



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 77 OF 2005

TRANSNATIONAL BANK LTD.....PLAINTIFF

VS.

PETER KIPSAT LELEI.....1ST DEFENDANT

EUNICE CHEPKEMBOI LELEI.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

By a plaint dated 24th Day of August, 2005 the Plaintiff sought the following reliefs;

- a. **The suit sum of Kshs. 3, 540,348.45/=.**
- b. **Interest on (a) above at bank rates as in paragraph 5 of the plaint.**
- c. **Costs of the suit plus V.A.T at 16%.**
- d. **Interests on (a) and (c) above till payment in full.**

PLAINTIFF'S CASE.

The Plaintiff being a financial institution in its plaint averred that it claims against the 1st and 2nd Defendants jointly and severally a sum of Kshs. 3,540,348.45 being in respect of an overdraft facility accorded to the 1st Defendant at his own request and which overdraft was guaranteed by the 2nd Defendant. The Plaintiff's further claim against the Defendants is for the principal sum and interest at applicable bank rates applicable from time to time until payment in full. The Plaintiff in its Plaint avers that on various occasions has given the Defendants repayment proposals but have failed to honour the same and hence rendering this suit necessary.

PW1, Michael Kipkurui Changwoni was the then Credit Supervisor of Transnational Bank, Eldoret Branch. He testified that on 24.11.1998, the 1st Defendant applied for an overdraft facility of 300,000/-. On 25.11.1998, he was given a letter of offer. Security was a guarantee with a legal charge. He was given the facility for one year but was renewable, and it was renewed by a letter dated 8.12.1999. The offer letter was dated 9.12.1999. The facility was to help the 1st Defendant run an Agro-Chemical shop. No sooner than the facility was given that the account started having problems. The 1st Defendant could not service the facility. On 22.3.2000, he applied for enhancement of the facility to Kshs. 750,000/-. The facility was offered to him and the 2nd Defendant guaranteed him. By letters dated 20.3.2001 and 24.5.2001, the bank informed the 1st Defendant that the balance had accrued to Kshs. 3,236,070/45 due to interest. This far, PW1 produced as exhibits all the correspondences relating to the Plaintiff's and the 1st

Defendant's communication.

PW1's further evidence was that as at 15.11.2001, the Defendants did not settle the debt. By a letter dated 15.11.2001 the 1st Defendant was informed that the debt had accrued to a sum of Kshs. 3,774,687/65. The 1st Defendant wrote to the bank informing it that he was pursuing a friend who had his debt of Kshs. 8,000,000/ and once the same was settled, he would repay the bank loan. Several letters were exchanged between the parties. As at 22.2.2002 the facility had accrued to Ksh. 4,031,114/40. On 9.10.2002, the 1st Defendant informed the bank by a copy of a letter to M/S Kalya and co. Advocates that he had so far paid a sum of Kshs. 1,214,000/. He requested the bank to allow him to sell a combine harvester by private treaty. The same was a security as a chattel mortgage. The bank agreed to the proposal. The bank also agreed to the sale of a parcel of land L.R. NO. Kiplombe/Kuinet/Block 6(Longnet 48 Uasin Gishu) which was also a security. The bank acknowledged receipt of the proceeds of the sale of the land in the sum of Kshs. 300,000/ which was set as a reserve price. Later, the 1st Defendant sold the combine harvester and deposited a further sum of Kshs. 300,000/ with the bank. As at 19.7.2005, the bank informed him that he owed it the sum of Kshs. 3,540,348/40.

PW1, in cross examination stated that he was the internal auditor at the plaintiff's bank. He stated that the 1st Defendant was the Plaintiff's customer and that in 1998 he was enjoying an advance facility of Kshs. 300,000/=. He stated that interest rate applicable was 32.5% p.a. plus 5%. He testified that 5% is risk handed on the base rate. He stated that as per the letter of offer, the penalty rate was 1.25% per month and that annually this would be 15% on top of the interest rate that was being charged. It was his testimony that in default the rate would go up to 47.5%. He stated that there was no default between 1998 to 1999. He stated that on 9.12.1999 the bank renewed the facility and that the base rate was 23% plus 5% and that penalty for excess overdraft was 1.1%. He stated that the 1st Defendant was warned when the account started getting problems.

