



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL CASE NO. 9 OF 2012

BARE ALI ISSACK.....1ST PLAINTIFF

ABDULLAHI BARE ALI.....2ND PLAINTIFF

VERSUS

FIRST COMMUNITY BANK LTD.....DEFENDANT

JUDGEMENT

1. The two plaintiffs herein a father and son brought this suit through a plaint dated 27th February 2012 filed on 28th February 2012 by their Advocates Mosi & Co. Advocates. They claimed to be the defendant's customers operating bank account Nos. [...] & [...] respectively. They stated that they approached the defendant for a loan facility to invest in their business of supplying beef cattle to Kenya Meat Commission upon demand and that payments were to be directly deposited into their accounts and the defendant would make prompt deductions as charges for the loan facility. They alleged that a dispute arose between them and the defendant when the defendant demanded excessive amounts well over and above the principal sum when the plaintiffs had been diligently servicing the loan since inception. They complained that the defendant acting through M/s Joseph Kariuki T/A Joserick Merchants issued a demand and notice of intention to advertise for sale by public auction securities deposited with the defendant in lieu of the disputed outstanding loan amount on the 1st plaintiff's registered property GSA/BULLA/124, PLOT 142/POSTA/GARISSA, GSA/PLOT No. 1752 and PLOT 1754/KISMAYU/GARISSA. They stated that the defendant's actions were actuated by malice, ill intentions, deceit, and that the actions were irrational, negligent, and without due diligence while the plaintiffs were owed a duty of care as customers.

2. The plaintiffs listed particulars of breach of agreement and duty of care and negligence in the plaint. The plaintiffs sought from this court the following orders –

(a) A permanent injunction restraining the defendant jointly and severally either through themselves, servants or agents or any person, body or institution acting pursuant to their instructions individually or collectively from interfering, advertising for sale, dealing, letting, selling, trespassing, interfering with the peaceful and quiet enjoyment and/or transferring the suit properties described as GSA/BULLA/124, PLOT 142/POSTA/GARISSA, GSA/PLOT No. 1752 and PLOT 1754/KISMAYU/GARISSA on claims of an outstanding loan amount on account no. [...] and [...].

(b) General and exemplary damages.

(c) Costs and interest.

(d) Any other relief that this court may deem fit to grant.

3. In response to the plaint, the defendant through their counsel Kenyariri & Associates Advocates filed a Statement of Defence dated 3rd April 2012. In the defence, the defendant stated that the said demand was made after the plaintiffs' accounts fell into arrears and there were no money to service the loan. They also stated that after default (of the plaintiffs) the defendant exercised their right under the law. They further stated that the plaintiffs had admitted that they owed the defendant but had not demonstrated their willingness to pay any money owed either by making proposals or pledges, and put the plaintiffs to strict proof of their allegations.

4. The case took long to be heard and the plaintiffs and the defendant changed their advocates with the lapse of time. On 30th October 2018, the plaintiffs' new counsel Balqesa & Co. Advocates filed an amended plaint dated 29th October 2018. However as the amended plaint did not comply with conditions set by this court, the said amended plaint was treated as not being properly on record and will not be taken into account by this court. The court will go by the initial pleadings above.

5. At the hearing of the case, each of the two plaintiffs tendered oral evidence, and 2nd plaintiff Abdullahi Bare Ali testified as PW1.

