



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Commercial Courts)**

**Civil Case 388 of 2003**

**GEORGE MAINA KING'ORI.....PLAINTIFF**

**-VERSUS-**

**THE CO-OPERATIVE BANK OF KENYA LTD.....DEFENDANT**

**JUDGMENT**

1. The brief facts of this case are as per the Further Re-amended Plaintiff dated **19<sup>th</sup> February 2007** and filed in Court on the same day. The facts are that, Co-operative Merchants Bank had loaned the Plaintiff a total of **Kshs. 500,000/=**. The assets and liabilities of Co-operative Merchants Bank limited have since been taken over by the defendant pursuant to **Section 9** of the **Banking Act Chapter 488** and pursuant to the approval granted by the Minister for Finance vide Gazette **No. 6404 of 2002**.
2. The Plaintiff avers that in or around **May 1998**, he applied for a short-term loan of **Kshs. 300,000/=** from the Co-operative Bank where upon the Defendant agreed and approved the same on **13<sup>th</sup> May 1998**. Around the same time, he further applied for an additional short-term loan of **Kshs. 200,000/=** from the Co-operative Merchant Bank Limited which was approved on **18<sup>th</sup> June 1998**. The two loans were consolidated to make the total of **Kshs. 500,000/=**. The Plaintiff accepted the terms of the consolidated loans herein which was payable in six (6) monthly instalments of **Kshs. 91,029/=** comprising both the principal and interest (at a rate of 31% per annum).
3. The Plaintiff further avers that the repayment was to start a month after draw down and that the loan in question was secured by his endorsement over his funds amounting to **Kshs. 3,200,000/=** held in a Treasury bill in favour of the Bank. He states that the purpose of the loan herein was to service business orders, a fact that was well within Co-operative Merchant Bank's knowledge. The Plaintiff avers that the Co-operative Merchant Bank recalled the loan on **28<sup>th</sup> July 1998** without notice and for no good/valid reason. It was a clear term of the loan offer that the facility could only be recalled on notice in writing. The Plaintiff thus states that Co-operative Merchant Bank was in total breach of their agreement and that he suffered damages and loss as a result of the breach. In this suit the Plaintiff seeks the following reliefs:-
  - a) A declaration that the Co-operative Merchant Bank Ltd was in breach and the Plaintiff suffered loss and damage.
  - b) A declaration that the defendant having taken over the assets and liabilities of Co-operative Merchant Bank Ltd is liable to compensate the Plaintiff herein for his loss and damage.
  - c) General damages

- d) Special Damages Kshs. 3,499,499.90
- e) Costs plus interest at court rates
- f) Any other further relief deemed fit and just to grant by the Honourable Court.

4. In reply to the Plaintiff's Further Re-amended Plaintiff, the Defendant filed a Further Amended Defence dated **28<sup>th</sup> February 2007**. The Defendant averred that they had taken over the assets and liabilities of Co-operative Merchant Bank vide Gazette Notice **Number 6404 of 2002**. The defendant further averred that the plaintiff had a working capital account number **01201/100990/00** with Co-operative Merchant Bank Ltd, which account was opened in July 2007. As at **13<sup>th</sup> May 1999**, the Plaintiff's account was overdrawn to the tune of **Kshs. 189, 155.55/=**. By an agreement entered into between the Plaintiff and Co-operative Merchant Bank Ltd, the overdrawn sum was converted to a short term loan and additional sums of money advanced to the plaintiff bringing the total loan advanced to him as at **13<sup>th</sup> May 1998** to **Kshs. 300,000/=**.

5. The Defendant further averred that as at **5<sup>th</sup> June 1998**, the Plaintiff's account had been overdrawn over the authorized loan limit of **Kshs. 300,000/=** by the sum of **Kshs. 34,155.55/=**. They entered into an agreement whereby the overdrawn sum was converted to a short term loan and additional funds advanced to the Plaintiff bringing the total further loan to **Kshs. 200,000/=**. The two loans of **Kshs. 300,000/=** and **Kshs. 200,000/=** were consolidated into one loan of **Kshs. 500,000/=**. The Defendant further averred that the Plaintiff was in default and as such, the Defendant was legally entitled to terminate the loan.