PW1 further stated that the Plaintiff's exhibit 5 showed that the 1st Defendant applied for another facility in joint account of both defendants. He stated that the bank gave the facility as per letter of offer dated 23.3.2000 for Kshs. 750,000/= and that the interest rate was 26.5% and penalty was 1.25%. To this end, PW1 referred to P. Exhibit 5. He testified that the latter overdraft was to be renewed on 21.3.2001, then the amount owed to the bank was not known and that only statements could show how the account operated. He stated that the amount claimed was arrived at due to the interest accruing.

PW1 further stated that he did not have statements to show the accrued Kshs. 3.5million. He stated that in 2005, the bank froze calculation of interest. He noted that this was after the suit was filed. He referred to a document dated 19.12.2008 which he thought related to A/C No. 601720013 which showed a balance of Kshs. 481,249.00 which was a loan overdraft. PW1 stated that the facilities were secured by land facility and a combine harvester. He stated that the 1st Defendant was allowed to sell the said combine harvester by private treaty at Kshs. 400,000/= and land for Kshs. 300,000/= amounts which were credited to the account.

In re- examination, PW1 stated that in 2001 the 1st Defendant had two accounts one by himself and the other joint with the 2nd Defendant, namely account numbers 006017013 and 0060425019 respectively. He stated that the 1st Defendant did not service the entire loan and that the bank gave another facility because he came up with a better facility and that he was bailed out by refinancing. He testified that by 2005, the accounts were not regularized.

DEFENDANTS' CASE.

1st Defendant, Peter Kipsat Lelei, testified as DW1. His testimony was that in the year 1998 he borrowed Kshs. 300,000/= which was an overdraft. To this end he referred to Plaintiff's exhibit 1. He stated that he was given the said loan as per the Plaintiff's exhibit 2. He testified that after one year he borrowed a second loan being a renewal overdraft. That was on 8.12.1999. He stated that he was to service the same within one year, and that he would have not been given the second overdraft without clearing the 1st one.

DW1 further testified that on 22nd March, 2000 he borrowed an overdraft of Kshs. 750,000/= and gave security of a tractor. To this end he referred to plaintiff's exhibit 6. He testified that he was only aware of the three loans and he could not recall having taken a fourth one. He stated that he had paid all the monies he had borrowed. He stated that they disagreed on the interests the bank was charging which had gone up to 43%. It was his testimony that the bank did not give any notice that the interest rate had gone up. He stated that the bank returned his log book and the title deed that had been deposited in relation to land parcel No. L.R. No. Kiplombe Kuinet Block (Longnet)/48.

DW1 testified that after he paid his loan, the bank released the title deed and that he was surprised that the bank could later sue him. He testified further that the bank was demanding Kshs. 3,540,348.05 as at 28.8.2005. It was his testimony that he demanded for his loan statements from the bank but it declined to give him. He stated that as per the letter dated 19.12.2008 the bank had demanded Kshs. 481, 249.99 and that even if there was any balance it could not have been beyond the said amount. DW1 insisted that he had repaid all the monies. To this end he produced the said letter dated 19.12.2008 as defence exhibit 1 vide by which he demanded his securities whereby he was asked to pay the balance which he paid and his securities were released. He stated that the bank forgot to write a discharge letter.

PLAINTIFF'S SUBMISSIONS

The Plaintiff's advocates, Manani, Lilani, Mwetich & Co. Advocates relied on their written submissions dated 11th November, 2015 and filed in court on 11th November, 2015. The Plaintiff's counsel submitted that the question for determination was whether the loan was repaid in full in terms of the offer letter and the security instruments and whether indeed what was recovered serviced the loan and accrued interests. Counsel submitted that the plaintiff produced all the necessary material including statements of account clearly showing the level of indebtedness of the defendant to the plaintiff. Counsel submitted that the defendant does not dispute the details of the statements but makes his strange assertion that he has repaid the loan without any payment receipt or any other documents. It was submitted that the defendant had not shown how he settled his debt as alleged and that his many proposals to repay were an admission of liability and the defendants could not run away from their duty to repay the loan in full.

Plaintiff's counsel further submitted that the Defendant's suggestion to the effect that the outstanding balance was Kshs. 481,249.89 failed to put into account the two overdrafts reflected in account number 6017013 wherein the balance was Kshs. 481,249.89 as at 13th February, 2003. To this end, counsel referred to Exhibits 9, 10 and 13. It is submitted that the defendants severally sought to be given time to regularize the facility but failed to do so thus occasioning the debt to escalate due to application of interest.

