



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO 486 OF 2016

SPIRE BANK LIMITED.....PLAINTIFF

VERSUS

MOSES THOGO GICHUKI t/a INTERSIGHT TRADERS.....DEFENDANT

JUDGMENT

1. The plaintiff **M/s SPIRE BANK LIMITED** through a plaint dated 21st November 2016 and filed on 30th November 2016 sued the defendant herein seeking the follows orders:-

- (a) **Kenya Shillings Four million, one hundred and ten thousand, four hundred and ninety seven and thirty five cents (Kshs. 4,110,497.35) being the debt owing;**
- (b) **General damages for breach of contract between the Plaintiff and the Defendant;**
- (c) **Interest on (a) and (b) above at the rate of 23.5% per annum from the date of default until payment in full;**
- (d) **Costs of and incidental to this suit;**
- (e) **Any other relief as the Honourable Court may deem fit and just to grant.**

2. The plaintiff's plaint is substantiated by the witness statement of Powleen Busena dated 25th June 2018 filed on 9th July, which the court marked as **exhibit 1** together with the documents, which the court marked as **P-exhibit 2** running from pages 2 to 19 being list of Documents duly filed by the plaintiff. The defendant was duly served with summons to enter appearance, however, he failed to file response or any documentation stating contrary position and has accordingly waived his right to be heard and by extension implied admitting the fact set forth by the plaintiff.

Facts of the case

3. The facts of the case are that on 31st January 2013, upon request by the Defendant through the Asset Finance Application Form dated 31st January 2013 (**Exhibit PB5**), the Plaintiff approved and subsequently advanced an asset finance facility to the Defendant to enable him purchase a Nissan Isuzu **FVR** Registration **No. KBU 012Z** for the Defendant's use for transportation of building materials which business the Defendant engages in (**Exhibit PB6**). The loan facility advanced was for Kshs. 3,640,000.00 which was payable in a maximum of 36 instalments of Kshs. 141,854.00 payable on the 11th day of every month and subject to interest at the rate of 23.5% per annum on reducing balance till payment in full (*See Clause 7 of The Approval for Asset Finance Facility dated 31st January 2013 [page 13] marked as Exhibit PB6*).

4. Right about the same time, the Defendant also stopped paying for the renewal fee for the tracking device fitted on the financed vehicle; of which he very well knew was his responsibility thus putting the Plaintiff bank to a lot of risk (*See Clause 10 of The Approval for Asset Finance Facility dated 31st January 2013 [page 14] marked as Exhibit PB6*). The Defendant made the last repayment on 19th November 2013 (**Exhibit 17**) and defaulted from the said date, which action promoted the Plaintiff, on 20th June 2014, to instruct Leakey Auctioneers to repossess the lorry which had been offered as security for the debt. On 9th July 2014, the auctioneers reported that the lorry could not be traced after which, on 26th October 2015, the Plaintiff instructed Fine Points Investigators & Loss Assessors to conduct a private investigation report on the Defendant which revealed that the Defendant is financially capable of paying off the loan due to the Plaintiff.

5. On or about 30th September 2013, the Defendant began defaulting in the payment of the outstanding loan amounts and as a result, the

Plaintiff sent several demand and/or reminders to the Defendant more specifically on 30th September 2013, and 25th October 2013, respectively reminding him to make good his loan arrears but the Defendant refused, declined or ignored to repay the outstanding loan amount.

6. Since the fateful date stated above, the Defendant has refused and/or neglected to repay the outstanding debt which has culminated in the outstanding balance due and owing on the Defendant's account as at October 2016 to be Kshs. 4,110,497.35 which amount continues to attract interest.

7. At the hearing M/s Nthiwa, learned Advocate appeared for the plaintiff whereas there was no appearance for the defendant. The plaintiff called Mr. Polween Busena who produced his witness statement and sought for the same to be adopted together with the list of documents as his evidence in chief. The witness statement was adopted as **PW1's** evidence in chief, marked "**PB1**" and his list of documents marked "**PB2** No. 2 - 19". The plaintiff thereafter closed his case and submissions dated 13th July 2018 were subsequently filed on 13th July 2018.

8. I have very carefully considered the pleadings, the evidence of the plaintiff, as well as the list of documents and counsel written submissions and I am of the view that the issues arising thereto for determination can be summed up as follows:-

a) Whether there was a valid enforceable contract between the plaintiff and the defendant?

b) Whether the plaintiff is entitled to prayers sought in the plaint?

A. Whether there was a valid enforceable contract between the Plaintiff and the Defendant?

9. In the instant suit, it is averred that on 31st January 2013, upon a request by the defendant the plaintiff approved and subsequently advanced an asset finance facility to the defendant to enable him purchase a **Nissan Izuzu FVR Truck Registration No. KBU 012Z** for the defendant's use for transportation of building materials which business the defendant engages in. The Asset Finance Application Form was produced as **P-exhibit PB4**. This is not denied nor challenged by the defendant. The Asset Finance Application Form "**P-exhibit PB4**" was an offer to the defendant which he readily accepted through the Approval for Assets Finance Facility dated 31st January 2013 on page 17 of "**P-exhibit B4**". The Approval was duly executed by both the plaintiff and the defendant. Their action was acknowledgement that each of them had the intention to be bound by all terms stipulated in the document especially page 14 and 17 and to confirm so the defendant voluntarily appended his signature to the document accepting all terms set thereto. There is no evidence that any party had no capacity to enter into the said contract. Both parties, I find entered into a legally binding contract which is enforceable in law. I further find that the facility offered and accepted can be construed as the consideration offered after acceptance placing an obligation on the defendant to perform his part of the bargain without any excuse.

