



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 212 OF 2009

JOHN NAHASHON MWANGI.....PLAINTIFF

VERSUS

KENYA FINANCE BANK LIMITED (in liquidation).....DEFENDANT

RULING

1. These proceedings are now at the tail end but there is a disagreement as to whether the debt that is the subject matter has been fully paid. The Plaintiff takes the view that she has in fact made an overpayment, and has through a Notice of Motion dated 13th February 2019 sought the following prayers:-

1. Spent

2. THAT the Honourable Court be pleased to order the Defendant to forthwith release the original title thereof being Title Number I.R 5311/1 and issue a Discharge of Charge in respect of Land Reference Number L.R No.2246/5 Langata.
3. THAT the Honourable Court be pleased to order the Defendant to refund overpayment in the sum of Kshs.928,974.
4. THAT upon release of the Plaintiff's Title and Discharge of charge this matter be marked as fully settled with no orders as to costs.
5. THAT the Honourable Court be pleased to grant any other order it deems fit and appropriate in the circumstances.

2. A short background can be sketched from the rival affidavits filed herein. John Nahashon Mwangi (now deceased) was a customer of the Defendant Bank. He fell into arrears of a loan granted to him by the Bank. His widow and administratrix to his estate, Lois Nyambura Mwangi, is now the Plaintiff in his place. Her contention is that after the parties herein reworked the debt it was agreed that it be fully settled at Kshs. 6,351,327.52. Her case is that she has not only discharged her obligation but has overpaid. The Plaintiff sets out the payments made as follows:-

Date Amount (Kshs.)

- a) Loan repayments before 2016 800,000/=
 - b) 6th March 2017 480,301/=
 - c) 8th December 2016 2,000,000
 - d) 7th September 2018 4,000,000
- Total amount repaid 7,280,301

3. The Bank's position is that while there were discussions about a possible settlement at that sum (ie. 6,351,327.32), the Plaintiff having made a proposal, it was subject to all costs being paid by the Plaintiff. In this regard, the Bank states that it advised the Plaintiff that the costs

payable was Kshs. 1,362,460.00 but the Plaintiff made a proposal to pay Kshs.500,000.00, an offer that was rejected.

4. On the alleged overpayment the Bank asserts that the Plaintiff has included a sum of Kshs. 800,000.00 which was paid prior to it going into liquidation and which was not part of the settlement.

5. It does seem to this Court that this is a rather straightforward matter that parties would have resolved. First, on the alleged repayment, the Bank's contention that Kshs. 800,000.00 was outside the agreed settlement of Kshs. 6,351,327.32 has not been rebutted. If that amount is excluded, as it should, then the argument of an overpayment could crumble. If however the Plaintiff insists that there is an overpayment even after excluding this amount, then this Court shall grant her the liberty to rework out the accounts on terms that it will set.

6. On the issue of costs, the Bank has produced a letter of 8th October 2018 in which the Bank rejects an offer by the Plaintiff to pay costs at Kshs. 500,000.00. That there was such an offer is, again, not rebutted by the Plaintiff. The offer was made after the settlement was negotiated and would therefore be an acknowledgment that the settlement did not include costs. Yet because there is no consensus as to the amount, the costs shall be subjected to taxation.

7. I know the Plaintiff feels aggrieved she has had to pay substantially more than the loan amount of Kshs. 1,450,000.00 but the settlement reached by the parties was not forced on them. At any rate the Court has not been asked to set it aside. It must be taken to be the bargain of the parties. A bargain which must be respected and given effect by the Court.

8. This is my answer to the Notice of Motion of 13th February 2019.

8.1 The Plaintiff is hereby granted liberty to agree with the Bank on the appointment of an accountant to work out all sums paid after the agreement of Kshs. 6,351,327.32. The repaid sum shall not include Kshs. 800,000.00 paid before 2016. Such appointment to be made within 21 days hereof. In the event of a disagreement as to the accountant, the Chairperson of the Institute of Certified Public Accountants of Kenya to make the appointment within 14 days of request by either party.

8.2 The accountant's fee shall be met in the first instance by the Plaintiff. However, if the accounts reveal on overpayment then the fees shall be paid back to the Plaintiff by the Bank.

8.3 Costs shall be taxed by the Taxing Master of this Court.

8.4 Otherwise the Notice of Motion dated 13th February 2019 is hereby dismissed with costs.

Dated, delivered and signed in open Court at Nairobi this 31st Day of May, 2019.

F. TUIYOTT

JUDGE

Present:-

Mirei h/b for Kingara for Plaintiff

N/a for Defendant

Fred – Court Assistant