6. The hearing commenced on **8<sup>th</sup> December 2011** with the Plaintiff providing his sole testimony. The Plaintiff set out his relationship with the Defendant and testified that he opened an account with the Defendant on or about **2<sup>nd</sup> July 1997**. He reiterated the facts at paragraph 5 of the Re-amended Plaintiff to the effect that he had applied for short-term loans with the defendant. In support of his claim, he produced two letters in court dated **13<sup>th</sup> May 1998** and **18<sup>th</sup> June 1998** as **exhibit No. 1** and **exhibit No. 2** respectively.

7. It was testified by the Plaintiff that the loan was to enable him to supply gunny bags to M/S Winter Merchants who had given him an order of **11,000/=** pieces at **Kshs. 300,000/=** each totaling to **Kshs. 3,300,000/=**. The Plaintiff produced a letter dated **4<sup>th</sup> May 1998** as **exhibit No. 3**. He stated that the purchase price was **Kshs. 1,100,000** and his profit was to be **Kshs. 2,200,000/=**. He paid a non-refundable deposit of **Kshs. 700,000/=** and the balance of **Kshs. 400,000/=** was to be paid on delivery of the items. A receipt dated **9<sup>th</sup> May 1998** was produced as **exhibit No. 4**. The Plaintiff averred that he did not supply the bags to M/S Winter Merchants due to financial shortfall and the order was cancelled as he could not supply in time. The letter cancelling the said order and dated **21<sup>st</sup> August 1998** was produced in Court as **exhibit No. 5**.

8. It was the Plaintiff's testimony that the first loan of Kshs. 300,000/= was availed to him. On **19<sup>th</sup> June 1998** he was given Kshs. 100,000/= and on **15<sup>th</sup> July** Kshs. 200,000/= hence a total of Kshs. 300,000/=. He averred that the second loan of Kshs. 200,000 was consolidated with the first one making a total of Kshs. 500,000/=. However, the Plaintiff testified that, the second loan was not disbursed to him and that he had given his treasury bills worth **Kshs. 3,200,000/=** as security in favor of the Defendant. The Plaintiff states that the amount of the treasury bills was indicated in the approval letter from the bank.

9. It is the Plaintiff's contention that the Bank did not recall the loan facility by notice according to the agreement. He averred that on **28<sup>th</sup> July 1998**, the bank recalled the loan, liquidated his treasury bills and recovered the sum of Kshs. 300,000/= they had advanced him and a further Kshs. 600,000/= making a total of Kshs. 900,000/= (A statement produced as exhibit No. 6). He went to the bank to complain about the same sometime at the end of July 1998. The Plaintiff states that soon thereafter, there was a bomb blast in the bank premises and the bank was closed. He did not receive any communication from the bank for over two months during which period he could not access his accounts. He was able to access the

account on or about October 1998.

10. The Plaintiff testified that he had tendered for the treasury bills in July 1997 for 90 days renewable and that he was getting about Kshs. 200,000/= per 90 days from the treasury bills. The interest was to be credited into his account after every 90 days. He further testified that by the time the loan was recalled he was not in default and that he had not concluded the draw down. He stated that he was dealing with M/S Winter Merchants in his registered business name of Penkat Industries, registration number 178768. The Certificate of Registration was produced as exhibit No. 7.

11. The Plaintiff contended that due to the foregoing he lost business expectations of Kshs. 2,200,000/= and interests on treasury bills amounting to Kshs. 199, 499.90/=. He concluded his testimony by reiterating his claim in the re-amended Plaintiff.

12. On cross-examination, the Plaintiff confirmed that the loan was for a total of Kshs. 500,000/= and that the same was to enable him purchase gunny bags. The Plaintiff testified that he had both savings and current account with the bank. On 28<sup>th</sup> May, 1998 there was an entry of withdrawal of Kshs. 50,000/= and therefore on 13<sup>th</sup>, 18<sup>th</sup> and 28<sup>th</sup> of May 1998 he had withdrawn a total of Kshs. 180,000/=. This was after he had signed the loan agreement. He testified that the second loan offer was given to him on 19<sup>th</sup> June 1998. On that very day he withdrew Kshs. 100,000/=: followed by Kshs. 85,000/=. On 29<sup>th</sup> June 1998 and on 15<sup>th</sup> July 1998 he withdrew Kshs. 200,000/=. The Plaintiff contended that his withdrawals of Kshs. 180,000/= and Kshs. 350,000/= did not show that he had used the loan. He stated that the withdrawals were not entirely on the loan as he had money in the account. He also indicated that after the month of July there were credit and debit entries in the account.

