



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 87 OF 2012

JOHN BERTRAM HARBOTTLE.....PLAINTIFF

VERSUS

ASHBURTON GROVE LIMITED.....DEFENDANT

JUDGMENT

1. Through a plaint filed on 16th May, 2012 against the defendant, the plaintiff claims special damages in the sum of Kshs. 13,170,789/= plus accrued interest at 14% on the said amount and costs of the suit. He also prays for other or further relief as this court may deem just and fair to grant. The claim arises out of a loan agreement entered into on 28th October, 2008 by the defendant through one of its Directors, Michael Bell and the plaintiff.

2. When this case came up for hearing, there was no appearance by the defendant or its Counsel on record. The court noted that the hearing date was taken by consent thus proceeded to hear the plaintiff's case.

3. The plaintiff, Mr. John Bertram Harbottle testified as PW1. He sought to amend his address to P O Box 5651 – 80401, Diani. He also amended his statement in paragraph 7 to read that he instructed his bank, Imperial Bank in Diani. He also amended paragraph 24 to read that the defendant was prepared to pay Kshs. 167,000/= per month into his bank account for 4 years.

4. The plaintiff testified that he advanced to the defendant money for construction of shopping units in Diani. He informed the court that the Directors of the defendant company, Mr. Michael Bell and his wife were his friends since the year 2001. It was the plaintiff's evidence that he loaned the defendant Kshs. 9 million after Mr. Bell told him that he was having trouble getting a loan from a bank. The loan he advanced him was to assist in completion of Baharini Complex in Diani, which he managed to complete. The agreement was for payment of the loan at 2% above the base lending rate. The amount was to be repaid by 31st October, 2010. The plaintiff testified that he transferred US Dollars 110,000 which was equivalent to Kshs. 8,735,000/= to the defendant's account from Oman International Bank. The plaintiff then bought a banker's cheque for Kshs. 265,000/= in favour of the defendant from his Imperial Bank account at Diani. The plaintiff produced proof of the said advancements of the loan as plf. exhs. 1(a) – (d).

5. It was his evidence that the defendant paid an amount of Kshs. 167,000/= on 15th March, 2012, Kshs. 200,000/= on 28th October, 2009 and an additional Kshs. 37,000/= was paid in the year 2009. He stated that in total he was paid Kshs. 705,000/=. He testified that after that, when no money was forthcoming, he

instructed his Advocates to write to the defendant which they did on 29th April, 2010 demanding for the payment. The demand letter was for the sum of Kshs. 8,735,000/=. He produced the said letter as plf. exh. 2. The defendant sent him responses dated 14th June, 2010 and 22nd June, 2010 which he produced as plf. exhs. 3(a) and (b), respectively.

6. The plaintiff testified that the letter dated 14th June, 2010 contains an admission in paragraph 1. In the letter dated 22nd June, 2010 the defendant's Director, Mr. Bell expressed interest to repay the loan using his pension dues. PW1 responded to the letter dated 14th June, 2010 on 22nd March, 2011 as per plf. exh. 5. He produced another letter dated 13th May, 2011 addressed to the defendant from his Advocate as plf. exh. 6 and the response thereto dated 7th July, 2011 as plf. exh. 7. He further testified that the final demand letter was made through a letter dated 29th August, 2011 which he produced as plf. exh. 8. He informed the court that the principal amount borrowed was US dollars 110,000 and not 100,000. He indicated that in the said letter his Advocate reminded Mr. Bell that the loan advanced to the defendant was to attract an interest rate of 12% per annum which was below the base lending rate by 2%, up to 31st October, 2010 and thereafter, it would attract the full bank lending rate of 14% until payment in full. The said letter was however returned undelivered as per plf. exh. 9(b) after being sent through Nation Courier Services as per plf. exh. 9(a).

7. The plaintiff further testified that on 12th January, 2012 his Advocates made a counter-offer as contained in the said letter produced as plf. exh. 10. In response thereof, Mr. Bell wrote to the plaintiff's Advocates on 15th February, 2012 admitting that he owed the plaintiff Kshs. 8,735,000/= but he stated that interest was to be at 10%, being 2% below the amount he was being offered and 9% above what the Plaintiff was obtaining in the United Kingdom (UK). Mr. Bell in the said letter stated that the prevailing Kenyan interest rates were never discussed. The plaintiff further testified that on 7th March, 2012, Mr. Bell wrote to him proposing to make monthly payments of Kshs. 167,000/= per month for 48 months. This was followed by a letter dated 15th March, 2012 confirming payment of Kshs. 167,000/=. He produced the said letters as plf. exhibits 11(a), (b) and (c).

