



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 321 OF 2016

JAMES MUNIU MUCHERU.....PLAINTIFF

VERSUS

NATIONAL BANK (K) LIMITED.....DEFENDANT

JUDGEMENT

1. The appellant, **JAMES MUNIU MUCHERU**, has challenged the decision by the trial court to hold him liable to compensate the respondent, **NATIONAL BANK (K) LIMITED**, to the tune of Kshs. 349,906.75.
2. The trial court had also awarded interest at 3.5% per month from 1st October 1999 until payment in full.
3. Finally, the appellant had been ordered to pay the costs of the suit.
4. The whole case is centered on a Credit Card which the plaintiff had allegedly granted to the defendant.
5. According to the plaintiff, the Credit Card was issued to the defendant after the latter had applied for it.
6. After the card was issued to the defendant, he is said to have utilized it. In order to prove the said utilization of the card, the plaintiff produced a Statement of Account.
7. It was the plaintiff's case that the defendant had failed to regularize the statement of account. Following the failure by the defendant to regularize the statement of account, the plaintiff gave a Demand Notice to the defendant.
8. However, the defendant still failed to remit payment to the plaintiff. It was at that stage that the plaintiff instituted litigation to recover the outstanding amounts.
9. In answer to the suit, the defendant denied ever having made any application to the plaintiff for the Credit Card.
10. The defendant specifically denied the contention that the signature on the application form was his.
11. The defendant also said that he had never received the statements of account which the plaintiff had allegedly sent to him. Indeed, his position was that it was not until the plaint was served upon him on 9th

May 2006, that he first got to know about the banking facility in issue.

12. Obviously, if it is the defendant who had made the application for the credit card, it cannot possibly be true that he only learnt about it after he had been sued.

13. The converse is also true; so that if the defendant first became aware of the credit card after he had been sued, he could not have applied for it in the first instance.

14. During the trial, each of the parties called one witness. **PW1, SAMUEL KIURA**, worked with the bank, as a Recovery Officer. He testified that it is the defendant who approached the bank, and sought the credit card facility.

15. However, **PW1** admitted that at the time when the defendant applied for the facility, **PW1** was not the bank official who approved the application.

16. The suggestion by the defendant appears to be that the plaintiff failed to prove that it is the defendant who applied for the credit card facility.

17. Of course, if the bank official, who received the application, had testified in court, he or she could have testified about a fact which he or she had a first-hand involvement in.

18. However, the fact that the bank official did not personally testify in court does not imply that the bank had failed to prove that it is the defendant who applied for, and who was granted the credit card facility.

19. On his part, the defendant explained that he suspected that the person who applied for the credit card was his acquaintance, **PAUL NJERU**. He said that the said Paul Njeru may have applied for the facility on his behalf.

20. It was worthy of note that the defendant explained that Paul Njeru is the person who cleared the defendant's personal effects when the defendant came back to Kenya, from Zurich.

21. It is also significant that the defendant testified that it was only in 1999 when he returned from Zurich, where he had been working.

22. The significance of that date stems from the fact that the application for the visa credit card was made on 6th March 1998. It would therefore follow that if Paul Njeru only, allegedly had access to the defendant's documents in 1999, he could not have used them in 1998, to apply for the credit card.

23. More importantly, as the plaintiff explained, the person who applies for a credit card is required to present himself or herself at the bank, in person.

24. As the defendant's passport was provided to the bank, and because it has the photograph of the defendant, I find it to be most improbable that any person other than the defendant could have presented the passport at the bank.

25. But I do note that the signature on the defendant's Witness Statement is different from that which appears on the application for the credit card.

26. The defendant reasoned that the plaintiff should therefore have led evidence to prove that the signature on the application for the credit card was his.

27. Ordinarily, when a person denies having appended his signature to a document, the onus is upon the person who asserts that the signature is of that person, to prove his assertion. Therefore, in the ordinary course, it is the plaintiff who should have led evidence to prove that the contested signature was that of the defendant.

28. However, in the circumstances prevailing in this case, there are other factors which must be taken into account. Those factors include the fact that the passport of the defendant was given to the bank, and that the bank required the applicant for the credit card to be present, in person.

29. When the photograph on the passport of the person making the application, is of the said applicant, there can be no reason for the bank to prove that the signature on the application was that of the person who signed the application at the bank. I say so because the bank would have witnessed the person whose photo was on the passport, signing the application.

30. There are 2 stories in relation to the signing of the application for the credit. On the one hand, the bank says that it is the defendant who personally signed it, and that he did so at the bank. At the time of signing, the defendant is said to have provided the bank with his passport.

31. In truth, the bank demonstrated that it had possession of the defendant's passport.

32. On the other hand, the defendant denied signing the application form. He said that it was possible that his friend, Paul Njeru, is the person who signed the form on his behalf.

33. In civil cases, evidence is weighed and the standard of proof is on a balance of probabilities. As I have already held, it is most improbable that Paul Njeru signed on behalf of the defendant, because the defendant testified that Njeru helped him in 1999, which was the year after the bank had granted the credit card.

34. In effect, on a balance of probability, I find that it is the defendant who signed the application form.

35. But then again, the defendant submitted that the signature on the application was not his.

36. Yes, the signature on the application is different from that on the defendant's passport. But it is equally true that the signature on the defendant's passport was different from the signatures on both the Witness Statement and on the application. This means that the defendant did not have one standard signature.

37. The differences in the 3 "*signatures*?" cannot therefore be the basis for determining that the defendant did not sign the application.

38. I also find that the bank did not need to demonstrate that payments for some of the outstanding sums had been made by the defendant.

39. When a creditor is paid money, he has an obligation to credit payments to the correct account. However, a creditor would not need to insist that it was only the debtor who could remit payments to the account.

40. In the final analysis, after I have re-evaluated the evidence tendered at the trial court, I have come to the conclusion that the learned trial magistrate cannot be faulted for having found the defendant liable.

41. Accordingly, there is no basis in law or in fact for setting aside decision of the trial court.

42. In find no merit in the appeal; and it is therefore dismissed.

The costs of the appeal are awarded to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of July 2017.

FRED OCHIENG

JUDGE

Judgement read in open court in the presence of

Oduor for Gathu for the Applicant

Ngugi for the Respondent

Collins Odhiambo – Court clerk.