REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 321 OF 2012

JACKLINE AWUOR OLENDO T/A

RAJAL ENTEREPRISES.....PLAINTIFF

-VERSUS-

EQUITY BANK LIMITED .....DEFENDANT

J U D G M E N T

The Plaintiff in this case is **Jackline Awour Olendo T/A Rajal Enterprises**, while the Defendant is **Equity Bank Limited** (hereinafter the Bank).

1. It is admitted by both parties that the Plaintiff was granted a loan facility, by the Bank, in June 2007 of Kshs. 4.5 million. That facility was for the purchase of 15 ton tipper vehicle. That facility was disbursed through the Plaintiff bank account No. 0170591264863 (herein after the original loan account).

2. It is also admitted that the Plaintiff by letter dated 10th November 2009 requested the Bank to restructure that loan facility. The Bank by its letter dated 10th December 2009 accepted the Plaintiff's request and restructured that loan facility. The amount the Bank offered the Plaintiff for the restructuring of that facility was for the maximum Kshs. 1,164,970. That amount was to be paid by the Plaintiff in the sum of Kshs. 106,595 each month, for twelve months. The re-payment was to commence one month after the date of drawdown until payment in full. The restructured account of the Plaintiff was account No. 0170594806654.

3. By this claim the Plaintiff alleges that the Bank mis-applied funds in its restructured account and paid them into the original loan account; that the Bank fraudulently repossessed the motor vehicle; that despite the Plaintiff regularizing its account the bank repossessed the motor vehicle; and that the bank continued to retain possession of the vehicle despite the Plaintiff having fully repaid its facility.

4. The Plaintiff's prayers in this case is for judgement for Kshs.7,560,000 with interest at commercial rate from June 2010 until release of the motor vehicle; judgment for loss of Plaintiff's business; judgment for storage of the motor vehicle; and compensation of the value of the motor vehicle.

5. The Plaintiff's case is denied by the bank. The bank denied that the Plaintiff punctually honoured its obligation of repaying the loan facility and pleaded in its defence that the Plaintiff's re-payments were irregular and in breach of the loan agreement.

6. It is important to state that the motor vehicle was released to the Plaintiff, after the Court issued an order, on 22nd November 2017.

ANALYSIS AND DETERMINATION

7. The issues before Court in this matter are three, in my view. They are:

a) Did the Defendant bank wrongfully repossess the motor vehicle?

b) If (a) above is in the affirmative is the Plaintiff entitled to the prayers for loss of use of the motor vehicle and/or the value of the motor vehicle?

c) Who shall bear the cost of the suit.

ISSUE (a)

8. The Plaintiff requested the original loan account to be restructured. That request was accepted by the Bank. The restructured agreement provided that the Plaintiff would repay the restructured amount by twelve months payments of Kshs. 106,595.

9. The Plaintiff alleges that it promptly and regularly repaid the amount in the restructured loan account. The repayments of the restructured account were to commence one month after the draw down. The draw down was on 31st December 2009.

10. What is clear, and it was explained by the Defendant's witness, Banjamin Nzioka, is that the loan on being restructured a new account was opened, the restructured account. In that account a debit sum of Ksh.1,150,113.77 is reflected as at 31st December 2009. This amount was the balance after deduction of insurance for the mother vehicle.

11. Simultaneously, when the Bank restructured the Plaintiff's facility the original loan account was accumulating the usual loan repayments and penalty charges for non-payment by the Plaintiff. In view of that the amounts paid into the Plaintiff's business account, being account number 012019168481, by the Plaintiff in January 2010 partly was utilized to clear the outstanding amounts and penalty charges in the original loan account.

12. I believe that this was clear to the Plaintiff and hence why in evidence chief, of the Plaintiff's witness, George Waida Opondo, he did not question the debits made to clear the payments due and penalty charge in the original loan account. It seems he only raised a query in that regard, in re-examination.

