



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CIVIL CASE NO. 96 OF 1999

KENYA COMMERICAL BANK LTD.....PLAINTIFF

VERSUS

JOSEPH NJORO KABECHU.....DEFENDANT

JUDGMENT

1. Pleadings

The plaintiff's claim against the defendant is for the sum of Kshs. 1,262,819.65 being money due from the defendant in respect of a loan granted to him by the plaintiff in 1992 at the defendant's request and instance. It was further pleaded in the plaint filed in this court on 6th April, 1999 that the loan continues to accrue interest at the rate of 22% per annum from 1st February, 1998.

According to the plaintiff, the attempts to recover the principal amount and the interest under the chargee's statutory power of sale had proved unsuccessful and despite demand for payment and notice of intention to sue having been given, the defendant had failed, refused or neglected to pay the amount owing or any part thereof.

The defendant not only resisted the claim but he also launched a counterclaim against the plaintiff. He admitted, however, that the plaintiff had loaned him Kshs 150,000/= and an overdraft facility of Kshs 30,000/= but that he had repaid these facilities in full. He denied owing the plaintiff the sum of Kshs. 1, 262,819.65 as alleged or at all and further contested the interest rates which the plaintiff applied to come to this figure.

The defendant contended further that in the course of his transactions with the plaintiff, the latter agreed to advance him a loan of Kshs 265,000/= which was to be secured by a charge over the defendant's property known as **Title No. Kirimukuyu/Mbogoini/413**. Although the charge was duly executed and registered, the plaintiff did not advance the loan as agreed as a result of which he suffered loss and damages; he particularised these items in his counter-claim as follows:

- a) Loss of business..... Kshs 3,212,122.75
- b) Irregular bank Charges..... Kshs 7,860,922.22
- c) Interest on unaccounted cash payment..... Kshs 27,024,394.96
- d) Loss of reasonable and expected return on

'Ungranted' loan..... Kshs 308,365,194.94

Total..... Kshs346, 462, 624.87

The defendant also sought for general damages. In the alternative, he claimed for money had and received by the plaintiff for use by the defendant plus the interest thereof. He also sought for the return of his title in respect of **Title No. Kirimukuyu/Mbogoini/413** and the costs of the suit.

On 9th of June 2014, the plaintiff filed a reply to the amended statement of defence and the defence to the counterclaim. It denied that the defendant was entitled to the sum of Kshs 346,462,634.87/= as claimed or at all.

The plaintiff also denied the existence of any agreement between it and the defendant to lend or advanced him the sum of Kshs 265,000/=. The plaintiff averred further that although the charge created was to secure the sum of Kshs 265,000/= it was agreed between the plaintiff and the defendant that only the sum of Kshs. 180,923/= was to be advanced in addition to the existing overdraft facility of Kshs. 50,000/=. The sum of Kshs. 180,923 was advanced as agreed and the plaintiff had no obligation to grant further advances over and above the amount advanced.

Further the plaintiff contended that the defendant had on various occasions acknowledged his indebtedness to the plaintiff and made several proposals on settlement of the outstanding amount and therefore his counterclaim was an afterthought and, at any rate, an abuse of the court process, scandalous and vexatious.

2. Evidence

Mr. Joshua Kiage testified that he was the plaintiff's employee at its Karatina Branch where he is in charge of the credit department. As at the time he testified on 23rd June, 2015 he had worked there for 8 years but he was aware that the defendant had been the plaintiff's customer since the early 1990's.

It was his evidence that the defendant borrowed from the plaintiff the sum of Kshs. 100,000/= in June 1992. As at that time he had an outstanding loan of Kshs. 80,923.95 so that the total due was now Kshs 180,923.95. Besides the loan he also had an overdraft facility for Kshs. 50,000/=.

