



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 209 OF 2013

DAVID WANYUNGU MASIEYIPLAINTIFF

VERSUS

SIDIAN BANK LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 14th March 2013 and amended on 8th June 2016, seeking for judgment against the Defendant in the following terms:-

(a) *Kshs. 952,000.00*

(b) *Special damages of Kshs. 7,660,000.00, being the value of the lost opportunity to trade in the shares from the time they ought to have been purchased to the date of filing suit;*

(c) *Interest on all the monies repaid to the Defendant by the Plaintiff up to April 2013;*

(d) *Costs and interest at court rates from time of tiling suit;*

(e) *Any other further orders that this Honourable court may deem fit to grant.*

2. The Plaintiff's case is that, on or around 11th April 2006, he applied and was granted by the Defendant, (successor of the former K-Rep Bank Limited), banking facilities through a letter of offer dated the 11th April 2006. The facility was for Kshs. 952,000.00 and was to be utilized for the purchase of 80,000 shares in Kengen Limited. It was repayable by thirty six (36) equal monthly installments, with effect from the date of disbursement of the funds to his account. That it was agreed that the Defendant would specifically purchase the shares on his behalf and hold a lien on the 80,000 on the same in exchange of regular payments of the loan facility.

3. The Plaintiff avers that, contrary to the terms and conditions of the letter of offer, the Defendant only purchased through CFC stockbrokers and Faida Investments Bank respectively, 22,100 shares and a further 554 shares at Kshs. 11.00 per share for the total amount of Kshs. 249,194.00. That despite, writing severally letters to the Defendant to explain how the balance of the monies was utilized and/or account for it, the Defendant has not explained and/or accounted.

4. That, he has diligently repaid the facility within the stipulated period, having made the final payment in April 2012, but the Defendant has failed to perform its duties including providing him with regular statements of account as a consequent of which he has suffered loss and damage due the inability to utilize the funds advanced for the stipulated purchase of shares; and Defendant's failure to account for the same.

5. The Plaintiff further avers that there was fraud on the part of the Defendant, in that the Defendant continued to receive repayments for the un-purchased shares and failing to appreciate that the purpose of the loan was investment and t trading on the stock exchange, which over the years could have earned him, the sum of Kshs. 7,660,000.00.

6. However, the Defendant(s) filed a statement of defence dated 30th July 2013, amended defence dated 28th April 2014 and a further amended defence dated 8th June 2016, denying each and every singular allegation of fact contained in the plaint. However, Tte Defendant averred, in the alternative and without prejudice that, if at all the Plaintiff was granted any facilities as alleged, which it denied, then the same was based on the terms contained in a letter of offer signed by the parties, and that, there were no additional or supplemental or separate terms therefrom.

