



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

CIVIL CASE NO.7 OF 2017

STANLEY KIPRUTO BOMMET.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

JUDGMENT

1. The plaintiff was a customer of the 1st defendant and held two bank accounts with the bank. On the 2nd October 1989 upon request, the Bank advanced him a loan in the sum of Kshs.300,000/= and a charge registered as security over his property known as **Baringo/Sabatia 103/153**.

2. In his Amended plaint filed on the 15th March 2017, while admitting having been advanced the said sum, he claims that he has overpaid the loan by three times, in the sum of Kshs.1,810,000/=, and that it is the bank that ought to refund him the overpaid money, and faults the Bank in instructing the 2nd defendant, Legacy Auctioneering services to attach the said property to recover a none existence loan balance.

3. The plaintiff claims that by a letter dated 22nd November 2016 the bank informed him that the outstanding loan balance was Kshs.600,000/= and not Kshs.3,458,887/= that it had demanded. As a result, the plaintiff seeks

(a) A mandatory injunction to restrain the bank from selling, disposing, alienating or in any other manner from interfering with the charged property – Baringo/Sabatia 103/153

(b) A declaration that the plaintiff has fully paid the loan

(c) A declaration that the 1st defendant do refund to the plaintiff the excess amount paid to the bank contrary to the requirements by the Banking Act.

4. The defendants denied the plaintiffs claims in their defence dated the 10th May 2018 and state that it is rightfully owed Kshs.3,458,877/10 together with further costs and interest.

5. **In his evidence the plaintiff (PW1)** adopting his witness statement filed on the 29th July 2018 testified that despite requesting for the loan statements none have been furnished to him, and that having overpaid the loan he cannot be called upon to pay Kshs.3,458,887/= demanded.

6. **The 2nd defendant** testified by its Manager, Recoveries and Records, Paul K. Chelanga.

It was his testimony that by the Letter of Offer dated 2nd November 1998, the said sum of Kshs.300,000/= was subject to an agreed interest at 15% p.a. and upon a charge over the security offered.

It was his testimony that the plaintiff defaulted in repayments and as at September 2016, the loan had grown to Kshs.3,458,887/10. He denied that the plaintiff had overpaid the loan, but admitted payment of Kshs.1,810,000/= only as at August 2005, and his acknowledgement of the outstanding sums in various correspondence to the bank.

7. Issues for determination

(i) Whether the loan advanced to the plaintiff by the 1st defendant has been fully paid and if so, whether there is an overpayment of the said loan by the plaintiff to the bank.

(ii) Whether the provisions of Section 44A of the Banking Act is applicable in this case.

8. I have considered the parties pleadings, evidence and submissions

Undisputed facts

(1) That the defendant advanced a loan of Kshs.300,000/= to the plaintiff that was secured by a charge over property L.R No. Baringo/Sabatia/103/153 Baringo County on the 7th December 1989 at an agreed interest rate of 15% per annum calculated on daily balances by a letter of offer and duly accepted dated the 2nd October 1989.

(2) That the plaintiff paid a sum of Kshs.1,810,000/= only in repaying the loan by August 2005.

(3) That as at 18th March 2015, the loan balance stood at Kshs.3,378,587/=.

(4) that no full bank loan statements were furnished to the plaintiff or the court.

9. Whether the plaintiff paid the loan fully

The plaintiff submission is that the initial account with the bank having been closed and a new one opened, the balance of the loan became non-performing and thus it cannot be recovered. Further it is urged that pursuant to provisions of **Section 44A** of the **Banking Act**, (Cap 486) the defendant is barred from covering the loan from the non- performing account as well as the limit to what it can recover from a debtor.

10. I have considered **Section 44 A (2) (b) of the Act**. The interest recoverable by a lender is limited to the interest as provided under the contract and should not exceed the principal owing when the loan becomes non-performing.

The question at this stage is whether the loan became non-performing and if so when.

11. In my view, closure of an account and opening another in its place - a scenario in this case – does not mean or translate to closure.

It was clear what circumstances lead to the closure of the plaintiff's original bank account, being systems upgrade when old accounts were closed and new ones opened. The new accounts carried all liabilities and obligations of the account holder to the new account – See **A.S. Sheikh Transports Ltd & Another –vs- BBK & 3 Others (2018) e KLR**.

12. At all material times the plaintiff knew of his obligations under the loan account. He knew the amount of the loan and what he had paid and the balance outstanding, facts he admitted in his letters to the bank dated 3rd November 2004, 27th April 2005, and 2nd August 2005 when he acknowledged the outstanding loan as Kshs.4,778,687/10 and appealed for restructuring by letter dated 1st November 2016, in his loan Account No.1011XXX formerly account No.301001XXX thus acknowledging that the initial account was only given another account number and was thus active, not non-performing.

13. Without a doubt, the plaintiff did not pay the loan fully and that resulted to the bank to exercise its charges right to realise the security through the 2nd defendant who for all intent and purposes was duly authorised agent of the 2nd defendant – See **KCB -vs- Rupa (K) Ltd & 2 Others (2014) e KLR**.

The 2nd defendant was thus wrongfully sued as it was acting under instructions of its principal, the bank. Indeed no claim or cause of action is stated in the plaint against the 2nd defendant.

14. An account becomes non-performing when it becomes inactive for a considerable period of time. I have seen only deposit slips by the plaintiff into the loan account being Kshs.150,000/= on the 14th March 2005, Kshs.260,000/= and Kshs.1,400,000/= making a total of Kshs.1,810,000/=. This is the amount admitted by both the plaintiff and defendant as having been paid by the plaintiff.

15. Under **Section 44 A (2) (b)** the maximum amount that a bank may recover from a debtor with respect to a non-performing loan is to

(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.

16. The claim by the plaintiff even without application of interest to the principal on the outstanding sum as to the date the loan account became inactive after August 2005 is Kshs.3,458,887/10.

I agree that no further interest ought to have been applied to the loan when the account became inactive.

17. Therefore under the **Banking Act Section 44A (2) (b)** the Defendant may recover the principal plus interest as agreed by the parties under the contract when the loan became non-performing, and any recovery costs and all expenses incurred in the recovery process; as provided under Section 44A.

18. The defendant did not provide the court with bank statement as at the 22nd August 2005 of the plaintiff's loan account, nor did the plaintiff.

To that end, it is not possible for the court to determine what the principal interest and prior recovery costs were as at 22nd August 2005. – **Kenya Commercial Bank Ltd –vs- Rupa (K) Ltd & 2 Others (2014) e KLR**. Had the statements been provided, it would have been easy to determine the amount.

19. However, as the plaintiff admitted having paid the sum of Kshs.1,810,000/= only, and also the balance as at 22nd August 2005, as Kshs.3,458,887/10 and testified to by the defendant, he is under a duty to pay the same.

I find no evidence whatsoever to support the plaintiff's claim of over payment but rather non-payment to the above extent.

20. For the aforesaid, I find no merit whatsoever in the plaintiff's claim against both defendants.

Consequently, I decline to issue any of the declarations sought by the plaintiff in his plaint.

The upshot is that the plaintiff has failed to prove his case against the defendants to the required standard, on a balance of probability.

I dismiss the suit with costs.

Delivered, Signed and Dated at Nakuru this 25th Day of July 2019.

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J.N.MULWA

JUDGE