10. In the case of **Charles Muriungi Miriti Vs. Thananga Tea Growers Sacco Ltd & another [2014] eKLR**, the Court of Appeal stated:-

"It is trite that there are three essential elements for a valid contract that is an offer, acceptance and consideration: See Halsbury's Law of England, Vol 22, and 5th Edition, paragraph 308."

308 - The general rule. Ordinarily, consideration is one of the three essential elements of a valid contract. Thus, a promise which is made without consideration may not be sued upon in the law of contract, for it is merely a bare promise on which no such action will lie. In the case of a contract which is divisible into two parts, for only one of which there is valuable consideration, that part only gives rise to a cause of action."

11. I have gone through the evidence of **PW1**, in this matter, his witness statement (**PB1**) and his list of documents (**PB2**) and I am satisfied that all the requirements of a valid contract were met by the plaintiff. I am further satisfied from the evidence, which has not been challenged or controverted, that the defendant has not been servicing the loan. I note that, part of the provisions of the duly executed Approval for Asset Finance Facility dated 31st January 2013, were that the interest would be charged at 23.5% p.a (*before the capping of the interest rates in September 2014*) on reducing balance as per clause 7 and that there was a requirement for the defendant to install a Tracking Device on the Motor Vehicle for the full period of finance. Whereas the court is alive to the fact that parties have freedom to contract, it is clear that whatever, contract party enter into, they are bound by whatever they agree on, so long as it is not an illegal contract. In the case of **National Bank (K) Ltd Vs. Pipe Plastic Sankolit (K) Ltd & another C A 95 of 1999**, the Court of Appeal, stated:-

"A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

In the instant case there is no allegation or semblance of the allegation of fraud, or coercion or undue influence on part of the defendant for consideration by the court. I find in view of the above this court cannot proceed to substitute what parties had agreed upon as the interest rate chargeable was mutually agreed between the parties and each of the party ought to respect and abide by the terms of their contract as that was their initial intention which I find is applicable to them.

12. On the issue of recovery through sale of the mutually registered motor vehicle, as per **PW1's** evidence, that the defendant defaulted to put track device and the lorry could not be traced by the auctioneers, I find the plaintiff gave satisfactory explanation, to the effect that it was impossible to pursue that option in spite of numerous efforts by the plaintiff on its own expense (**see P-exhibit 12, 13, 15, 16 and 18** in the plaintiff list of documents "**PB2**").

13. I therefore find that there is a valid enforceable contract existing between the plaintiff and the defendant in this matter.

B. Whether the plaintiff is entitled to prayers sought in the plaint?

14. From PW1's evidence and list of documents which remain unchallenged, I find the plaintiff has demonstrated that the defendant has not only failed to abide by his contractual obligations but has also not shown any interest in this case after being given an opportunity to defend himself and further has ignored to pay the loan amount.

15. In the case of **Rosaline Mary Kahumbu Vs. National Bank of Kenya Ltd (2014) eKLR**, Justice J. Havelock, referring to the case of **Samson S. Maitai & Another Vs. African Safari Club Ltd & Another (2010) eKLR**, in which Emukule, J observed thus;

".....On the other hand according to Halsbury's Laws of England, Vol .15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption....."

16. In the instant case, I have considered the evidence tendered by the plaintiff against the defendant and I find that the plaintiff has demonstrated there was a contract between the parties and that the defendant is to blame for his failure to have honoured the monthly instalment toward servicing of the loan and further in failing to have the vehicle fitted with tracking device as agreed in the contract. That the plaintiff had pursued every avenue for recovery of the amount due unsuccessfully. I find that the plaintiff deserves reprieve to recover the amount advanced to the defendant in the course of its business.

17. In dealing with this matter, I am guided and do appreciate the wisdom by the learned Justice I. Lenaola, as he then was; in the case of **Jopa Villas LLC Vs Private Investment Corp & 2 others, Machakos Hccc No. 2015 of 2008** where the learned Judge stated thus:-

"I am clear in mind that the Applicant is running away from the obligations lawfully imposed and with its knowledge and participation. Courts should not aid it in that quest but will instead uphold the rights of the 1st Defendant to recover the monies lawfully advanced....our Courts must uphold the sanctity of lawful commercial transactions [Emphasis Added]."

This is similar to the case at hand. The Defendant has neither denied existence of the debt nor filed any documents to rebut the claim herein.

The Plaintiff is not in the business of granting charity to its customers and it therefore follows that the Defendants should be compelled to do the right thing. Pay up!

18. In the instant case, I find that the defendant is avoiding his lawful obligation by applying whatever tricks he can come by but it is unfortunate for him as the court will uphold the sanctity of lawful commercial transaction in accordance with provisions of the law. The defendant in this case has neither denied the existence of the debt nor filed any document to rebut the plaintiff's claim nor bothered to seek settlement of the same. I would add that the defendant should be made to understand that the plaintiff is not a charitable organization granting charity to its customers but is out on business to make profits. It has no free money that it can be dishing out to the parties. The defendant should understand that he is expected to do the right thing by paying what he lawfully owes to the plaintiff in terms of their banking agreement.

19. The upshot is that the plaintiff's suit succeeds. I accordingly enter judgment for the plaintiff as follows:-

- a) Kenya Shillings Four million, one hundred and ten thousand, four hundred and ninety seven and thirty five cents (KShs. 4,110,497.35) being the debt owing;
- b) General damages for breach of contract between the plaintiff and the defendant; were not proved.
- c) Cost of the suit to the plaintiff;
- d) Interest on (a) above at a rate of 23.5% per annum from the date of default until payment in full.

Dated, signed and delivered at Nairobi this 27th day of September, 2018.

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J .A. MAKAU

JUDGE