This witness testified further that the loan of Kshs. 180,923.95 was to be paid by monthly instalments of **Kshs. 7,000/=** and the interest rate applicable was 18.5% per annum. The loan was secured by a charge registered against **Title Number Kirimukuyu/Mbogoini/413**. The charge was for the sum of **Kshs. 265,000/=** which he admitted was over and above the borrowed amount. I understood him to say that the charge document would ordinarily reflect a higher figure than what was actually borrowed so that if a further loan facility was to be advanced to the customer, the bank did not have to register a fresh charge. In the defendant's case, the actual amount advanced was **Kshs. 230,000/=**.

The witness further testified that the plaintiff bank demanded the payment of the total amount overdue when the defendant defaulted on repayment of the facilities. As of 18th November, 1992, this amount stood at Kshs 252, 513.40/=. It was this witness' evidence that the defendant never disputed owing this debt; as a matter of fact, he not only admitted owing the plaintiff but he also made proposals of how he intended to settle the debt. He did not follow his proposals through though.

Consequently, on 3rd March, 1993 the plaintiff issued him with a notice demanding payment of Kshs. 254,948.05 within three months. He was also notified that the sum would continue attracting interest at rate of 22.5% per month until payment in full.

The defendant still did not comply with the notice and it is then that the plaintiff invoked its statutory power of sale and sought to realise its security. It instructed Messrs. Njoka&Kariuki (Kenya Ltd) to auction the security. However, no bidder showed up on the first two occasions when the property was

advertised for auction. The defendant then made another proposal to dispose of the property because he had found a buyer and if his proposal was acceptable, the agreed purchase price of Kshs. 600,000/= was to be paid directly to the plaintiff.

The money was not paid as agreed and so the property was advertised for auction again on 10th January, 1996 but once again there were no bidders who showed any interest. The auctioneer still made attempts to sell the property but he couldn't dispose of it because the defendant's wife was hostile to the auctioneer and the potential bidders. It is when everything else failed that the plaintiff initiated this suit at which time the amount owing was Kshs 1,262,819.65.

That is as far as the plaintiff's case went.

In his evidence, the defendant admitted that he signed a charge in favour of the plaintiff to secure payment of Kshs. 265,000/=; however, he was not given the money. He also testified although the agreed interest rate was 21.5 %, the plaintiff levied higher rates when it demanded for its money; for instance, in the letter of 18th November, 1992, it demanded the sum of Kshs 252,513.40 calculated at the rate of 22.5 % yet on 28th June, 1995 it made a demand of Kshs 548,934.65 at 39%.

The defendant further testified that the plaintiff was all along aware that he wanted the money for expansion of his garage business; he was apparently a stockiest of motor vehicle brakes and clutches or he used to repair them. He referred to correspondence between him and the plaintiff detailing the nature of his business and such information as was relevant for the application of the loan including a statement of audited accounts.

The defendant also testified that he started dealing with the plaintiff as early as 1974 and that he had previously been advanced loan facilities by the plaintiff. It was his case that although the plaintiff was now claiming the sum of Kshs. 1,295,965.39, he couldn't tell how it arrived at this sum because it had not provided him with previous bank statements. However, in answer to questions put to him in cross-examination, the defendant admitted that he used to get the statements though belatedly.

It was also his evidence that he used to bank his money with the plaintiff and his deposits were deemed to repayments of a loan which ironically, he was never advanced. Despite this denial, he admitted that he wrote to the plaintiff on 11th January, 1993 seeking for a review of the repayment schedule because his business had stalled. According to him, he was mistaken that he owed the bank and that it is only in 2013 that he discovered that the plaintiff had not advanced him any money.

According to him the money that he deposited in his account and which the plaintiff did not account for was Kshs 42,000/=.

At the time he requested for review of the payment schedule, the bank was in the process of auctioning his land. He then instructed a firm of auditors to study his accounts, the accounts of his business and his relationship with the plaintiff. The auditors reported back that the plaintiff had not lent him any money at all and for that reason he demanded the sum of Kshs. 346,462, 634.87 from the plaintiff. He was also seeking for damages and for the return of the title of his land which is still in the custody of the plaintiff bank. He also sought for the costs of the suit.