6. He stated that he was a customer of the defendant bank since 2010 operating Account No. [...] Eastleigh Branch Nairobi, and that the 1st plaintiff was his father and a reknown livestock dealer and supplier to Kenya Meat Commission (KMC). He was aware that KMC entered into a Memorandum of Understanding (MoU) with the defendant bank through which suppliers to KMC were given an invoice and before the lapse of the ninety (90) days payment period, the bank (defendant) would pay the suppliers and then the defendant bank would wait for the money from KMC within the said ninety (90) days. In that arrangement the defendant bank would pay the suppliers of livestock 80% of the amount of the invoice that KMC would then pay to the bank.
7. According to him, his father had long been a supplier of KMC and used to wait for the ninety (90) days payment period, but when he saw the Memorandum of Understanding (MoU) advertised in newspaper while at Jamia Mosque he informed his father about the arrangement and they opened bank accounts with the defendant. Though his father continued supplying livestock to KMC, he was the one running the activities with the defendant and telling his father to sign for the transactions, which were governed by Islamic Law principles and that such transactions were called "Invoice Discounting". Both himself and his father signed Letters of Offer. He referred to a letter dated 4th October 2010 and said it was an example of a Letter of Offer which they signed. There were other Letters of Offer which they signed, and in this regard he produced a letter of KMC dated 30th June 2010 and a letter from First Community Bank dated 4th October 2010 as exhibits. He said that the transaction value of the letter of 4th October 2010 was Kshs.5,000,000/= but the bank disbursed to him Kshs.700,000/=. He also relied on his bank statement which he produced in court as exhibit 3. He stated that he also deposited a Letter of Allotment of his father's Garissa plot to the bank (defendant) without the knowledge of his father because a bank official told him that such was an informal arrangement, and he wanted to go into other lines of investment after he talked to the defendant's Credit Officer called Charles, because supplies to KMC were not doing well.
8. He complained that though he asked for reconciliation of the accounts, charges and fees from the defendant, he was not supplied with the same to date. The defendant bank however, sent him a demand letter that he owed Ksh.3.5 million and they referred to an amount of Kshs. 2 million which he took on 14th January 2011 while in fact the bank did not disburse Kshs.2 million to his bank account.
9. According to him, on 4th October 2010 the bank disbursed to his account Kshs.700,000/= and on 29th September 2010 they disbursed to his account Kshs.900,000/=; thus when the bank asked for Kshs.3.5 million he wondered why there was such an exorbitant amount of money owing when the bank did not tell him how much they had received from KMC. According to him, the bank did not account for Kshs.1.9 million.
10. He stated that there were discrepancies in the account such as an ATM withdrawal of Ksh.60,000/= while the maximum withdrawal amount was Kshs.30,000/=: and denied withdrawing Kshs.60,000/=:.
11. He stated also that his father's account showed an ATM withdrawal of Kshs.861,000/= on 1st September 2010 while his father had not made such withdrawal as he did not have an ATM facility on his account.
12. He stated that on the basis of Islamic principles, the bank should have taken the two plaintiffs through the entire bank accounts and entries to verify the amount. He agreed however that he was running the show for his father and according to him his father's account had a discrepancy of Kshs.1.1 million which the bank had not explained so far. He stated that the total disbursement to his father's account were Kshs.18,200,000/= while the doubtful transactions were for Kshs.861,000/= reflected as ATM withdrawals.
13. He said that initially he did not intend to move to court but he did so because his father did not know that he had used his land property document at the bank, which had now been advertised for sale. According to him, some bank employees wanted to take his father's property. He relied on his father's Letter of Allotment and produced it as exhibit 4. The demand letter from the bank was produced as exhibit 5. He also produced the letters to the bank for request of reconciliation of the accounts as exhibit 6 (a) and 6 (b).
14. In cross examination, he agreed that his father and himself were customers of the defendant bank and that his father signed various Letters of Offer. He denied taking over the business of his father but agreed that he was the one who brought his father to First Community Bank (the defendant) as his father operated and account with Co-operative Bank. He agreed that his business was different from that of his father, but said that he signed the Letter of Offer in good faith. He agreed that he owed First Community Bank money but maintained that it was not the amount demanded by the defendant bank. He stated that even if reconciliations were done he would owe the bank some money though he could not confirm the exact amount. He agreed it was his obligations to pay debts, and stated that he used his father's Letter of Allotment without the authority of his father and that the bank had a right to pursue the money owed, but only if it was correct. He agreed that he made several transactions through his account. He was not aware that there was a charge of 15% p.a. on default and stated that such amount did not arise under Islamic banking arrangements.
15. In re-examination, he stated that he was not aware that the bank wrote any letter to KMC. He said that, because the plaintiffs knew that the transaction was based on Islamic banking, they relied only on the Letter of Offer which they signed and not the bank's conditions.
16. The 1st plaintiff Bare Ali Issack testified as PW2. He said that he was a businessman selling livestock, and was introduced by his son the 2nd plaintiff to First Community Bank (the defendant) who told him that he did not have to wait for 3 months to get payment from KMC for supply of livestock. He trusted his son, went to the defendant bank and signed a document which the bank officials did not read to him. He produced a Letter of Offer dated 24th August 2010 as P-exhibit 7, and denied giving to the defendant bank documents on his land. He said that he did not get any benefit from the defendant and was convinced that they were bad people.
17. He stated that, because the money was not coming to him the way he wanted, he left First Community Bank and did not currently have an account with them.
18. In cross examination, he agreed that First Community Bank deposited money in his bank account on a number of occasions, but said that sometimes the amount of payments were very small. He denied signing a Letter of Offer dated 11th October 2010 and said that he used to

sign in Arabic language. He denied knowledge of Ksh.1 million said to have been disbursed to his account by the bank on 22nd September 2010. He also did not know of Kshs.3 million disbursed to his account on 14th October 2010. With regard to provision of the Letter of Allotment, as security, he said that he did not authorize his son the 2nd plaintiff to provide that security.

