REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 159 OF 2011

NATIONAL BANK OF KENYA LTD……APPELLANT

VERSUS

HARRISON KARIUKI MURU…….RESPONDENT

(Being an appeal against judgment and decree in Nyeri Chief Magistrates' Court Civil Case No. 538 of 2009 (Hon. Wambilyanga, Resident Magistrate) on 11th February, 2011)

JUDGMENT

The respondent sued the appellant in the magistrates' court for the sum of **Kshs 66,578/=** and interest calculated at **16**% **per annum** from April, 2008 till payment in full. He also asked for judgment against the appellant for **Kshs 142, 710/=** plus interest at court rates together with costs of the suit and interest thereof.

According to the respondent's plaint, the respondent sought for a credit facility from the appellant for purposes of purchasing 100,000 shares at the stock market apparently in an initial public offer by Safaricom, a mobile phone company. On 11th April, 2008, the appellant offered and the respondent accepted the loan amounting to **Kshs 450,000/=** to facilitate this transaction. According to this agreement, the respondent was to pay an additional **Kshs 60,578/=** being the 10% contribution the respondent was obliged to make towards the purchase of the stocks; the loan would be secured by the shares which the appellant was to purchase.

Apart from the loan agreement, it was also agreed that the appellant was to buy the stocks on behalf of the respondent. The respondent averred that when sought to dispose of the shares and instructed the appellant to sell them on 9th July, 2008, he realised that the appellant had in fact not purchased the shares as agreed. But even then the appellant still instructed Kenya Commercial Bank Ltd where the respondent held his Central Depository and Settlement Corporation (CDSC) account, to sell the respondent's 21,300 shares which he had purchased through a separate loan facility from Kenya Commercial Bank. It was the respondent's case that the appellant not only occasioned the loss of his shares but it also unjustly enriched itself to the tune of Kshs 60,705/= which is the amount it received from selling the respondent's shares.

The respondent pleaded that had the appellant bought the shares as instructed, it would have sold them at Kshs 6.70 per share bringing his total earnings to Kshs 142,710 at the time he instructed the appellant to dispose of the shares.

The appellant not only denied the respondent's claim, but it also raised counter-claim against him; it admitted however, that by a letter of offer dated 19th April, 2008 it advanced the respondent the sum of Kshs 450,000/= to purchase the shares and that the shares were purchased and credited to the

respondent's CDSC account at Kenya Commercial Bank.

The appellant also admitted having received the respondent's instructions to dispose of his shares and that shares were sold and the proceeds credited to the respondent's loan account. The appellant also contended that the shares were sold, at the prevailing market rates, in exercise of its right to sell them inorder to settle the respondent's liabilities to the bank.

In its counterclaim, the appellant contended that on 13th May, 2009, Kenya Commercial Bank sold the respondent's 21,300 shares at the price of Kshs 2.85 per share and the proceeds thereof amounting to Kshs 59,082.40 were credited to the respondent's loan account with the appellant. The surplus of Kshs 2,582/= was credited to the respondent's current account leaving it with an overdrawn balance of Kshs 26,266.255 as at 31st May, 2009 and that this account continued to attract interest at the rate of 21% and 'other charges'. The appellant claimed for this amount from the respondent.

After hearing the suit, the learned magistrate upheld the respondent's claim and dismissed the appellant's defence and counterclaim; it is against this decision that the appellant appealed. In its memorandum of appeal, it raised the following grounds:-

1. The learned magistrate erred in law and in fact in entering judgment in favour of the respondent without taking into consideration the weight of evidence adduced by the defendant in its defence and counter-claim.

2. The learned magistrate erred in law and in fact in relying solely on the evidence of the respondent when the subject matter was technical to extent that it required the evidence of a professional.

3. The learned magistrate erred in law and in fact in holding that the appellant had delayed in acting upon the respondent's instructions.

4. The learned magistrate erred in law in entering judgment against the appellant in total disregard of its evidence.

5. The learned magistrate erred in law and in fact in failing to appreciate that a relationship of bank-customer existed between that appellant and the respondent and therefore the issue setoff would arise.

On 2nd December, 2014 parties took directions on the hearing of the appeal; it was directed that the appeal would be determined by way of written submissions and that the appellant was to file and serve its submissions within twenty one days of that date. The respondent, on the other hand, was given the same period to file and serve his submissions upon service of the appellant's submissions. When the appeal was subsequently mentioned to confirm compliance with these directions, the appellant's representative did not appear in court and had not filed any submissions on the appellant's behalf. Without the submissions and in the absence of counsel for the appellant, the respondent's counsel asked this Court to dismiss the appellant's appeal. I would have acceded to this application and dismissed the appeal if it had been set down for hearing on the material date; however, since the appeal was only scheduled for mention to confirm compliance with the directions of the court and eventually issue a date for judgment, I opted against what would appear to be a rather drastic action. I trust the course I took is consistent with **Order 42 Rule 20** of the **Civil Procedure Rules** which states:-