ANALYSIS AND DETERMINATION

8. On 26th March, 2017, the Counsel for the plaintiff filed a list of the following issues:-

- (i) Whether the Plaintiff entered into a loan agreement with the Defendant on or about 28th October, 2008 for the sum of Kshs. 9,000,000/= for the purposes of constructing shopping and housing units in Diani;
- (ii) Whether one of the terms of the agreement was that the loan would attract interest at 12% per annum from December, 2008 to 31st October, 2010;
- (iii) Whether the interest would be varied after 31st October, 2010 from 12% to the rate equivalent to prevailing bank lending rates until payment in full;
- (iv) Whether in consideration of the loan agreement, the Defendant would make monthly repayments of Kshs. 200,000/= from the month of December, 2008 until payment in full;
- (v) Whether in accordance with the agreement, the Plaintiff transferred a sum of USD 110,000 (the equivalent of circa Kshs. 8,735,000/= at that time) to the Defendant's bank account on or about 28th October, 2008;
- (vi) Whether the Plaintiff made a further payment of Kshs. 265,000/= to cover the balance to the loan amount;
- (vii) Whether the Plaintiff had fulfilled its obligations under the loan agreement and made timely repayments;

(viii) Whether the Defendant breached its obligations under the loan agreement;

(ix) Whether the Plaintiff is entitled to a claim of Kshs. 4,802,798/=;

(x) Whether the Plaintiff is entitled to court interest rates at 14% on the principal amount of Kshs. 8,735,000/= until payment in full;

(xi) Who shall pay the costs of this suit and interest thereon?

9. The Counsel for the plaintiff filed her written submissions on 13th September, 2017 in which she stated that a partial consent judgment was entered into on 16th October, 2012, thus the only outstanding issues were:-

(i) Costs of the suit;

(ii) Interest for the sum of Kshs. 8,735,000/= at 14% per annum from 31st October, 2010 until payment in full.

10. She informed the court that Kshs. 7,402,255/= had been paid and sought the balance outstanding from the consent judgment. This court has considered the issues herein and is of the finding that following the consent entered into, the only outstanding issues are whether the plaintiff is entitled to court interest rates at 14% on the principal amount of Kshs. 8,735,000/= until payment in full and who shall pay the costs of the suit. In her submissions, Counsel for the plaintiff prays for further interest at the rate of 4% on the sum of Kshs. 8,735,000 from 28th October, 2008 until payment in full. The 4% interest being sought is in addition to the 10% interest that was agreed on.

11. A consent order can only be varied by consent of the parties. In Kenya Commercial Bank Ltd vs specialized Engineering Co. Ltd [1982] KLR 485, Harris J held *inter alia*, that -

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed Advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

12. The prayer being sought for variation of the interest payable to the plaintiff is in my view an attempt to vary the consent order of 16th October, 2012 where interest was agreed at 10% per annum from 28th October, 2008 until payment in full. I therefore decline to grant the orders sought on that ground.

COSTS

13. In arguing on the issue of costs, Counsel for the plaintiff relied on the case of **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others** [2014] eKLR where the Supreme Court stated thus:-

"So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principal is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In justice Kuloba's words (Judicial Hints on Civil Procedure, at page 94): The object of ordering a party to pay costs is to reimburse the successful party for the amounts expended on the case. It must not be made merely as a penal measure. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."

14. The plaintiff expended his time and energy in filing pleadings and in preparing for the hearing of this suit before a consent judgment was entered into on 16th October, 2012. He also prosecuted the claim for costs. He is therefore entitled to costs and interest on the same until payment in full.

15. The plaintiff also prays for the balance of Kshs. 1,332,775/=. This balance is legally due to the plaintiff pursuant to the consent order that was entered into by the parties herein. The defendant is therefore duty bound to pay the said amount failing which the plaintiff will be at liberty to execute in terms of paragraph (e) of the consent judgment. The plaintiff's suit succeeds only to the extent expounded in this judgment.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of November, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Onyango holding brief for Ms Mulindi for the plaintiff

No appearance for the defendant

Mr. Oliver Musundi - Court Assistant