



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO.811 OF 2010**

**CFC STANBIC BANK LIMITED.....PLAINTIFF**

**KENYA YOUTH HOSTELS ASSOCIATION**

**REGISTERED TRUSTEES.....DEFENDANT**

**JUDGEMENT**

The plaintiff filed this suit on 30th November 2010 against the defendant seeking kshs 2,908,041 together with interest at 29.5% per annum from 29<sup>th</sup> April 2009 till payment in full plus costs of this suit.

The defendant filed defence dated 10<sup>th</sup> January 2011 on even date.

On 21<sup>st</sup> February 2017 when this matter was listed for dismissal for want of prosecution, the plaintiff's counsel in response to notice to show cause informed the court that the defendant closed their premises making it difficult for plaintiff to effect service of court documents. She further submitted that the court file could not be traced to enable the plaintiff move the court; she attached letters dated 22<sup>nd</sup> January 2014 and 12<sup>th</sup> February 2014 addressed to the deputy registrar to demonstrate that the court file was missing. The court discharged the notice to show and allowed the plaintiff's application dated 20<sup>th</sup> February 2017 seeking to effect service by use of both registered post and advertisement in local daily. The suit was set down for hearing on 27th march 2017. The defendant failed to turn up for hearing. Affidavit of service dated 24<sup>th</sup> march 2017 was filed to confirm service of hearing notice to the defendant as per court order of 21<sup>st</sup> February 2017.

The plaintiff availed one witness Ann Kaswi Muli who is the team leader legal recoveries with the plaintiff. She adopted her witness statement dated 23rd march 2017 as evidence. She testified that the defendant opened an account with the plaintiff in November 2004 and on diverse dates the defendant asked the plaintiff to honour various cheques presented to it as the account had insufficient funds at the time of request. She said that the plaintiff accommodated the defendant and honoured the cheques and in the process overdrawed the account. She added that the plaintiff requested the defendant to regularize the account; she produced correspondences addressed to the defendant and indicated that the defendant never disputed the amount owing but promised to pay. PW1 testified that the amount owing continued to accumulate interest at the rate of 29.5% as per the terms of the agreement of grant of the facility; she produced the bundle of documents filed as exhibits. The plaintiff resorted to filing this suit when the defendant failed to clear the debt as per promises made.

The defendant never adduced evidence but on perusal of defence filed I note that defendant denied having

undertaken to make good the alleged debt of kshs 2,908,049.81 nor having made any borrowing and went further to state that such borrowing if any was null and void and unenforceable in law being contrary to clause 7(c) of the defendants constitution incorporated pursuant to the provisions of the trustee (perpetual succession) ACT Cap 164 Laws of Kenya.

Counsel for the plaintiff submitted that the defendant voluntarily entered into financial obligation with the plaintiff and acknowledged the overdraft of kshs 2,908,041.81 as illustrated by correspondences produced in court as exhibits and that the defendant should not be allowed to seek refuge in court. She cited **Warsame J. in Hyundai motors Kenya limited v East Africa Development Bank Ltd (2007) eKLR**, where the learned judge held that lenders money is not free and excuses should not be made to postpone payment.

On the defendant's claim that the loan is not enforceable, she cited the case of **Muti v Kenya Finance Corporation & Ano. (HCK) (2004)2 EA182(HCK)** where it was held that where a man either by express terms or conduct makes a representation to another of existence of a certain state of facts which he intends to be acted upon in that way, he is estopped from denying existence of such state of facts. She submitted that the claim to the effect that the overdraft was unenforceable for want of authorization was an afterthought aimed at delaying or defeating obligations to the plaintiff. In support of the above argument counsel for the plaintiff cited Court of Appeal decision in **East Africa safari Ltd v.kegode & Ano. (2011)eKLR** where rule in Turquands case where the court **held** that people transacting with companies are entitled to assume that internal company rules are complied with, even if they are not and if the lender is acting bonafide will stand in good position even though sanction has not been obtained.