The defendant's witness, **Francis Mwaniki Ngure (DW2)** testified that he was the proprietor of M/s Ngure & Company which is an accounting firm based in Karatina. He is an accountant by profession having qualified in 1981 and is registered with the Institute of Certified Public Accountants of Kenya (ICPAK). Besides, he also holds a Master of Business Administration degree in finance.

By virtue of his profession, the defendant instructed him to look at his books in relation to a facility he obtained from the plaintiff. He was also informed of the plaintiff's claim in court. He established that although the defendant is alleged to have been given an additional loan of Kshs. 100,000 which ought to have been credited to his account on 23rd June, 1992, that did not happen. According to him, the account

balance as of June, 2004 was nil. He also testified that the rates levied on the defendant's account were exorbitant.

In his estimation the defendant made losses of up to Kshs.3, 212,122.75 between the years 1992-2013. According to this witness, if the defendant had received the loan of Kshs 265,000.00 he would have been able to make Kshs 223,323,713.37 for the same period at the rate of 39% assuming there were no withdrawals.

He also established that there were credits made on the defendant's account; the money debited was Kshs 180,923.95 but that the money that was credited to his account was Kshs 108, 308. 55. There was a deficit of Kshs. 72,598.40 which, according to his own calculations, would have generated an amount of Kshs 83,041,481.75 from 1992 to 2013. As for the amount of Kshs. 42,000/= which the plaintiff is alleged not to have accounted for, it would have generated Kshs. 27,024,394.96 between 1992 and December, 2013. The irregular charges amounting to Kshs. 10,843.7 would have generated Kshs. 7,860,922/=. The total of these losses, according to him, was Kshs. 346,462,634.87.

He also testified that the rate of interest applied by the plaintiff to the defendant's loan oscillated between 18.5 and 52%.

On cross-examination, the witness tabulated how he arrived at the sum of Kshs.346, 462,634.87 as follows:

1. Business lossKshs. ,212,122.75
2. Loss of expected low return
on item (1).....Kshs. 223,323,713.37
3. Loss of expected return
on item (2).....Kshs. 85,041,481.50
4. Interest on cash pending.....Kshs. 27,024,394.96
5. Irregular bank charges.....Kshs. 7,860,922.27
- Total.....Kshs.346, 467,634.87

The witness however admitted that he had no proof that the defendant was in business between 1992 to 2013 but that he used the profits he made in 1992 as his base figure. He could not also confirm that the defendant had made any returns to the Kenya Revenue Authority or complied with the tax requirements even at the time he is alleged to have been in business.

According to him, the defendant made the discovery that he had not been given any loan by the plaintiff though the defendant himself testified that he only made this discovery from the report given to him by this witness.

3. Analysis of the Evidence

From the available evidence, there is no dispute that sometimes in June 1992, the plaintiff offered, and the defendant accepted, certain banking facilities. The offer and the subsequent acceptance were a culmination of the defendant's application for the facilities and his meeting with the plaintiff's representatives. This fact is captured in the plaintiff's letter dated 26th June, 1992 addressed to the defendant and whose pertinent part reads as follows:

“We refer to your application for facilitation for facilities detailed in your letter dated 23/6/92

and subsequently discussed with us on 23/6/92 and are pleased to advise that we have sanctioned the following facilities:

(a) An additional loan of Shs. 100,000-making in all Shs. 180923-95 repayable at Shs. 7000-per month.

(b) Continuation of your overdraft facility for Shs. 50,000- to be reviewed on 31/3/93.”

