



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 670 OF 2005

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

- VERSUS -

ABDI HASHHI DUALE.....DEFENDANT

JUDGEMENT

1. The plaintiff's claim against the defendant is for a sum of Kshs. 7,610,428.95 plus interest at 29% per annum until payment in full. The plaintiff also claims costs of the suit.
2. It is the plaintiff's case that the defendant applied for a credit facility and that the plaintiff provided the said facility.
3. The defendant is said to have failed to remit payments in accordance with the terms and conditions of the agreement between the parties.
4. As a result of the alleged defaults by the defendant, the plaintiff said that it was owed Kshs. 7,610,428.95 as at 28th July 2005.
5. In his defence, the defendant denied the existence of any agreement between him and the plaintiff. This is how the Defence reads:

“4. The Defendant denies that he is indebted to the Plaintiff to the tune of Kenya Shillings Seven Million, Six Hundred and Ten Thousand, four Hundred and Twenty-Eight Shillings and Ninety Five Cents Kshs. 7,610,428.95 as at July 2005 and/or at all as alleged by the Plaintiff and puts the plaintiff to strict proof thereof.

5. In the alternative and without prejudice to the foregoing the Defendant avers that sometimes back the Defendant charged his property L.R. No. Narok/Township/242 to access a credit facility from the plaintiff.

6. Further to paragraph 5 above and without prejudice to the foregoing, the Defendant avers that the plaintiff has consequently sold the said property L.R. No. Narok Township/242 in recovery of the outstanding debt and to date the Defendant is not indebted to the plaintiff in the sum alleged by the plaintiff and/or at all”.

6. During the trial each party had one witness. **PAUL CHELANGA**, the Credit Remedial Manager of the plaintiff, testified on behalf of the Plaintiff, whilst the Defendant, **ABDI HASHI DUALE**, testified on

his own behalf.

7. Both parties confirmed that the defendant used to be a customer of the plaintiff, **NATIONAL BANK OF KENYA LIMITED**.

8. By a letter dated 19th October 1996, the defendant sought the extension of an overdraft facility of Kshs. 700,000/-. The plaintiff granted the said facility, as is clear from its letter dated 5th November 1996.

9. It is also common ground that on 27th October 1996 the defendant wrote to the plaintiff, seeking a loan of Kshs. 4,000,000/-.

10. Having given consideration to the application, the bank offered to the defendant a loan amount of Kshs. 2,000,000/-.

11. The defendant testified that he invested the proceeds of that loan in wheat farming. However, the defendant's said investment was not successful. This is how he described it:

“As evidenced by my several correspondences, I recall on 29th October 1996, I applied for loan of Kshs. 4,000,000/- to be secured by the titles to undertake wheat farming.

However, the bank approved Kshs. 2,000,000/- which I invested in wheat farming.

However, the farming business did not materialize and I did not harvest any wheat. I incurred a loss”.

12. As a result of the failure of the investment in wheat farming, the defendant was unable to service the financial facilities which the plaintiff had provided to him.

13. By a letter dated 19th April 1999 the defendant requested the bank to consolidate the overdraft facility and the loan facility. At that time, the outstanding overdraft was Kshs. 1,652,273.20, whilst the outstanding loan was Kshs. 722,224/-.

14. Upon the amalgamation of the 2 facilities, the outstanding balance was Kshs. 2,374,497.20.

15. The plaintiff's initial evidence was that he had provided the title documents with the bank, as security for the financial facilities given to him;

a) Narok Township/173;

b) Narok Township/32; and

c) Narok Township/242.

16. He even said that the bank had sold all those 3 properties, to recover the money due to it.

17. However, upon being cross-examined further, the defendant said that it was only one property, (Narok Township/173), which was sold by the bank.

18. The bank sold the security for the sum of Kshs. 1,820,000/-, on 14th August 2003.

19. As the defendant had alluded to the value of the 3 properties being Kshs. 10,000,000/-, his position was that the sale at Kshs. 1,820,000/- was at an under-valuation.

20. However, even if it were to be assumed that the value of the 3 properties was Kshs. 10,000,000/-, there was no evidence provided by the defendant to demonstrate the value of each of the 3 properties.