DEFENDANT'S SUBMISSIONS

Defendants' advocates, Birech, Ruto & Co. Advocates relied on their written submissions dated 3rd December, 2014 and filed in court on 4th December, 2014. They urged the court to consider the following issues; one, whether the defendants obtained overdraft and if so on what condition? It is submitted that the 1st Defendant does not deny obtaining overdrafts from the Plaintiff and guaranteed by the 2nd Defendant. It is admitted that the 1st Defendant borrowed the overdrafts three times; the first one of Kshs. 300,000/= was accepted by the bank (plaintiff) on 25th November, 1998, (exhibit 2), the second overdraft of Kshs. 300,000/= was accepted by the Plaintiff on 9th December, 1999 (exhibit 4). It is submitted that the 2nd Defendant was not a party to the second overdraft and that the said two overdrafts were guaranteed by charge over L.R. No. Kiplombe/Kuinet Block 6(Longnet)48. Defendant's counsel submitted that the third overdraft of Kshs. 750,000/= was granted on 23rd March, 2000 vide exhibit marked 6 and that the same was guaranteed by a combine harvester.

Two, whether the 1st defendant was discharged from liabilities of the previous overdraft once the next over draft was advanced? It is submitted that the Plaintiff would not renew the subsequent overdrafts without the Defendant clearing the previous ones. It is submitted that the Plaintiff's acceptance to renew

the overdraft, implied that the previous overdrafts had been discharged. In the alternative and without prejudice to the foregoing, the said three overdrafts constituted three separate contracts and that the Plaintiff had not specified on which overdraft the Defendant had been sued.

Three, what is the basis of the of claim of Kshs. 3,540,348.45/? Counsel submitted that that the Plaintiff's claim had no basis. It is submitted that the 1st Defendant took three separate overdrafts amounting to Kshs. 1,350,000/= which was the principal amount and that the he diligently repaid the amount to a tune of Kshs. 1,214,000/=. It is submitted that the Plaintiff had not specified or given details of the claim of the said Kshs. 3,540,348.45 and that there was nothing to show how much the sum demanded by the Plaintiff constituted the interest and how much constituted the principal sum.

Defendants' counsel submitted that if there was any legitimate and valid claim which still the 1st defendant denies, it ought to be for Kshs. 480,000/= which the Plaintiff confirmed formally to the 1st Defendant through a letter dated 19th December, 2008 (D. exhibit1). To this end counsel relied on the case of ***Muiruri vs. Bank of Baroda (Kenya) Ltd 2001 KLR 183.***

Four, whether the plaintiff has come to court with clean hands? It is submitted that the Defendant severally asked the Plaintiff to give him bank statements but the Plaintiff failed to do so. It is submitted that the interest rates were charged at bank's applicable rates without disclosing the rates agreed on and that offended the provisions of the Banking Act. Counsel submitted that the Plaintiff's actions are not in good faith and that the amount claimed is not justifiable.

EVALUATION OF EVIDENCE AND DETERMINATION

The salient issue for determination is ***whether the plaintiff has proved a claim of Kshs. 3,540,348.45.00 against the defendants on a balance of probability?*** The most critical issue that this honourable court should labour to deal and grapple with is; in the absence of clear record of the accounts (Bank Statements), what would be the principal amount due and the interests accrued thereof? And further in that scenario how was the amount claimed arrived at? This is quite critical and in search of the above answers the end result may be more speculative than a reality situation. This is so because it is only the bank statements that would have rendered a true reflection of the accounts herein. Through the bank statements the court would certainly figure out the flow of payments and defaults made. The Plaintiff in its testimony acknowledged that it did not have bank statements in support of the instant claim. I have noted that the Plaintiff has entirely relied on its correspondences with the 1st Defendant. The question then is. ***Can the letters written by the plaintiff to the defendant(s) be accurate and a true reflection of the accounts?***

In the case ***Cyn Energy Company Limited vs Synergy Industrial Credit Limited [2014] e KLR, H.C at Nairobi Civil Case No 540 OF 2013*** the learned judge Makau J. at paragraphs 42 and 43 Observed as follows;

“What is, however, clear from paragraph 7 of the Plaintiff's Supplementary Affidavit is that there were outstanding amounts. It did not, however, give a figure of what it considered to be undisputed amounts. Indeed in its two (2) letters dated 4th April 2013 to the Defendant which were annexed on pp 188 and 190 of the Defendant's Replying Affidavit, the Plaintiff undertook to pay a sum of Kshs. 4,000,000/= and Kshs. 6,900,000/= and requested the Defendant to hold onto the logbooks/properties and securities pending payment of the said sums which it requested the Defendant to re-schedule.