It is also apparent from this letter that amongst the fundamental terms of the agreement between the two parties over these facilities were:

(a) The registration of a fresh legal charge in favour of the plaintiff over the defendant's property known as **Title No. Kirimukuyu/ Mbogoini/413 (herein the security)** to secure payment of the sum of Kshs 265,000/=. The value of the security was agreed to be Kshs. 412,000 as at 19th June, 1992.

(b) A discharge of the then existing charge over the security for the sum of Kshs 150,000.

(c) The facilities were approved for expansion of the defendant's business.

(d) The deposit mobilization fee was to be levied upon release of the funds and thereafter during the currency of the facilities.

(e) The interest charged was agreed at 18.5% per annum on the authorised facilities. A penal rate of 21.5% was to apply for the amounts in excess of the authorised limits for the time outstanding and was to be calculated on daily balances and debited monthly by way of compound interest. The plaintiff, however, reserved the right to charge such rate or rates of interest as it deemed fit from time to time though such rate or rates of interest could not exceed the rate prescribed by the Central Bank for the sort of facilities advanced to the defendant.

Subsequently, and in particular on 9th July, 1992, the defendant executed the charge over the security in favour of the plaintiff for the sum of Kshs 265,000/=. The Charge was registered the following day on 9th July, 1992.

It would appear that the defendant defaulted in payment of the sum secured within three months of the registration of the charge since on 18th November, 1992, the plaintiff issued him with a notice under section 74 of the Registered Land Act (Repealed) requiring him to pay the outstanding sum of Kshs 252,513.40 failure of which it was going to exercise its statutory power of sale and dispose of the charged property in a public auction.

The defendant responded to the notice vide his letter dated 11th January, 1993 in which he not only acknowledged receiving the plaintiff's notice but also proposed to settle the amount demanded by monthly instalments of Kshs 3,500/=. He also admitted that he ought to have been paying the sum of Kshs 7,000/= monthly but due to low business he could neither maintain repayment of the loan at that rate nor pay the lump sum of Kshs 252,513/= as demanded by the plaintiff.

The plaintiff wrote another notice addressed to the defendant on 3rd March, 1993; this time round, it demanded from him payment of the sum of Kshs. 254,948.05. The defendant was also reminded that the sum claimed attracted interest at the rate of 22.5% and that if he did not pay the amount within three months of the date of the notice, his property would be auctioned to realise the security.

According to Messrs. Njoka & Kariuki (Kenya) Ltd auctioneers who, apparently, were instructed to auction the property, the auction was held on 5th July, 1995 but then it fell through as there were no bids made.

Rather than surrender and watch as the plaintiff strived to auction the security, the defendant opted to sell the property or a subdivision thereof to offset the loan; this arrangement appears to have found favour with the plaintiff because in its letter dated 21st December, 1995, addressed to Messrs Unique Property Developers (who were apparently the defendant's agents) the plaintiff was willing to cancel yet another auction slated for 10th January, 1996 if the defendant was going to submit a copy of the sale agreement between him and the purchasers and also if an appropriate undertaking was made to its lawyers to the effect that, upon conclusion of the sale, the entire purchase price would be paid to the plaintiff.

In response to the plaintiff's letter, **M/s Maina Karingithi & Company Advocates** wrote to the plaintiff and confirmed that they were willing to undertake the payment of the sum due to the plaintiff once the purchase price had been deposited with them. A sale agreement dated 4th January, 1996 executed between the defendant and one Mary Mumbi Karuma for the sale of part of the security was forwarded to the plaintiff's advocates on 8th January, 1996, two days to the auction. Amongst the terms upon which the parties agreed was that the property was charged to plaintiff and as of the date of the agreement, there was an outstanding balance due to the plaintiff. They also agreed that the purchase price was to be paid to the bank directly. This is how that aspect of the agreement was covered:

A...

B...

C...

D. That the buyer is aware that their (sic) is a charge in favour of Kenya Commercial Bank which have(sic) outstanding balance of Kshs 6712707.80 six hundred seventy one thousand seven hundred and seven eighty cent.

E...