That would have been necessary as it is only one of the 3 properties which was tendered as a security; and it is only that one property which was sold.

21. Meanwhile, the bank did engage the firm of **TOCO PROPERTIES LIMITED**, for purposes of carrying out a valuation of the plot **NAROK/TOWNSHIP/173**, which was the security given by the defendant.

22. By a report dated 25th April 2003, the valuers indicated that the Market Value of the property was Kshs. 2,500,000/-, whilst the Forced Sale Value was Kshs. 1,800,000/-.

23. A Certificate of Sale dated 28th August 2003 shows that the property was sold by public auction, for a sum of Kshs. 1,820,000/-. The purchaser was **JOHN NTINANA LOLCHOKI of P.O. Box 416 NAROK**.

24. In the light of the Valuation Report, which cited the Forced Sale Value as Kshs. 1,800,000/-, and the Market Value as Kshs. 2,500,000/-, I find that the sale price of Kshs. 1,820,000/- was a fair price. It was not a sale at an under-value.

25. A perusal of the Statement of Account reveals that as at 31st July 2003, the outstanding balance was Kshs. 8,101,625.95.

26. After crediting the purchase price (*of Kshs. 1,820,000/-*) towards the outstanding balance, the balance still outstanding is Kshs. 6,281,625.95. However, I note that the statement of account did not give credit to the full purchase price. The sums credited to the account amount to Kshs. 1,200,000/-, which reduced the outstanding sum to Kshs. 6,901,625.95.

27. Whilst the court appreciates that the auctioneer must have been paid by the bank, for the services he rendered, I find that the bank did not provide the court with proof of the exact sums paid to the auctioneer.

28. Furthermore, I hold that the difference between the sum of Kshs. 6,901,625.95 (*which is the balance as reflected in the bank statement*); and the sum of Kshs. 6,281,625.95 (*which is the balance arrived at by my calculations*) is staggering Kshs. 620,000/-.

29. In my considered opinion, that amount of money cannot have been justifiably paid to the auctioneer, as his fees and costs.

30. As the plaintiff did not provide proof of the exact amount he paid out to the auctioneer, and because the sum of Kshs. 620,000/- was too high a sum to be paid to the auctioneer, I find that the plaintiff has failed to justify its failure to credit that sum to the defendant's account.

31. Nonetheless, it cannot be denied that the auctioneer was entitled to his reasonable fees, together with a reimbursement of his expenses such as for the advertisements in the newspapers.

32. Doing the best I can, in the absence of receipts to support the actual expenses, I find that the auctioneer's fees and costs should not exceed Kshs. 200,000/-.

33. In effect, the defendant was entitled to a further credit to his account; the said further credit ought to have been in the sum of Kshs. 420,000/-. Accordingly, the balance of Kshs. 6,901,625.95 is to be reduced by Kshs. 420,000/-. By my calculations, the balance due to the bank, as at 28th August 2003 should have been Kshs. 6,481,625/95.

34. Meanwhile, on the issue of interest, the plaintiff has claimed for it at the rate of 29% per annum.

35. The plaintiff did not lead any evidence to prove that it was entitled to interest at the rate of 29%. In

my considered view, the fact that the plaintiff's Demand Notice dated 23rd February 2000 cited the interest rate, is not a reason either in law or in fact, to justify the claim.

36. A plaintiff may prove that he was entitled to interest at a particular rate by adducing evidence, for instance, to show that it was a term of the contract between the parties or that it was the rate generally applicable at the material time.

37. As the plaintiff did not prove that it was entitled to the interest rate claimed, the said claim for interest at 29% is rejected.

38. In the exercise of the discretion bestowed upon me by Section 27 of the Civil Procedure Act, I award interest at 14% per annum.

39. Accordingly, I now enter judgement in favour of the plaintiff for Kshs. 6,481,625/95, plus interest at 14% per annum, with effect from 28th August 2003 until payment in full. The plaintiff is also awarded the costs of the suit.

DATED, SIGNED and DELIVERED at NAIROBI this 13th day of June 2016.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Ngugi for the Plaintiff

Kiptoo for the Defendant

Collins Odhiambo – Court clerk.