On the issue of interest counsel for the plaintiff submitted that the plaintiffs letter of offer dated 19<sup>th</sup> October 2007 indicate the interest of the overdraft facility as 29.5% chargeable per annum as per clause 5 of the terms and conditions for grant of the overdraft. Plaintiff cited the case of **Orion East Africa vs. Housing Finance of Kenya co.Ltd Nairobi HCCC NO.914 OF 2001** to support her argument that penalty or default interest is chargeable on amount in default.

I have considered evidence adduced, submissions by counsel for the plaintiff and defence filed. I have also perused and considered authorities cited. I consider the following as issues for consideration;

1. Whether borrowing by the defendant from the plaintiff was authorized
2. Whether money was advanced by the plaintiff to the defendant and if so on which terms
3. Whether the defendant is indebted to the plaintiff

On the first issue the defendant annexed the constitution of the defendant to the defence & in paragraph 3 state that borrowing if any is unenforceable for failing to comply with paragraph 7 of its constitution. On perusal of Clause 7(c) of the constitution I note it provide that any commitment of more than 400/= shall require approval by management committee. I have perused the letter dated 6<sup>th</sup> January 2007 from the defendant to the plaintiff. In the letter the defendant is requesting the plaintiff to honour its cheques despite the fact that they had not formalized an overdraft facility. In another letter dated 15 may 2007 the defendant committed itself to formalizing the overdraft facility to enable them know the exact monthly obligations towards reduction repayment of the overdraft. By a letter dated 16<sup>th</sup> July 2007 the defendant asked the plaintiff to formalize the overdraft and made commitment to make monthly payments of kshs 50,000; in the said letter minutes of the board of trustees authorizing formalization of the overdraft was among the documents the defendant committed itself to supply to the plaintiff. The minutes have not been produced. There is no indication as to whether the minutes were supplied. The promise to avail minutes to the plaintiff clearly demonstrate that a meeting had been held to authorize the transaction. A Letter of offer was signed on 10<sup>th</sup> August 2007 by authorized signatories on behalf of the defendant. No evidence has been adduced to challenge that. The conduct of the defendant prior to formalization of the overdraft do not portray a situation where action was taken without authority. From the correspondence the defendant is appreciative of the overdraft for helping see them through lean period of their operations. It is evident that the defendant represented itself to the plaintiff that the necessary authority was obtained

and is estopped from denying existence of minutes. It would not also be expected of a lender to dig into the affairs of a borrower if by conduct it's clearly demonstrated that the borrower has carried out its internal obligation. I therefore find that the plaintiff was right in assuming that authority had been obtained.

Secondly was overdraft facility advanced to the defendant? The offer letter produced in court is signed by 2 officials of the defendant. Terms of the facility are attached to the letter of offer. Bank statement has also been produced showing the amount owing from the defendant to the plaintiff. There is evidence on part of the defendant disputing the amount owing. I agree with **Warsmae J** in the above cited authority that no money is given for free. Money was advanced to the defendant in form of overdraft. There is no evidence to the effect that the amount was disputed, the plaintiff is entitled payment of money advanced plus interest.

Thirdly, is the defendant indebted to the plaintiff? Having established that an overdraft was issued the defendant, the question that follow is, is there any prove of payment or dispute of the amount owing? On perusal of the correspondences produced the amount claimed herein is specified. No evidence has been adduced to rebut the plaintiff's evidence. The amount claimed remain unchallenged and is therefore owing from the defendant to the plaintiff.

From the foregoing I find that the plaintiff has proved its case against the defendant. I proceed to enter judgment for the plaintiff against the defendant for kshs 2,908,041.81 plus interest and costs of this suit. I note that to arrive at the above amount above Interest had been charged at 29.5% from the time of advancing the credit facility. I find that to continue calculating at that rate would be oppressive on part of the defendant bearing in mind that the debits reflected in the statement produced relate to interest accruing monthly. I find it fair and just to order that interest be charged at court's rate. Interest on kshs 2,908,041.81 be charged at courts rate from the time of filing this suit till payment in full.

Judgment dated, signed, and delivered at Nairobi this...28<sup>TH</sup> day of April 2017.

RACHEL NGETICH

JUDGE

In the presence of:

.....court Assistant

.....counsel for the plaintiff

.....counsel for the defendant