F. That the agreed purchasing price is Kshs 600,000 six hundred thousand only for that one acre.

G...

H...

I. That the seller have (sic) allowed the lawyer to pay Kenya Commercial Bank straight after transaction is done."

The plaintiff responded to the letter of M/s Karingithi & Company Advocates almost immediately and advised that it was willing to postpone the sale if the plaintiff could either deposit with it the sum of Kshs 300,000/= immediately and give a definite period to finalise the sale or in the alternative, his advocates to give an undertaking for payment of the sum of Kshs 600,000/= within 60 days.

It would appear that neither of these conditions was met and so the charged property was put up for auction as scheduled; however, as it was in the previous auctions, no bidders showed up. This information is contained in the auctioneer's letter dated 11th January, 1996 addressed to the plaintiff.

Subsequent attempts were made to auction property but according to Messrs. Villa Auctioneers who were also engaged to dispose of it, the defendant's wife was hostile to potential buyers. The property was therefore not sold and it is as a result of this failure to crystallize the security that the plaintiff moved to court for recovery of the outstanding balance due which stood at Kshs 1,295,965.35 as per the defendant's debt statement dated 28th April, 1998.

4. Determination

The contract duly executed between the plaintiff and the defendant and the ensuing series of correspondence over the subject matter removes any doubt that the defendant was indebted to the plaintiff. To the extent that the validity of that contract has not been questioned on any of the grounds known in law, it goes without saying that the parties thereto are bound by it. According to the common law principle of freedom of contract, parties are best judges of their own interests and if they freely and voluntarily enter into a contract, the only function of the law and, of course, the courts, is to enforce it. With this principle in mind Lord Diplock observed in **Photo Production Limited versus Securicor Transport Limited (1980) A.C. 827** at 848 that:

“A basic principle of the common law of contract...is that the parties to a contract are free to determine for themselves what primary obligations they will accept.”

And in **Attorney General of Belize versus Belize Telecom Ltd (2009) UKPC 10 at 27 Lord Hoffmann** noted:

“the court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It is concerned only to discover what the instrument means... It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.”

It is in this light that the relationship between the plaintiff and the defendant must be viewed.

In discharge of its obligations under the contract, the plaintiff advanced the defendant the total sum of Kshs 230,923.00 which was partly made up of an existing loan and an overdraft facility. Accordingly, as I understood the plaintiff's witness, it did not necessarily follow that the defendant's account was credited with the sum of Kshs, 265,000/= upon execution of the charge; besides the additional loan and the overdraft facility, the charge was also meant to secure payment of an existing loan. I do not find anything strange with this arrangement because a charge may be created to secure payment of a past, present or future debt.

There was the question whether the amount advanced and which was secured by the charge was the sum of Kshs 265,000/=. I accept the plaintiff's witness' evidence that this sum was the aggregate sum which the plaintiff could advance the defendant under the charge. In other words, apart from the amount already advanced, the defendant could still borrow up to the maximum of Kshs 265, 000/= in which event the charge, though registered prior to such borrowing, would still cover the total aggregate sum borrowed. It followed that though the actual amount advanced to the defendant and which was covered under the charge was Kshs. 230,000/=:, the defendant could borrow another Kshs 35,000/= without having to execute and register a further charge over the security.

In his defence and counter-claim, the defendant admitted that he only received from the plaintiff the sum of Kshs 180,000/= which was made up of a loan of Kshs 150,000/= and an overdraft of Kshs.30, 000/= but which he paid. However, he did not produce any evidence of payment. As a matter of fact, his evidence was that though he executed charge to secure the payment of Kshs 265,000.00 he never received this money from the plaintiff.

I found the defendant's evidence wanting in the sense that although he admitted in his pleadings that he had received a total sum of Kshs 180,000/= from the plaintiff and that he had paid it in full, his evidence was that he had only paid Kshs 42,000/=:; his bone of contention when he testified was that the plaintiff had not accounted for this sum.

