



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL**

**CIVIL CASE NO 331 OF 2004**

**CO-OPERATIVE BANK OF KENYA LIMITED..... PLAINTIFF**

**VERSUS**

**PETER KIMANI.....DEFENDANT**

**JUDGEMENT**

**INTRODUCTION**

1. In its Complaint dated 21<sup>st</sup> June 2004 and filed on 22<sup>nd</sup> June 2004, the Plaintiff sought entry of judgment against the Defendant for:-
  - a. **The sum of Kshs 7,341,884.55**
  - b. **Interest on (a) aboveherein (sic) at commercial bank rates from 8-4-2002 until payment in full.**
  - c. **Costs of the suit.**
  - d. **Interest on (c) aboveherein (sic).**
  - e. **Any other relief that the court may deem fit to grant.**
2. The Plaintiff filed its Statement of Agreed issues dated 16<sup>th</sup> February 2006 on even date. Its List of Documents was dated 31<sup>st</sup> January 2006 and filed on 16<sup>th</sup> February 2006. It also filed its Further List of Documents and Witness Statement of George Ratemo Mateo on 5<sup>th</sup> December 2012.
3. The Defendant filed his Defence dated 25<sup>th</sup> January 2005 on 26<sup>th</sup> January 2005 and denied the allegations set out in the Complaint in their entirety. His Witness Statement was dated 2<sup>nd</sup> October 2012 and filed on 10<sup>th</sup> October 2012 while his List of Documents was dated 9<sup>th</sup> October 2012 and filed on 10<sup>th</sup> October 2012.
4. Neither the Defendant nor his advocates attended court on 3<sup>rd</sup> March 2014 despite having been served with a Hearing Notice as was evidenced by the Affidavit of Service that was filed on 27<sup>th</sup> February 2014. As a result, the hearing proceeded in their absence whereupon the court gave directions regarding the filing of written submissions.
5. When the matter came up in court on 22<sup>nd</sup> September 2014, the Defendant had not filed its written submissions. In fact, his advocates sought to have their application to cease acting served by way of substituted service. However, court rejected the said advocates request as it noted that their Notice of Motion application dated 5<sup>th</sup> December 2013 and filed on 9<sup>th</sup> December 2013 had never been prosecuted.
6. Notably the Defendant had been indolent in defending this very old case. The court therefore

indicated that it would proceed to write its judgment based on the documentation that was presented before it as it had a duty to determine matters expeditiously

### THE PLAINTIFF'S CASE

7. The Plaintiff's case was that sometime in 1996, it loaned to the Defendant a sum of Kshs 800,000/- that was repayable in twelve (12) months at an interest rate of twenty eight per cent (28%), comprising of a six per cent (6%) mark up on the bank's base lending rate of twenty two percent (22%).
8. The loan was secured by a legal charge over the Defendant's property LR Dagoretti/Ruthimitu/733 (hereafter referred to as "the subject property"). It stated that the Defendant had failed to repay the loan herein upon demand by the Plaintiff, necessitating its filing the instant suit.

### THE DEFENDANT'S CASE

9. The Defendant contended that his right of redemption had been extinguished once the Plaintiff exercised its statutory power of sale of the charged property and was thus fully discharged from his obligation in respect of the outstanding loan amount.
10. It was his contention that the amount realised from the sale of the property fully liquidated the loan amount outstanding at that time. He further stated that it was the Plaintiff's own omission that it failed to realise the charged property at the time of the default of repayment of the outstanding loan by the Defendant, and that in any event, no notice of demand had been issued by the Plaintiff in demand of the repayment of the outstanding loan of Kshs 7,731,884.55.

### LEGAL ANALYSIS

11. The Plaintiff identified the following as issues for determination by the court:-

- a. **Whether or not the claim was time barred under the Limitations of Actions Act;**
- b. **Whether or not the Plaintiff loaned the Defendant, at the Defendant's request, the sum of Kshs 800,000/=;**
- c. **Whether or not the Plaintiff could institute any suit against the Defendant in respect of the suit property and/or any outstanding loan amount;**
- d. **Whether or not the loan facility as at 8<sup>th</sup> April 2002 stood at Kshs 7,341,884.55;**
- e. **Whether or not the Defendant and Techmore Engineering Limited separately maintained an account with the Plaintiff and further where a signing instruction of the account of Techmore Engineering Services Limited was deposited with the Plaintiff;**
- f. **Whether the Plaintiff had established a case with a probability of success.**

12. In view of the fact that the Defendant did not tender his Witness Statement and his documents under oath or adduce any oral evidence, the Plaintiff's evidence can only be deemed to have uncontroverted or not rebutted.