13. The Plaintiff further testified that when the two loans were consolidated the terms for repayment changed and draw down started after receiving the balance of Kshs. 200,000/=. However, the defendant recovered the money from the treasury bills. The Plaintiff stated that he had not made any payments by the time the defendant recovered the money from his treasury bills. He averred that he had tried to mitigate his loss by seeking funds from other banks but he failed because he did not have security as his security was with the defendant.

14. On re-examination, the plaintiff confirmed that in both letters dated 13<sup>th</sup> May 1998 and 18<sup>th</sup> June 1998 there were hand written insertions but the same were not countersigned. The Plaintiff stated that in the letter dated 18<sup>th</sup> June 1998, there was a requirement that a demand had to be made which the bank did not do before liquidation was done. The said letter also had a draw down clause in which the two loans were consolidated and repayment was to be in six monthly installments commencing one month after draw down. The Plaintiff reiterated that he did not get the loan of Kshs. 200,000/= and added that the loans were direct loan facilities and not overdrafts. He also stated that the total amount he withdrew of over Kshs. 500,000/= were normal withdrawals and that the only component of that which was a loan was Kshs. 300,000/=. The Plaintiff further stated that he used to get proceeds from his treasury bills of Kshs. 200,000/= every three (3) months and therefore money would come into his account.

15. The defendant had one witness, Rita Kiege, described as the manager at the head office of Co-operative Bank of Kenya. The witness confirmed that she was familiar with the facility advanced to the plaintiff. She referred to the Plaintiff's exhibit No. 1 as the offer that was made to the Plaintiff and stated that the only issue was with the hand written comments and statements. She confirmed that exhibit No. 6 was a correct statement of the Bank and stated that on the basis of the statement the account of the plaintiff was in debt. The defendant testified that the Plaintiff had already overdrawn the account by Kshs. 109,000/= even before the facility was granted. She stated that on 2<sup>nd</sup> May 1998, the Plaintiff had withdrawn kshs. 100,000/= while on 8<sup>th</sup> May 1998 he withdrew kshs. 20,000/=. On 13<sup>th</sup> May 1998 the facility was granted to the Plaintiff and on that day he withdrew Kshs. 80,000/=. The Plaintiff made further withdrawals as follows: 18<sup>th</sup> May 1998 Kshs. 50,000/=: 28<sup>th</sup> May 1998 Kshs. 50,000/=: 5<sup>th</sup> June 1998 Kshs. 45,000/=: 19<sup>th</sup> June 1998 Kshs. 100,000/=: 29<sup>th</sup> June 1998 Kshs. 55,000/=: and on 15<sup>th</sup> July 1998 Kshs. 500,000/=:

16. Ms. Rita Kiege further testified that the 1<sup>st</sup> day of draw down was on 19<sup>th</sup> June 1998 and that the Plaintiff should have started repaying the loan on 18<sup>th</sup> July 1998, one month after draw down. She testified that there was no indication of payment on 19<sup>th</sup> July 1998. The bank went ahead and recovered the loan on 28<sup>th</sup> July 1998 through the treasury bills. The proceeds of the Treasury bills were credited to the defendants account.

17. On cross-examination, the witness confirmed that the bank was aware that the loan advanced was meant to facilitate the Plaintiff to do business. She also confirmed that the original documents as relates to the transaction of advancing the loan were destroyed in the 1998 bomb blast at Ufundi House. She averred that the bank did not have a copy of the demand recalling the facility as it was one of the documents destroyed in the blast. Ms. Rita further confirmed that the proceeds of the treasury bills were credited to the plaintiff's account. She testified that on 28<sup>th</sup> July 1998 a sum of Kshs. 900,000/= was recovered by the Bank. However, on re-examination she stated that she did not know in what respect the Kshs. 900,000/= was recovered.