By implication, the Plaintiff did also seem to admit that it had a balance of Kshs. 68,738,298.91 if one is to go by the IRAC report which it submitted in its evidence. In the absence of any proof of payment of the same by the Plaintiff, the only logical conclusion was that this was an undisputed sum that ought to be paid. It committed itself to pay certain monies in its letters on 4th April 2013 which monies it does not appear to have paid. It would therefore be estopped from alleging that it does not owe the Defendant any monies or at all. Bearing in mind Clauses 6 of the Hire-Purchase

Agreements, the Defendant had the right to repossess the assets based on the arrears no matter the amount.

And at paragraph 51 the court held

“It is, however, of paramount importance that the Plaintiff be furnished with a Statement of Accounts with a view to getting sufficient information of the exact sum that is due from it to the Defendant. This is critical as there was a disparity of the sums demanded by the Defendant in its letters of 4th and 29th November 2013”

In light of the foregoing holding, it is very clear that amongst all the exhibits produced in court by the Plaintiff, there is no single bank statement. In his submissions counsel for the Plaintiff submitted that the plaintiff produced all the necessary material including statements of account clearly showing the level of indebtedness of the defendant to the plaintiff. This is not true because what was produced in court were mere letters of correspondence and no bank statements were produced to ascertain a true and accurate status of the accounts in question. In fact, PW1 testifying on behalf of the bank conceded in his testimony that there were no bank statements to show that the Defendants were indebted Kshs. 3.5 million. Plaintiff’s counsel further submitted that the defendant does not dispute the details of the statements but makes his strange assertion that he has repaid the loan without any payment receipt or any other documents. It appears that the Plaintiff is shifting the onus and burden of proof to the Defendant. It is trite law that he who alleges must prove. See Section 107 of the evidence Act which provides;

107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

The Plaintiff has produced a litany of letters which are mere correspondences between it and the 1st Defendant. These letters do not clearly render the status of the account in terms of principal amount due and the interests accrued. Be that as it may, the Plaintiff’s position on the amount due on part of the 1st Defendant is not consistent. This is so because vide the letter dated 16th November, 2004, which was produced as Plaintiff’s exhibit number 22, the Plaintiff through its advocates, C.S Lilan & Company Advocates demanded from the 1st Defendant Kshs. 3,415,648.54 four years later when the 1st Defendant sought to know the status of his overdraft account. The Plaintiff itself replied to him vide the letter dated 19th December, 2008 (defence exhibit 1) and stated that the 1st Defendant owed it Kshs. 481,249.89. In fact, the said letter is referenced as ‘REQUEST FOR LOAN CONFIRMATION’. In the letter dated 16th November, 2004, the plaintiff’s counsel referred to accounts number 0060172013 and 0060425019 being outstanding with Kshs. 3,415,648.45. In the instant claim the Plaintiff is claiming Kshs. 3,540,348.45.00 as amount due on the part of the 1st Defendant. While in the letter dated 19th December 2008, the Plaintiff referred to account No. 601720013 being outstanding with Kshs. 481,249.89. Account number 601720013 appears in both letters. In such a situation the court is unable to demarcate between the two figures, the correct status of the monies owing.

I beg to add that it was only proper if the Plaintiff had demarcated the respective accounts each with well calculated principal and the accrued interests. That could only be reflected through statements of accounts. Moreover, it is worthwhile to note that the second overdraft of Kshs. 750,000/ was meant to bail out the first which the 1st Defendant had been unable to service. Unfortunately the Plaintiff failed to inform the court that the first loan ceased to exist after the second was issued. In lieu thereof, he ought to have accurately demonstrated which loan accumulated which interest. Without proper records the court cannot be able to competently ascertain the amount due, if any; be it principal and/or the interest. This is buttressed by PW1’s evidence who testified that **“I have no statements to show his accrued to Kshs. 3.5 million”** In that case the questions that call for answers include the following. *Why dint the plaintiff avail bank statements in court? Why did the plaintiff in first instance return securities that had secured the said overdrafts to the defendant if he had not cleared the repayments of the overdraft facilities?* The

Plaintiff did not candidly avail these answers and therefore the only inference to be drawn in the circumstances is that the Defendant must have cleared his loan.

As a result, I find that the Plaintiff has failed to prove his case on a balance of probabilities. It is a claim that must fail. The suit is accordingly dismissed with costs to the Defendants.

DATED and DELIVERED at ELDORET this 20th Day of April, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of :-

1. Miss. Mokuu holding brief for the Plaintiff.
2. Mr. Birech for the Defendants.