was because, it had in fact admitted that the Defendant had paid it a sum of Kshs 1,600,000/=. Demanding the entire principle sum of Kshs 1,984,997/= would be to take the view that the Defendant never made any payments, which as we have seen hereinabove, was not the correct position.

35. Secondly, compound interest is a special damage and must be strictly proven. Whereas compound interest is allowable where there is an agreement between the parties to that effect as was held in the cases of Veleo (K) Ltd v Barclays Bank of Kenya Ltd (2013) eKLR, Feroz Nuralji Hirji v Housing Finance Company of Kenya Ltd & another [2015] eKLR and Caledonia Supermarket Ltd v Kenya National Examination Council [2017] eKLR, this court agreed with the Defendant that the Plaintiff did not particularise its claim making it difficult to establish and ascertain from when that compound interest would have been payable and on what amounts as the monies were paid in instalments.

36. Indeed, even if any compound interest was payable, it would have had to be on the unpaid sums and compounded interest thereon. It was not possible to ascertain these figures from the way the Plaintiff's claim was presented before this court, a position that was correctly pointed out by the Defendant herein .

37. Thirdly, charging the cumulative interest totalling to Kshs 7,349,169/= at the time of filing suit was contrary to the provisions of Section 44 (A) of the Banking Act Cap 488 (Laws of Kenya) which provides that:-

- 1. An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).**
- 2. The maximum amount referred to in subsection (1) is the sum of the following—**
  - a. the principal owing when the loan becomes non-performing;**
  - b. interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and**
  - c. expenses incurred in the recovery of any amounts owed by the debtor.**
- 3. If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.**
- 4. This section shall not apply to limit any interest under a court order accruing after the order is made.**

38. Indeed, charging the cumulative interest in the sum of Kshs 7,349,169/= was in violation of the *in duplum* rule. In this respect, this court had due regard to the case of Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another [2020] eKLR where the Court of Appeal rendered itself as follows:-

**“According to this rule, which is a common law rule, it is provided that arrears interest ceases to accrue once the sum of the unpaid (accrued) interest equals the amount of capital outstanding at the time. The rule directly translates to “double the amount... The rationale for the “in duplum” rule was explained by this Court in the recent case of Mwambeja Ranching Company Limited and Another v Kenya National Capital Corporation [2019] eKLR as follows:**

**“The in duplum rule is concerned with public interest and its key aim was to protect borrowers from exploitation by lenders who permit interest to accumulate to astronomical figures. It was also meant to safeguard the equity of redemption and safeguard against banks making it impossible to redeem a charged property. In essence, a clear understanding and appreciation of the in duplum rule is meant to protect both sides.”**

39. The fourth reason which was equally important was that, the Plaintiff did not adduce any evidence to demonstrate that it was licensed by CBK to lend money and charge any interest thereon.

40. For the foregoing reasons, this court came to the firm conclusion that the Plaintiff could not charge compounded interest and was thus not entitled to the accrued cumulative interest of Kshs 7,349,169/=.

41. As the monies were paid in instalments, it was difficult for this court to ascertain from when interest on the unpaid sum of Kshs 1,984,997/= would have accrued. Declaring the period from when interest would accrue would be prosecuting the case on behalf of the Plaintiff, which would be prejudicial to the Defendant as the nature of litigation in our jurisdiction is adversarial.

42. The onus was on the Plaintiff to adduce a cogent and easily comprehensible case to enable the court make definite determinations. It failed to discharge its burden of proof, regarding the cumulative interest, as required under Section 107 (1) of the Evidence Act Cap 80 (Laws of Kenya) that stipulates that:-

**“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

43. Bearing in mind that the Defendant did not demonstrate that it paid the Plaintiff the balance of Kshs 384,997/=, being the difference between Kshs 1,984,997/= it was advanced and the sum of Kshs 1,600,000/= it was said to have paid the Plaintiff herein, this court found and held that the Plaintiff was entitled to that amount.

44. Indeed, the court came to the conclusion that the Defendant had paid the Plaintiff a sum of Kshs 1,600,000/= and not Kshs 1,800,000/= as had been indicated in the Loan Repayment Agreement dated 10<sup>th</sup> September 2014 because in her evidence, DW 1 admitted that Cheque No 928 dated 22<sup>nd</sup> September 2014 in the sum of Kshs 200,000/= was returned unpaid.

45. The Defendant did not demonstrate that it made good that cheque so as to bring the total sum paid to Kshs 1,800,000/=. Further, it did not take lay out its case clearly that it actually paid the sum of Kshs 2,300,000/= as DW 1 had asserted when she was cross-examined. In fact, this evidence was not in her Witness Statement which she adopted as her evidence in chief and was hence not supported.

#### **DISPOSITION**

46. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's suit that was filed on 28<sup>th</sup> October 2015 was partially merited and as a result, judgment be and is hereby entered in favour of the Plaintiff against the Defendant for the sum of Kshs 384,997/= together with interest thereon at court rates from the date of filing suit plus costs.

47. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of October 2020**

**J. KAMAU**

**JUDGE**