> ***20. (1) where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, and has not filed a declaration under rule 16, the court may make an order that the appeal be dismissed.***
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> ***(2) Where the appellant appears, and the respondent does not appear and has not filed a declaration under rule 16 (3), the appeal may be heard ex parte.***

While the appeal was pending for judgment, the appellant's counsel wrote a letter addressed to the Deputy Registrar seeking admission of the written submissions out of time; even then, the submissions had purportedly been filed and enclosed in the letter. It is not clear how they were filed without the court file which obviously was in my chambers awaiting delivery of judgment. Be that as it may, I have to ignore those submissions for the simple reason it would be prejudicial to the respondent for this court to partially consider the appellant's submissions which the respondent has not been given opportunity to respond to. I will therefore proceed on the premises that neither of the parties filed their written submissions.

To begin with, it is necessary to consider and evaluate afresh the evidence at the trial before coming to the conclusion whether the learned magistrate's decision should be upheld or overturned; in assessing the evidence, I am conscious that only the trial court had the advantage of hearing and seeing the witnesses before it but inspite of this advantage I have to come to my own conclusions independent of those that the learned magistrate came to.

On his part the respondent testified that after he approached the appellant for funding, the latter advanced him a loan of Kshs 450,000/= being 90% of the purchase price of safaricom shares that were then available in an initial public offer; the respondent contributed the balance of 10%. The arrangement was reduced in writing and the two parties signed an agreement dated 19th April, 2008 and which they both referred to in their evidence.

Subsequently, the respondent opened an account with the appellant being account no. 0103043406100 where he made deposits of Kshs 52,000/= on 17th April, 2008 and Kshs 13,000/= on 19th April, 2008.

Other than the loan from the appellant, the respondent testified that he also got a similar facility of Kshs 500,000/= from Kenya Commercial Bank to buy shares from the Safaricom Company in the same initial public offer. He was allotted 21,300 shares which the bank purchased for him in this latter transaction. According to him, nothing came forth from the appellant implying that it did not buy any shares for the appellant.

Oblivious of the fact that the appellant had not purchased any shares, the respondent asked it to sell his shares and deduct its loan from the proceeds thereof on 9th July, 2008. It was his evidence that a share was then selling at Kshs 6.90. Contrary to his instructions, the appellant did not sell the shares as instructed but that it was only on 13th May, 2009, almost a year later, that he received a message alert on his phone that Kenya Commercial Bank had disposed of his shares at a price of Kshs 2.35 per share. When he enquired from the bank why it had sold his shares without his authority, the respondent was shown the appellant's letter dated 11th May, 2009 instructing it to sell his shares.

Incidentally, on the same date of 11th May, 2009, the respondent's advocates wrote to the appellant apparently notifying the appellant of his intention to file suit that was subsequently filed in the magistrates' court. The bank wrote back vide its letter dated 14th May, 2009 saying that it was seeking particulars of the respondent's claim and promised to revert substantively shortly. According to the respondent, no response of whatever sort had been received from the bank by the time he filed his suit four months later.

The witness testified that he had only one CDSC account with Kenya Commercial Bank and the purchase or disposal of his shares either by this bank or by the appellant bank could only be transacted through this particular account.

Dannis Thuita Muraguri testified on behalf of the appellant; he was a credit officer at the appellant bank at the material time. The witness admitted that it was true that in April, 2008 the respondent approached the bank to finance his purchase of 100,000 Safaricom shares. The purchase price at the initial public offer was Kshs. 5 per share. A loan of Kshs 450,000/= was disbursed to the respondent's account no. 0113743406100 and was to be secured by the shares. The respondent financed himself Kshs 50,000/= being 10% of the purchase price and also paid Kshs 9,000/= as appraisal fee. Upon the disbursement of

the loan, the appellant debited the respondent's account with an amount of Kshs 500,030 on the 22nd April, 2008 to purchase the shares.

The witness testified that the bank applied for 100,000 shares in the name of the respondent but because of oversubscription, he was only allocated 21,300 shares worth Kshs 106,500/=. A refund of Kshs 393,500/= was remitted back to the appellant bank and was applied to reduce the respondent's loan to Kshs 56,500/=. This witness also acknowledged that the respondent had applied for other shares through from the same initial public offer through Kenya Commercial Bank but that the appellant was initially not aware of this purchase. When the appellant received the schedule of all loans it had funded, the respondent was indicated as having been allotted 21,300 shares which had been credited to his account at Kenya Commercial Bank CDS account No. 000008784078 L1.