13. As regards issue (a) hereinabove, the court noted that the Defendant had filed a Chamber Summons application dated 12<sup>th</sup> April 2010 seeking the dismissal and striking out of the Plaintiff herein on the ground that the Plaintiff's claim was time barred. However, the said application was dismissed by Koome J (as she then was) on 24<sup>th</sup> September 2010. In view of the fact that this issue, a ruling had been made on the court agreed with the Plaintiff's submissions that the suit was properly before the court as that issue was *res judicata*.

14. In respect to issue No (b) above, the court found and held that the Defendant had been advanced a sum of Kshs 800,000/- as had been averred by the Plaintiff as the ruling of the aforesaid learned judge had indicated that the Defendant had admitted the debt, which finding had never set aside, varied and/or appealed against.

15. Indeed perusal of the aforementioned documents and the evidence by George Ratemo Macheo who was the Plaintiff's Credit Recovery Officer, it was manifestly evident that the Defendant

indeed had borrowed Kshs 800,000/- from the Plaintiff and the same was secured by a charge over the subject property. In fact in her ruling of 24th September 2004, the aforesaid learned judge observed that the Defendant had acknowledged the debt and that the cause of action arose on the date of his acknowledgement of the debt.

16. In respect to issue No (d) hereinabove, the court found and held that in the absence of any evidence to the contrary, the loan facility stood at Kshs 7,288,697.55 as at 8<sup>th</sup> April 2002 as was evidenced in the statements on pp 30 and 31 of the Plaintiff's Bundle of Documents filed on 16<sup>th</sup> February 2006. The entries in the statements that were made on 31<sup>st</sup> December 2002 and 8<sup>th</sup> April 2002 were Kshs 5,435,914.55 and Kshs 1,852,783/= respectively giving a total sum of Kshs 7,288,697.55 shown hereinabove. The figure was therefore not Kshs 7,341,884.55 as had been stated by George Ratemo Macheo in his evidence-in-chief.
17. There was no evidence that was placed before the court to show that the Plaintiff realised the security. What was clear, however, was that the Plaintiff was relying on Section 74 (3) of the Registered Land Act Cap 300 (Laws of Kenya) (now repealed) in which it was provided that in case of default of payment of the principal sum:-

**“The chargee shall be entitled to sue for the money secured by the charge.”**

18. It referred the court to the case of **Aberdare Investments Ltd v Housing Finance Company of Kenya & Another [1999] 2 EA 1** in which it was held as follows:-

**“...the choice of the remedy is in the hands of the chargee, and the court cannot direct the chargee to choose a remedy which is more convenient to the chargor.”**

19. It also placed reliance on the case of **Faud Mahmoud Mohamed vs Commercial Bank of Kenya Limited [2007] eKLR** in which it was stated as follows:-

**“..if a chargee exercises his statutory power of sale and does not recover the outstanding amount in full it can always sue under the covenant to repay and vice versa.”**

20. It is trite law that one who asserts a fact must prove it as has been stipulated in Section 108 of the Evidence Act Cap 80 (Laws of Kenya). The Defendant did not adduce any evidence to support his contention that the Plaintiff sold the subject property by public auction. It was not sufficient for the Defendant to have alleged this fact. As the Plaintiff did not address this issue at all in the evidence it submitted to court, the court was unable to make a conclusive determination in respect of this issue.
21. However, in answer to issue No (c) hereinabove, the court found and held that in the absence of any evidence to the contrary, the only conclusion that it could come to, was that the Plaintiff could sue the Defendant for the outstanding monies as its evidence was not controverted and/or rebutted by the Defendant.
22. The court was also unable to arrive at a just conclusion in respect of issue No (e) as no evidence was adduced in respect of the same. Issue No (f) regarding the question of whether or not the Plaintiff had established a case with probability of success was superfluous as all the Plaintiff was required to do was to prove its case to the required standard. The court did not therefore make a determination on the said issue.
23. Accordingly, having carefully considered the evidence, written submissions and case law herein, the court found that the Plaintiff had proved its case. However, as it did not lead evidence or lay a basis why it ought to have been awarded interest on commercial basis and why it ought to be awarded the same from 8<sup>th</sup> April 2002, the court found that the interest applicable herein would be that at court rates. Indeed, there were no submissions that showed how much was the commercial rate that was obtaining at all material times.
24. As an obiter, parties must ensure that their witness statements that stand as examination – in – chief must be detailed, cogent and concise which the court found the Plaintiff's witness statement was not. It did not address the issue of interest at commercial rates or at all.

## **DISPOSITION**

25. For the foregoing reasons, judgment is hereby entered in favour of the Plaintiff against the Defendant in the sum of Kshs 7,288,697.55 together with interest at court rates from the date of filing suit until payment in full.

26. It is so ordered.

**DATED and DELIVERED at NAIROBI this 19TH day of DECEMBER, 2014**

**J. KAMAU**

**JUDGE**