19. In re-examination, he stated that he used to bring cheques to the bank from KMC.

20. That was the evidence for the plaintiffs.

21. The defendant brought one witness DW1 Abdiaziz Farah the Relationship Manager, Garissa Branch who adopted the witness statement of Molu Halkano.

22. He relied on the documents provided by the bank and said that the two plaintiffs operated different bank accounts, in a working capital arrangement which would enable someone to purchase things like livestock. It was an arrangement between the client and the bank, where the bank disbursed money to the client who would pay through Kenya Meat Commission (KMC). According to him, Bare the 1st plaintiff paid most disbursements with no issue. His son also paid but there was an issue on two different dates.

23. With regard to account No. [...] for 2nd plaintiff, he said that on 13th July 2010 Kshs.400,000/= was disbursed, and 2nd plaintiff paid to the bank Kshs.409,863/=. On 29th September 2010 Kshs.900,000/= was disbursed but not paid. On 4th January 2011, Kshs.2,000,000/= was disbursed and he paid only Kshs.98.77/=. On 4th October 2010 Kshs.700,000/= was disbursed and he paid Kshs.144,835/95. According to him, Abdullahi Bare the 2nd plaintiff did not pay kshs.3,515,921/45.

24. Bare Ali's account had several transactions. On 28/5/2010 Kshs. 2 million was disbursed and he paid Kshs.2,063,123/29. However 22nd September 2010 Kshs. 1 million was disbursed and he paid only Kshs.162.747/=. On 10/10/2010 Kshs. 3 million was disbursed and he did not pay anything. The balance was therefore Kshs.3,936,225/92.

25. He stated that both plaintiffs signed Letters of Offers on which they were bound. He produced a number of Letters of Offer as exhibits. According to him, the Letter of Allotment on the 1st plaintiff's Garissa land was validly deposited with the bank as security as there was a letter of authority from the 1st plaintiff for his son to use the Letter of Allotment as security.

26. He stated that the defendant bank sent demand letters with 14 days' notice but the plaintiffs did not pay, therefore the auctioneer was properly instructed to conduct the sale. He emphasized that Clause 4 of the Terms of Agreement gave the bank the right to charge 15% p.a. on default. According to him however, the bank was lenient and had not imposed that 15% on the plaintiffs. He said that the bank now was seeking Kshs.7,452,254/62 from both plaintiffs which did not include any interest. He said that the bank had the right to sell the security or the property.

27. In cross examination, he agreed that the two plaintiffs had separate bank accounts. He stated that "payment in approval" was when funds were disbursed to the customer and that "ATM withdrawal" was when the customer accessed the account through an ATM machine. He did not know if any of the plaintiffs had special authority to withdrawal from ATM more than the allowed ceiling. He did not know if the 1st plaintiff had an ATM card. He maintained that the two plaintiffs were still the bank's customers. He stated that it was the right of the customer to be supplied with the details on the operation of the bank account. He did not know however why First Community Bank did not respond to the letters for an account. He maintained that the Letter of Authority for the land security was signed by Bare Ali even though there was no copy of the identity card of Bare. He agreed that the relevant Letter of Offer on the security deposit was not signed by the guarantor that is Bare Ali. He also agreed that no formal charge was signed, but maintained that the transaction was a simple deposit of a document. He said that under Islamic Law there was prohibition of charging interest, but profits were allowed. He said the banking facility herein was asset based and the asset herein was livestock.

28. In re-examination, he stated that clients got reconciliation for their accounts at any time. He said that though the plaintiffs wrote letters, it would be much easier for them to go to the bank for the reconciliation of the accounts. He said however that under Clause 12 (e) of the Agreement the client was obligated to ensure payment was made directly to the bank. He maintained that, both the plaintiffs herein knew about the Letter of Allotment being given to the bank as security.

29. After the closure of the evidence of the parties, the plaintiffs' counsel and the defendant's counsel filed written submissions, which I have perused and considered.

30. There is no dispute that the two plaintiffs were customers of the defendant bank. Each opened a separate account. The 1st plaintiff was introduced to the bank by the 2nd plaintiff his son on the attraction of an advertisement that the bank had entered into a Memorandum of Understanding (MoU) with KMC through which suppliers of livestock to KMC would be paid for the supply of livestock before the lapse of 90 days, provided that the amount for the value of the livestock reflected in the invoice was paid to the bank.