7. The Defendant denied that, there was any agreements obligating it to either directly or through an agent purchase shares on behalf of the Plaintiff from the proceeds of the facility or otherwise and neither was it under any contractual duty or any other duty at all, to purchase shares as alleged.
8. It was argued that the Defendant is not a licensed stock broker or securities agent and at no point did it hold itself out to the Plaintiff as such. In any event, at all material times to these proceedings, the Plaintiff knew or ought to have known that the Defendant was a banking institution under the Banking Act, (chapter 488) of the laws of Kenya, and could not be obligated in law to invest and/or trade in shares and/or securities on behalf of the Plaintiff.
9. The Defendant argued that the Plaintiff's claim for lost opportunity to trade and lost earnings is unsustainable in law as against the Defendant in that, they are in the nature of consequential loss and cannot have been within the reasonable contemplation of the Defendant whilst dealing with the Plaintiff, it at all. Therefore they are not recoverable. The allegations of fraud and the particulars thereof were also denied too.
10. The Defendant averred that, further in the alternative and without prejudice to the foregoing, the facilities granted to the Plaintiff were utilized by a stockbroker appointed by him to purchase shares on his behalf and therefore his present claim herein is vexatious and an abuse of the court process.
11. However the Plaintiff filed a reply to the defence and reiterated the utilization of the facility granted by the Defendant was under the Defendant's direct control and disposal, and at no time did the he get an opportunity to access the funds to instruct a stockbroker of its choice.
12. The case was heard on 9th June 2016, whereby the Plaintiff testified that he was an employee of Kengen Company at the time of the events herein and a customer of K-Rep Bank limited and held an account number 0411016012. On 11th April 2016, he applied for a loan of Kshs 952,000 to purchase Kengen company shares. He recommended CFC as stockbrokers to the Defendant for the purpose.
13. Subsequently he was granted and fully repaid the loan facility, but the Defendant has not communicated as to whether the shares were purchased at all nor furnished him with the share certificate.
14. That being a senior business analyst taking into account the inflation factor, and interest paid, he claims for damages and the money he paid. However, he conceded in cross-examination that, he commended CFC stockbrokers (now known as SBG securities limited) as the agent to purchase the shares on his behalf.
15. He further conceded that the CDS account produced show a total of 22,100, Kengen company shares purchased for him. However, he insisted that the funds were disbursed on 11th August 2006 and yet the facility was taken on 11th April, 2006.
16. The Defendant called one witness, Jessica Kubania, its Relationship Manager who adopted and relied on the witness statement filed dated 2^{4th} September 2018 and the contained in its list of documents. She testified that the shares were purchased on 18th August 2006, at Kshs 33 per share instead of Kshs 11 due to fluctuation in the share price, and although then shares were purchased months after the facility was approved, and it would be important to establish the price at the time of approval of the facility.
17. The parties filed their final submissions wherein, the Plaintiff submitted that, one of the salient terms in the letter of offer was that, any refunds for unallocated shares would be credited to his loan account to reduce the loan repayment. That, although the Defendant, argues that, at the time of the disbursement, the shares were then trading at approximately Kshs. 33.00 per share and that they disbursed a sum of Kshs. 759,250.00 to CFC Financial Services, the balance of Kshs. 192,750.00, not utilized has not been accounted for. Neither has the Defendant explained why the shares were not purchased immediately, yet it was clearly stipulated in the letter of offer, that "no disbursement would be allowed before the securityis perfected." Therefore, it was incumbent upon the Defendant to remit the monies to the stockbroker at the earliest.
18. The Plaintiff submitted that the Defendant's witness conceded in cross examination that he has suffered loss as a result of its failure to disburse the monies on time. Further, the Defendant continues to hold a lien over the shares despite the fact that, he has repaid all the sums due and owing together with interest. The continued holding onto shares as a lien has denied him the ability to trade in them.
19. The Plaintiff argued that, if the price of the shares at the time of grant of the loan facility was Kshs 33.00 per share and not Kshs. 11,00 then simple mathematics would have led the Defendant to then approve a facility of Kshs. 2,640,000.00 and not Kshs. 952,000.00. Therefore the Defendant cannot claim that, they did not know the value of the shares at the time of application for the facility and one can only read pure negligence on their part.
20. Finally the Plaintiff submitted that, the Defendant has admitted that to date, the share certificates which they should have retained as security for the facility had not been secured at the date of the hearing. Therefore there was no security for the facility.
21. However, the Defendants filed response submissions basically reiterating the averments in the statement of defence. It was argued that the disclosure made by SBG Securities Limited through the share transaction reveals that a total of 22,100 were purchased for an accumulated sum of; Kshs 739,600 through the stockbrokers, leaving a balance of Kshs, 5,643.25 on the Plaintiff's account. Therefore the Plaintiff has no valid claim against the Defendant.
22. I have considered the evidence adduced and submissions filed. The Plaintiff invited the court to consider the following issues for determination:-

- a) Whether there was there a contract between the Plaintiff and the Defendant for the Defendant to purchase 80,000 shares as per the letter of offer?
- b) whether the Defendant in breach of the contractual terms of the Agreement?
- c) whether the Plaintiff has suffered loss?
- d) whether as the Defendant was negligent and/or there was fraud on the Defendant's part?

23. However, in my considered opinion the issues that have arisen for determination in a nutshell are:-

- (a) What were the instructions the Plaintiff gave Defendant the regarding the loan facility and purchase of shares?;
- (b) Whom did the Plaintiff instruct to purchase the shares for him?
- (c) Was time of essence?
- (d) Did the Plaintiff release the funds on time?
- (e) Has the Plaintiff suffered any loss or damage; and
- (f) Should the court grant the prayers sought?

24. I have considered the evidence on these issues and find that, the Defendant granted the Plaintiff a loan facility of Kshs. 952,000 for the purpose of purchase of 80,000 Kengen shares. The Plaintiff accepted the facility on 11th April 2006. There is no dispute that the Plaintiff subsequently fully repaid the loan facility. However, evidence reveals that, only 22,100 instead of the 80,000 shares were leaving s a deficit of 57,900 shares.

25. The question that arises is; who to blame for the deficit. The Plaintiff blames the Defendant but the Defendant argues that, whereas the purchase of, 80,000 shares was based on a price of Kshs. 11 per share, the shares were bought at Kshs. 33 per each. The question that arises is; why were the shares bought at a higher price. What occasioned it?

26. The evidence adduced reveal that the loan facility was offered and accepted on 11th April 2006, but according to an affidavit sworn by Rita Njora, the legal manager of the Defendant, on 17th January 2014, (in support of an application seeking for orders that SBG securities be ordered to disclose the information relating to the Plaintiffs and produce share certificate transaction statement), the funds in the sum of; Kshs. 759,000, were transferred as per Funds Transfer order annexed to her affidavit, to CFC Limited on 18th August 2006.

27. The details in the client's statement from SBG Securities reveal that, the amount of Kshs. 759,000 was received from the Defendant on 25th September 2006, vide a cheque No. 279586, and on the same date, the stockbrokers purchased a total of 20,600 Kengen shares for the Plaintiff at a cost of Kshs. 702,799.75. The payment was effected on 10th October 2006. A further 1,500 shares were purchased on 11th October 2006, at a costs of Kshs. 50,551.50, giving rise to a total of 22,100 shares bought at an accumulative cost of Kshs 753,351.25.