18. The plaintiff's prayers among others is for a declaration that the Co-operative Merchant Bank Ltd was in breach of the loan agreement and that the Plaintiff suffered loss and damage and for special damages to the tune of Kshs. 3,499,499/=. The alleged breach is that the defendant did not recall the loan facility by notice according to the agreement. The plaintiff contends that the defendant was to issue a written demand to the Plaintiff as was required in the letters dated 13<sup>th</sup> May 1998 and 18<sup>th</sup> June 1998.

19. The relevant part of the letters that required a written demand was a hand written insertion which the defendant claims was not there in the original letter. Unfortunately the defendant did not adduce copies of the said original letters for the reason that the documents got destroyed during the bomb blast that occurred in August 1998. In that case, this court has no way to ascertain the authenticity of the said handwritten insertions.

20. The above notwithstanding, it is clear from the said letters that the loan facility was to be recalled on demand by notice. Therefore whether the same was to be in writing or otherwise should not be an issue. In her testimony, DW 1 alluded that they recalled the loan by way of notice in writing when she averred that the defendant did not have a copy of the demand recalling the facility as it was one of the documents destroyed in the blast. That being the case, our next issue is whether or not the defendant notified the Plaintiff before recalling the loan facility.

21. The Plaintiff maintains that the loan facility was recalled without notice. On its part, the defendant simply stated that they did not have a copy of the demand recalling the facility as it was one of the documents destroyed in the blast. In this case, it is my considered view that it was incumbent upon the defendant to adduce affidavit or oral evidence demonstrating that they indeed sent a notice to the plaintiff before recalling the loan facility. However, they did not do so and in that case I am not satisfied that they have sufficiently rebutted the plaintiff's claim. Having found so, I do hold that the defendant was in breach of the terms of the loan facility resulting to the plaintiff's loss.

22. The Plaintiff also stated that the 2<sup>nd</sup> part of the loan of kshs. 200,000/= was not disbursed to him. This was not refuted by the defendant. It seems that the defendant was suggesting that the said amount was not disbursed to the Plaintiff as his account was allegedly overdrawn. However, the letters of offer granting the plaintiff the loan does not mention anything to do with overdrafts. Therefore the presumption is that the loan facility was separate from the overdrafts.

23. As regards the special damages to the tune of Kshs. 3,499,499/=: it is trite law that special damages must be proven. The Plaintiff has produced documents to the effect that he was awarded the contract of supplying gunny bags to M/S Winter Merchants who had given him an order of **11,000/=** pieces at **Kshs. 300,000/=** each totaling to **Kshs. 3,300,000/=**. The purchase price was at Kshs. 1, 100,000/= of which the plaintiff had already made a deposit of kshs. 700,000/=.

24. The defendant was aware and has not disputed that the loan facility was to facilitate the plaintiff to do

business. Therefore, by recalling the loan without notice to the plaintiff and before granting the plaintiff the 2<sup>nd</sup> part of the loan of Kshs. 200,000/= the defendant was in breach. As a result, the Plaintiff suffered loss and damage as the contract for supplying gunny bags awarded to him was cancelled. In that case, it can be concluded that the plaintiff is deserving of the lost business expectations to the tune of Kshs. 2,200,000/=.

25. In addition, it has been established that the plaintiff had a 90-day T-Bill. It therefore follows that the same was to earn interest after maturity. The interest of Kshs. 200,000/= earned on the T-Bill was not disputed by the Bank.

26. In view of the foregoing, I enter judgment in favour of the plaintiff against the defendant as follows:-

- a) A declaration that the Co-operative Merchant Bank Ltd was in breach and the Plaintiff suffered loss and damage.**
- b) A declaration that the defendant having taken over the assets and liabilities of Co-operative Merchant Bank Ltd is liable to compensate the Plaintiff herein for his loss and damage.**
- c) General damages for lost expectations of Kshs. 2,200,000/= and Kshs. 199,499.90/= being interest earned on T-bills hence a total of Kshs. 2,399,499.90/=.**
- d) Interest on the above at Court rates from the date of filing of this suit.**
- e) Costs of this suit and interest thereon.**

**DATED, READ AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY 2013**

**E.K.O OGOLA**  
**JUDGE**

**Present**

Kiamba h/b for Ngala for plaintiff

N/A for Defendant

Teresia – court clerk