Again, in all his correspondence to the plaintiff, the defendant neither disputed the fact that he was indebted to the plaintiff nor the amounts which the plaintiff demanded from time to time as the outstanding loan; if anything, he not only admitted that he owed the plaintiff but he also made proposals on how he intended to settle the debt. This is clear from his letter dated 11th January, 1993, his advocate's letter dated 8th January, 1996 and the sale agreement dated 4th January, 1996 which I referred to earlier in

this judgment.

It is also apparent that despite his denial, at no time did the plaintiff ever attempt to halt, legally, the realisation of security on various occasions when the plaintiff sought to auction it in exercise of its statutory power of sale.

In the face of these uncontroverted facts, I find it difficult to believe the defendant's evidence that he only realised that he did not owe the plaintiff any money when the plaintiff sued for payment of the outstanding loan. This aspect of his evidence was compounded even further when his own accountant appeared to contradict the defendant's testimony that he only came to learn that the plaintiff had not advanced him any money after the accountant had presented him with his report. The accountant testified that the defendant was all along aware that the plaintiff had not credited any money to his account.

I would, however, agree with the defendant that plaintiff was not entitled to charge interest rates that were higher than the rates agreed upon; as I noted earlier, the parties were bound by the terms of their contract and as far as the interest rates were concerned, the applicable rate was 18.5 % if the payments were made on schedule; the penal rate which applied in the event of default, and which I suppose applies to present claim against the defendant, now that he has been proved to have defaulted is 21.5%. I have reached this conclusion because although the plaintiff was vested with such a wide discretion to vary interest rates, no evidence was proffered to the effect that the rates charged over and above the agreed rates were within the limits set by the Central Bank of Kenya. It must be remembered that the discretion of the plaintiff to vary the rates was subject to such limits.

It follows that the appropriate plaintiff's claim which, in my view, has been proved on a balance of probabilities is the sum of Kshs 230,000/= plus interest calculated at 21.5% per annum from the date of the initial default which, going by the first demand notice was 18th November, 1992, till payment in full.

As far as the defendant's counter-claim is concerned, I find it to be too remote and abstract. To begin with most of the items which comprise his cumulative claim of **Kshs346, 462, and 624.87** are based on the mistaken and discounted notion that the plaintiff did not advance any money to the defendant as a result of which the latter was denied the opportunity to make the kind of money that he is now seeking the plaintiff. Having found as a fact that the defendant received from the plaintiff certain financial facilities which were secured by the charge over the security provided, it is apparent that the defendant's claim has no factual foundation.

The only other items that appear to be independent of the allegation that no money was advanced are what the defendant has described as the "interest on cash pending" which has been calculated at Kshs.27,024,394.96 and "irregular bank charges" of Kshs.7,860,922.27. These claims, in my humble view, were not proved. All that the defendant alleged was that he had, on diverse dates, deposited in his account sums of money totaling Kshs 42,000.00; however, there was no proof of such deposits. But even if it was to be proved that the plaintiff had retained such a sum, the furthest the defendant would go is to have it offset against the plaintiff's claim.

As for "irregular charges" it has not been proved that the defendant paid any charges let alone the "irregular charges". In any event, I would suppose that the defendant's claim under this head would only have made sense if he had paid the charges so that all he would be seeking now would be reimbursement of the money paid, assuming those charges are proved to be "irregular".

In the circumstances, I do not find any merit in the defendant's counter-claim; it has not been proved on a balance of probability.

In the final analysis, I hereby decree as follows:

1. Judgment is entered against the defendant for the sum of Kshs 230,000/= together with interest calculated at the rate of 21.5 % per annum from 18th November, 1992 till payment in full;

2. The defendant's counter-claim is dismissed.

3. Costs to the plaintiff.

Dated, signed and delivered in open court this 24th November, 2017.

Ngaah Jairus

JUDGE