It was this witness' evidence that on 9th July, 2008, the respondent instructed the appellant to dispose of his shares and retain whatever was sufficient to pay off the outstanding loan out of the proceeds thereof. Kenya Commercial Bank sold the respondent's shares on 14th May, 2009 upon the instruction of the appellant; the proceeds from this sale amounting to Kshs 59,082.40 was credited to the respondent's loan account whose debit balance stood at Kshs 56,500/=. The balance was credited to his current account which, according to this witness had been overdrawn as a result of the ledger fees and interest; the debit balance at the material time was Kshs. 27,230.40.

The witness testified that on 7th September, 2010, the appellant wrote to a company called Image Registrars Limited enquiring of the allocation of the shares to the respondent; this company confirmed that 21,300 shares had been allocated to the respondent in his CDSC account with Kenya commercial Bank except that it did not have access to the Allotment advice. He said that this company was an agent of Safaricom Company. He testified that he had no evidence that the appellant bank purchased any shares on behalf of the respondent.

The appellant claimed from the respondent the sum of Kshs 28,956.55 as at 16th September, 2009 plus interest at 21 % per annum; he denied that the appellant owed the respondent any money.

In answer to the respondent's counsel's questions during cross-examination the witness admitted that the respondent did not have access to the money advanced to him and that it was debited back to the appellant's account. He also admitted that he did not have share allotment advice. The witness testified that the appellant instructed KCB to sell the respondents shares in July, 2008 but the bank did not comply. The witness admitted that had the shares been sold at the time the appellant was instructed, they would have fetched sufficient funds to pay off the amount demanded and even spared some profit for the respondent. He admitted the shares were sold at a loss at Kshs 2.85.

The evidence by both the respondent and the appellant reveals the existence of a contract between them; the fundamental aspects of this contract included the advancement of a loan facility by the appellant to the respondent and applying the loan to the purchase of ascertained number of shares by the appellant on behalf of the respondent. The shares were from a specific company and were on the market courtesy of an initial public offer. It was also a material agreement between the parties that once purchased the shares would secure the loan advanced to the respondent. Amongst the respondent's obligations under the agreement was his contribution of 10% of the purchase price and also the payment of the requisite fees or charges associated with the loan transaction and the purchase of the shares. He was also under obligation to repay the loan together with the chargeable interest.

It is not in dispute that the loan was advanced as agreed but as noted from the appellant's evidence, the sum awarded was not accessible to the respondent but retained by the appellant for the sole of purchasing 100,000 shares for the respondent. It is not also in dispute that the respondent fulfilled his part of the bargain and paid 10% of the purchase price together with the loan negotiation fees and other related charges necessary to facilitate the advancement of the loan facility and the purchase of the shares.

The primary issue in contention, in my view, is whether the appellant purchased the shares as agreed and

if so whether it ought to have disposed of them at the instruction of the respondent. Also crucial is the question whether the shares the appellant sold were sourced by or through the appellant or were those shares which the respondent purchased independent of the agreement between him and the appellant. Related to these questions are the questions whether the respondent suffered any loss if the appellant did not purchase the shares as agreed or if it did, whether the respondent suffered any loss if the shares were sold contrary to the respondent's instructions.

The first question was provoked by the respondent's claim that the appellant did not purchase the shares as agreed or at all. In the face of this claim, it fell upon the appellant to prove that it discharged its obligation under its agreement with the respondent and purchased the shares. While addressing this issue, its witness testified that the appellant bank applied for 100,000 shares on behalf of the respondent but that he was only allotted 21,300 shares which were credited to the respondent's CDSC account at Kenya Commercial Bank. However, he also admitted that the appellant learnt later that the respondent had separately applied for and had been allotted the same number of shares through Kenya Commercial Bank itself and that these shares had been credited to his CDSC account in that particular bank. What he could not tell, and of course he did not provide any proof in that regard, was that the 21,300 shares in the respondent's CDSC account at the Kenya Commercial Bank were those that it purportedly purchased for the respondent and had nothing to do with what the respondent himself secured though a separate arrangement with the Kenya Commercial Bank. The witness admitted in unambiguous terms that he did not have anything to show that the appellant bank had purchased shares for the respondent. All he knew was that when the appellant received a schedule of all loans it had funded, the respondent's name appeared in that schedule as one of those persons who had been funded by this bank; it is worth noting that the alleged schedule was not produced in evidence.

In what appears to me to a belated attempt by the appellant to look for the rather non-existent yet crucial evidence, the appellant wrote to a company called Image Registrars Limited on 7th September, 2010 after the respondent had testified and even closed his case seeking confirmation from that company that the appellant had purchased the shares on behalf of the respondent, the number of the shares allotted to him and the CDSC account in which those shares were credited. Apart from seeking that confirmation, the appellant also sought for a certified copy of the 'allotment advice'. By a letter dated 8th September, 2010 the said company responded to the appellant's enquiries advising that the respondent had been allotted 21,300 shares which had been credited to his account with the Kenya Commercial Bank. In the same letter, the company advised that it did not have access to the 'allotment advice' requested by the appellant.