13. It follows that although the Plaintiff had made payment of Kshs. 95,000. Some of that amount was used to settle the repayments and penalty payments in the original loan account. It is as a consequence of that, that the Plaintiff defaulted when it first repayment of Kshs. 106,595 was due in February 2010.

14. Although Plaintiff's case is that it made regular payments into its restructured account, that is not borne out by the bank statements before Court. Even the Plaintiff's own witness George Waida Opondo confirmed while being cross examined that the payment Plaintiff made, in March 2010, was insufficient to cover the agreed instalments of the restructured account. Indeed the Plaintiff's repayment of its restructured account continued to be insufficient until the motor vehicle was repossessed in May 2010. The same applies to the second repossession of the motor vehicle in July 2010. The Plaintiff's restructured bank account statement reveals that the Plaintiff did not remit amounts sufficient to make payment as per the restructure agreement. I therefore fail to understand the basis of the Plaintiff's claim that the bank's repossession of the motor vehicle was wrong.

15. There is also the fact that the Plaintiff seems have had more than one account into which money from the business account was paid. These accounts are: Loan account No. 017059126486, loan account 0170592213516, loan account 017059480665, and loan account 017059480665. The parties did not assist me to understand what relevance these accounts had to the matter at hand.

16. In the end, however, I do find in respect to issue (a) that the bank was not wrong to repossess the Plaintiff's motor vehicle.

17. The Plaintiff alleged that the bank refused to release the repossessed motor vehicle even after it concluded repayment of its loans. The bank confirmed that the Plaintiff completed its repayment of the loan but that the Plaintiff failed to collect its release letter to enable the Plaintiff obtain the motor vehicle.

18. The Plaintiff alleged that despite several letters it wrote to the bank, and even though it had no debts with the bank, the bank failed to release the repossessed motor vehicle.

19. The Plaintiff's first letter to the bank before Court, is dated 19th July 2010. By the tone of that letter it is clear the Plaintiff was aware it had not cleared its loan. The second letter of Plaintiff to the bank was dated 27th July 2010. By that letter it is also clear that the Plaintiff was aware it had not cleared its loan. The third letter written by the Plaintiff's Advocate to the bank is dated 9th August 2010. By that letter the advocate stated that the Plaintiff's loan was not in arrears and therefore demanded the release of the Plaintiff's motor vehicle. The fourth letter was written by the Plaintiff and was dated 18th March 2011 by that letter the Plaintiff confirmed having completed repayment of its loan and requested for the release of the motor vehicle.

20. None of those letters, by or on behalf of the Plaintiff, received a response from the bank. It is also not clear if the Plaintiff ever presented itself to the bank officials for the release of the motor vehicle to be undertaken. How else would the release of the motor vehicle have been done if the Plaintiff did not present itself at the bank. It was not enough for the Plaintiff to write letters asking for the release of the motor vehicle and fail to attend at the bank for such release to be done. That however does not exonerate the Defendant from its responsibility to respond to Plaintiff's correspondence requesting the release of the motor vehicle.

21. In the end I find that the repossession of the motor vehicle by the Bank was not wrongful. It was in accordance with the restructuring agreement.

22. Having found in respect to issue respect to issue (a) in the negative I will not proceed consider issue (b). This is because since it is this Court's finding that the repossession was within the provisions of the agreement of the parties the Plaintiff, then, cannot claim to be entitled to compensation for loss of user or loss of value of the motor vehicle.

23. The Plaintiff's case, in view of the above discussion, fails and is dismissed. Having been dismissed I am of the view that this case would not have been filed if only the Bank had responded to the Plaintiff's correspondence. Even though the case is dismissed, therefore, I will order each party to pay its own costs.

24. In the end this case is dismissed and each party will pay its own costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at NAIROBI this 30TH day of MAY, 2019.

MARY KASANGO

JUDGE

Judgment Read and Delivered in Open Court in the presence of:

Sophie.....COURT ASSISTANT

.....FOR THE PLAINTIFF

.....FOR THE DEFENDANT