28. Therefore, it evident that the funds were transferred to the stockbrokers at least four (4) months and seven (7) days, after the offer and acceptance of the loan facility. As such, if there was any change in the value in shares during this period, then it falls on the shoulders of the Defendant, in the absence of any reasonable explanation for the delay.

29. Indeed it is noteworthy that, the first shares were actually purchased five (5) months and fourteen (14) days from the date the loan was approved and the 2nd shares purchased six (6) months later. Obviously, any shares trading on the stock exchange would be subject to share fluctuation during this period. In a nutshell, find no evidence that the stockbrokers delayed in the purchase of the shares.

30. The Defendant raised a further defense that, it is a bank and not a stockbroker and was not commissioned to purchase the shares on behalf of the Plaintiff. That is correct and in fact there is adequate evidence that the Plaintiff recommended CFC Limited, stockbrokers to act for him in the purchase of the shares. However, the Defendant did not transfer funds to the stockbrokers immediately. The funds were transferred late as noted herein. The delay has not been explained.

31. In conclusion, I find that, the Plaintiff applied for and was granted a sum of Kshs. 952,000 by the Defendant to purchase 80,000 shares. Thus 80,000 shares at Kshs 11 per share give rise to Kshs 880,000. If 80,000 shares were to be purchased at Kshs. 33 per share, that would give rise to a figure of Kshs. 2,640,000. That is not what the Defendant approved and/or advanced. Therefore the logical conclusion and indeed as evidenced in the letter of offer is that the 89, 000 shares were to be bought at Kshs 11 per share and obviously time was of essence.

32. It is also noteworthy that, the Defendant was to hold a lien over the shares. It clear from the inquiry it made from the stockbrokers on the Plaintiff's shareholding, there is no evidence they executed its right of a lien.

33. Be that as it were, the shares were later purchased at Kshs. 33.5 and Kshs. 33 respectively, at a total cost of Kshs 753,351.25. But had those for 22,100 shares been purchased at Kshs. 11, then the Defendant would have paid a total of; Kshs. 243,100.00, and credited the balance of the loan sum to the Plaintiff's account.

34. In that regard it suffices to note that, the Defendant transferred to the stockbrokers a sum of Kshs. 759,000.00, out the amount of Kshs 952,000 advanced, leaving a balance of Kshs. 193,000.00, which has not been accounted for. Therefore, the Plaintiff is entitled to a refund of that money plus interest from the date of disbursement of the loan to repayment in full.

35. In addition, the Defendant failed to remit the funds in time and therefore, caused the Plaintiff to purchase 22,100 shares at Kshs. 33.5 and Kshs. 33 instead of Kshs. 11. As such, the Defendant should pay the Plaintiff the difference between the Kshs. 759,000 and Kshs. 243,100 which is Kshs. 516,000, plus interest thereon from the date of transfer of the funds to the stockbrokers to payment in full.

36. In view of the finding above and taking into account the fact that the Plaintiff has a total of 22,000 ordinary shares in Kengen company, his claim for refund of Kshs. 952,000.00 plus interest, cannot succeed. I therefore dismiss it. In the same vein, the claim of Kshs. 7,660,000 as pleaded is a special damages claim which must be pleaded and specifically proved. I find no evidence has been adduced to support it. There is no evidence on how the shares in question have been or were performing during all these years. Shares by nature fluctuate in value on a daily basis and they can appreciate and depreciate in value at any time. The claim is thus speculative. Even then, the Plaintiff has the shares already bought for him and the court has found in his favour on the sum not utilized, it will be unjust enrichment to be award the sum sought.

37. As regards the claim of interest on all monies paid by the Plaintiff to the Defendant, I find no basis for the same having dismissed the claim for the refund of the sum advanced. The Plaintiff knew he was taking a loan repayable with interest. He did not borrow Kshs. 952,000 to put into a fixed deposit or interest earning account to be refunded on demand. The loan was for utilization to purchase the shares. The Plaintiff also claims for costs and interest. Having partially won the case, he is entitled to costs.

38. The upshot of the aforesaid is that, I enter Judgment for the Plaintiff in the sums of Kshs. 193,000.00, being the amount not disbursed from the loan facility advanced plus interest from the date of disbursement to payment in full and Kshs. 516,000.00 being the amount lost due to purchase of shares at a higher price as a result of the Defendant's remittance of funds late. That sum will attract interest from the date of transfer of the sum to the stockbrokers to payment in full. The sum total payable will attract interest at court rates from the date of judgment to payment in full. Costs are awarded to the Plaintiff as stated above.

39. It is so ordered.

Dated, delivered and signed in an open court, this 23rd April 2019, in an open court at Nairobi.

G.L.NZIOKA

JUDGE

In the presence of:

Mr Odhiambo for Ms Mwenesi.....for the Plaintiff

Mr Ngondo for Mr Otieno.....for the Defendant

DennisCourt Assistant