The search for evidence after the respondent had testified and closed his case and therefore did not have opportunity to address this particular piece of evidence when he testified left a lot to be desired though the respondent's counsel did not appear to take any issue with it.

Notwithstanding the appellant's efforts, the allotment advice which was the important aspect of the evidence sought and which would have perhaps laid to rest the question whether the appellant purchased any shares for the respondent was not produced. In the context of the respondent's suit or the counterclaim against him, that piece of crucial evidence was not available and therefore for purposes of determination of the dispute on this issue, there was no proof that the appellant ever purchased any shares for the respondent.

Assuming the appellant was to be given the benefit of doubt that it bought some shares for the respondent, the next question would be whether it disposed of those shares in accordance with the instructions of the respondent.

The respondent provided proof and infact the appellant admitted that it received written instructions from the respondent to dispose of his shares on 9th July, 2008; these instructions, according to the respondent, were given on the presumption that the appellant had purchased the shares as agreed or at least had paid for what the respondent had been allotted. It is apparent from the record that that the appellant did not act on the instructions until 11th May, 2009, almost a year later, when it forwarded the respondent's letter to the Custodial Service Department of Kenya Commercial Bank asking it to dispose of the respondent's

shares and remit the proceeds thereof to respondent.

As at 9th July, 2008, when the instructions to sell the shares were given, a share was going for **Kshs 6.90** and the appellant's witness admitted that had the respondent's shares been sold at this time he would have made a profit and recouped sufficient funds to pay of his loan and still remain with some credit balance on his account. When the appellant sold the respondent's shares the prices had fallen to Kshs 2.85 per share which the appellant agreed was a loss.

According to the appellant, though it was aware of the fluctuations in the price of shares, it chose not to sell the respondent's shares on 9th July, 2008 because, as I understand its witness to have argued, there was nothing in the respondent's letter indicating when the shares were to be sold and secondly, the respondent had allegedly countermanded the instructions.

I have had occasion to read the respondent's letter; in it he categorically stated;

> ***I am the holder of A/C 0103043406100 in your bank. And I had taken a loan to buy shares. I was allocated 21,300 shares which I do wish to sell now. The funds should be channelled through national Bank of Kenya Nyeri Branch so that you can deduct your balance. My CDS No. KCBC/C-8784078/LI-0. (Underlining mine).***

It is obvious that the respondent wanted his shares to be sold "now" which in my view would imply that he wanted them sold immediately perhaps because he wanted to take advantage of the increase in prices and make a profit. The appellant's argument that the respondent did not indicate when the shares were to be sold is simply contrary to the available evidence.

The second reason that the respondent had countermanded his instructions in the letter of 9th July, 2008 is self-defeatist because the appellant relied on the authority of this particular letter to dispose of the respondent's shares when it ultimately disposed them and, in any event, there was no evidence that the respondent ever countermanded his instructions; having expressly authorised the bank to sell the shares in writing one would have expected the respondent to countermand his authority in the same manner; at least that is the very minimum the appellant bank would have required of him if at all he countermanded his instructions as alleged.

As it turned out the shares which the appellant purported to sell were those that the respondent acquired through a separate arrangement he had with the Kenya Commercial Bank so that at the end of the day it did not matter whether or not the appellant acted on the instructions of the respondent to sell his shares; as noted, the respondent's instructions were given on the presumption that the appellant purchased the shares allotted to the respondent but the respondent came to learn later that the appellant did not purchase any shares and therefore it could not possibly sell them. Although the appellant did not state it expressly, my understanding of its case is that it mistakenly sold those shares which the respondent had purchased through Kenya Commercial Bank; I have come to this conclusion because its witness was clear that when it instructed the Kenya Commercial Bank to sell the respondent's shares, it was not aware that the responded had applied for and had acquired some other shares through Kenya Commercial Bank and therefore it must have assumed that the shares credited to the respondent's CDSC account at the latter bank were those which he had applied for through the appellant bank.

Whichever angle one looks at the appellant's actions, it is difficult to resist the conclusion that the appellant breached the fundamental aspects of contract between it and respondent. It did not buy the shares either as agreed or as per the allotment made to the respondent; even if it did, it did not dispose of the shares when instructed to do so; without the respondent's authority it sold the respondent's shares which had been acquired through Kenya Commercial Bank; and to the respondent's detriment the appellant disposed of the shares at loss when, from the available evidence, the share prices were at their lowest.

In these circumstances I am inclined to agree with the learned magistrates' decision that the respondent proved his claim on a balance of probability. Accordingly I do not find any merit in the appellant's appeal

and I hereby dismiss it with costs. It is so ordered.

Dated, signed and delivered in open court this 26th day of February, 2016

Ngaah Jairus

JUDGE