



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 276 OF 2010

EQUITY BANK LTD.....PLAINTIFF

-VERSUS-

JAMES NJENGA WANDUNGA.....DEFENDANT

JUDGMENT

1. The background to this case is straight forward.

The plaintiff advanced a loan to the Defendant to purchase a vehicle in the sum of Kshs.133,235/= payable in 36 equal monthly installments at an interest rate of 8% per annum and a default interest rate at 6% per annual among other conditions. The defendant fell into arrears.

2. By a plaint dated 26th October 2010 the plaintiff Bank sued the defendant for a sum of Kshs.4,845, 279.03 as at 13th September 2010 due on the loan facility which amount continued to accrue interest at the rate of 24% per annum from the 13th September 2010.

3. In his statement of defence dated the 28th February 2011 while admitting having been advanced the said sum denies that he owes the plaintiff Kshs.4,845,279/03 and denies the interest rate at 24% per annum on the arrears.

He further states that the vehicle (Bus) was attached without a court order or a registered chattel instrument.

4. The defendant denied having been informed of the amount that was raised after the sale of the bus by the Auctioneers. To that, the defendant has urged that the plaintiff be directed to render an account of the proceeds of sale of the bus before the demand for unpaid loan arrears can be settled.

5. **The plaintiffs credit manager Peter Waititu** testified as **PW1**. He reiterated the statements in the plaint and produced documents as exhibits No 1-7, being Letter of Officer, Deposit paid insurance loan, letter from Auctioneer dated 23rd November 2010 loan statement and Bank statements which as at 13th September 2010 showed the balance of the loan including accrued interest for the period.

6. It was his evidence that there was a registered chattels instrument upon which the vehicle was sold by the Auctioneer.

He further testified that the defendant was notified of the sale and the proceeds of sale. It was his testimony that the defendant never raised any complaint about what he terms as wrongful attachment or sale.

7. **The defendant** testified as **DW1**. He admitted the facts as stated in the plaint as well as the default in repayment of the loan. His complaint was that the bank sent his name to the Credit Reference Bureau and that no documents were sent to him by the bank nor did he know the loan or default amount at time of sale of the vehicle.

8. Issues For Determination

(1) Whether the defendant was indebted to the plaintiff

(2) Whether there was a registered chattel instrument in respect of the Defendants Bus Registration No. KBA 021D Nissan UD, and if not, whether the attachment and subsequent sale was illegal, and if so, consequences thereof

(3) Whether the plaintiff is entitled to the reliefs stated in the plaintiff.

9. Though (**PW1**) talked of a registered Chattel instrument in respect of the bus it financed, none was produced as an exhibit in court.

The bank statements showed the balance of the loan as at the date of filing of the plaint. The defendant, looking at his defence and evidence was not seriously opposed to the plaintiff's claim as stated nor the loan and the default amount.

10. The only issue raised by the defendant in his submissions was lack of a registered chattel instrument to secure the loan nor a court order for the attachment and sale of the bus.

11. The applicable legal provisions is the **Chattel Transfer Act** more specific **Section 13(1)** that states:

“Every instrument, unless registered in the manner provided under this paragraph shall upon the expiry of the time for registration or if time for registration is extended by the High Court upon the expiry of the extended time, be deemed fraudulent and void against”

12. As no chattel instrument was exhibited, it will be safe to conclude that none existed or registered, and therefore the requirements stated in the Act do not apply in this case.

13. What we have then is a matter of a bank as the lender and a loan borrower where the borrower falls into arrears and the bank sues for recovery of the loan arrears. In my opinion it would be a sad day if a bank or a financial institution would be barred from recovery of loan arrears from a borrower for the only reason that no chattels instrument over the chattel for which the loan was granted was not drawn and/or registered.

14. The terms of the letter of offer dated 11th August 2007 and accepted by the defendant are plain and clear. The borrower admitted being in arrears. When the vehicle was sold to recover the arrears he did not complain. I am persuaded that the defendant was well informed of all the steps taken prior to the sale proceeds.

15. In his evidence the defendant did not testify that the repossession attachment and sale of his vehicle were illegal. He did not even complain of the default interest rates as all had been agreed prior to disbursement of the loan. It is only in his written statement of defence that he raised issues about high interest rates, exorbitant and illusionary unfounded amounts of money.

16. A party is bound by its pleadings. No evidence ought to be adduced that does not support the pleadings as doing so would be an ambush to the opposite party. None of the parties can be allowed to depart from their pleadings – **Civil Appeal No.219 of 2013 IEBC and Another -vs- Stephen Mutinda Mule and 3 Others (2014) e KLR**. See – **Order 2 of Civil Procedure Rules**.

17. Though the defendant denies owing the sum demanded by the plaintiff he did not challenge the bank statements or at all in his evidence. The said bank statements therefore stood unchallenged.

18. A court of law cannot rewrite a contract between parties. Its duty is to enforce the terms of the contract unless such contract is riddled with coercion, fraud or illegality that have been pleaded and proved – **National Bank of Kenya Ltd -vs- Pipeplastics Samkolit (K) Ltd (2002) EA 503**).

19. I have looked at the agreement between the parties in the letter of offer. No sign of duress undue influence or oppressive terms and conditions are evident to warrant the court to revisit and relief the oppressed party. I am persuaded that the defendant entered into the contract with the plaintiff voluntarily and bound himself to the terms thereof. He cannot run away from his obligations under the contract – **Court of Appeal Civil Appeal Civil Appeal No. 48 of 2015 Pius Kimaiyo Langat -vs- Co-operative Bank of Kenya Ltd (2017) e KLR**.

20. Upon the evidence adduced by the parties and the applicable legal principles, it is my finding that the defendant is indebted to the plaintiff in the sum stated in the plaint. I further come to the finding that the provisions of the **Chattels Transfer Act, Laws of Kenya** are inapplicable to the loan agreement between the plaintiff and the defendant and therefore the attachment and sale of the defendant's bus was well anchored in the parties contract exhibited in the Letter of Offer which was signed by both.

21. The **Banking Act, Cap 488 Section 44A** states 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 Sub-section (2).

Sub-section (2) states

The maximum amount referred to in Sub-section (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

(b) expenses incurred in the recovery of any amounts owed by the debtor.

22. By the bank loan statements – PExt 7 – the default occurred sometimes in the month of September 2010 as stated by **PW1** and stated in the plaint, during which time the loan was Kshs.3,782,264.53 being the closing balance.

23. **Section 44A(2) Banking Act** empowers a lender to recover both the principal and interest as at the date of default, but interest ought not exceed the principal sum.

Looking at the Bank loan statement as at 13th September 2010 the cumulative default sum was Kshs.3,948,260. After that several repayments were made such that as at date of filing this suit, on the 27th October 2010 again looking at the statements, the sum outstanding was Kshs.3,782,264/53.

24. That in my view is the sum that the defendant was indebted to the plaintiff, and in conformity with Section 44A of the Banking Act.

The Plaintiff did not state and/or prove the sum stated in the plaint Kshs.4,845,279/03. No statement to that effect were produced.

25. For the above reasons, I find that the plaintiff has proved its case against the defendant to the required standard, upon a balance of probabilities. **Consequently, judgment is entered for the plaintiff in the sum of Kshs.3,782,264/53 as at the date of filing the suit on the 27th October 2010. This sum shall accrue interest from the date of filing the suit at the agreed rate, being 24% per annum until payment in full.**

26. The defendant shall pay costs of the suit to the plaintiff.

Dated, signed and delivered this 24th Day of January 2019.

J.N. MULWA

JUDGE