31. Each of the plaintiffs signed Letters of Offer. They would be paid 80% of the amount of the invoice for the supply of livestock and when the full payment was received from KMC by the defendant bank, the bank would deduct its charges and transmit the extra amount to the account of the plaintiffs.

32. From the evidence, it appears that at the beginning the arrangement operated well but afterwards, there were issues of alleged defaults in payment. Later the defendant bank wanted to sell the land property of the 1st plaintiff to recover amounts owing to it.

33. The plaintiffs have come to this court praying for an injunction and damages as well as costs.

34. The first issue in my view is whether the plaintiffs owed the defendant bank any monies. The evidence of the plaintiffs and the defendant is in my view clear. The defendant say so. The plaintiffs, especially the 2nd plaintiff who has been the prime operator of the activities of both plaintiffs agreed to this on behalf of both plaintiffs. He only stated that he did not know the exact amount because the defendant failed to facilitate a verification or reconciliation of the accounts. He also said that the amounts claimed by the defendant included charges which violated Islamic banking principles. I find that the two plaintiffs owed the defendant monies, whose exact amount is unknown.

35. The second issue is whether the land of the 1st plaintiff can be sold by the defendant for the debts. In my view, the Letter of Allotment of the 1st plaintiff cannot be sold by the defendant for the debts, as it was not validly offered as security because the process of accepting it as security adopted by the defendant violated the provisions of the Law of Contract Act (Cap.23), section 3 which required the agreement on same to be signed by the owner of the land. Section 3 is very clear that the owner of the land (1st plaintiff) was required to sign the security agreement for the land, which signature was to be attested by a witness, which was not done. The land of the 1st plaintiff cannot thus be sold as security for the indebtedness.

36. The third issue is whether the plaintiffs are entitled to the prayers sought.

37. As regards to the request for injunction, the contention of the plaintiffs is that the 2nd plaintiff pledged the Letter of Allotment of a plot of his father the 1st plaintiff without his knowledge. The 2nd plaintiff says so in many words. He said that the business with KMC was not doing well and he thus wanted to diversify. The 1st plaintiff says that his property should not be auctioned as intended by the defendant because he did not authorize that his property be used as security. I have already found that the defendant bank violated the written law regarding the process of taking the Letter of Allotment as security, and cannot be sold for the debts.

38. It appears to me that the 2nd plaintiff took advantage of the trust of his father and used his Letter of Allotment to transact business with the bank and then defaulted. He confidently said in court that he did not seek approval of his father nor did he tell him about his use of the Letter of Allotment until the property was advertised for sale. He appears to be a person of trickery and I clearly got that impression when he testified in court.

39. Since the cannot sell the property as security, the prayer for injunction with regard to the property in the Letter of Allotment is justifiable and I will grant the same.

40. The plaintiffs have asked that general and exemplary damages be awarded to them. They have claimed that they are entitled to such damages because they have not benefited from their commercial transactions with the defendant bank and one of them has been reported to the Credit Rating Bureau. They want damages also as they think that the defendant bank was unfair by charging them exorbitantly and contrary to the principles of Islamic Law.

41. With regard to Islamic Law, parties to a contract are bound by the terms of the contract. It is not the heading of the contract that matters but the detailed terms of the agreement. Whether one talks of Islamic banking or not, the actual terms of their agreement are what bound the parties. Therefore, in my view, the documentary agreements signed by the parties herein bound all of them in all details, and if there are charges for default and penalties therein, so be it. That cannot create a basis for award of damages as sought.

42. Though the plaintiffs have shown that they asked for accounts details from the defendants in vain, the defendant's witness said in evidence that the better approach was for the plaintiffs to go to the bank physically for the verification of their accounts to be done. I find that statement to be misplaced as the plaintiffs in my view are entitled to the statements of their accounts through of course they are liable to pay copying charges. But again that is not a basis for award of damages.

43. Having said so, I find that the plaintiffs have suffered inconvenience but have not demonstrated to this court that they are entitled to any damages. In my view, they have not suffered any damages in the form of pain and suffering or loss of profits or loss of business opportunities. I decline to award them damages.

44. In conclusion, the suit succeeds in part. I allow the plaintiffs' prayer for injunction and I grant the same. I decline to award damages to the plaintiffs.

45. I will add that this being a commercial matter between clients and a bank, the plaintiffs and defendant should find ways of settling the indebtedness herein amicably.

46. As each of the parties appear to have had an issue against the other, I order that parties bear their respective costs of the proceedings.

Dated and delivered at Garissa this 21st day of December, 2018.

.....

George Dulu

JUDGE