



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 726 OF 2002

NATIONAL BANK OF KENYAPLAINTIFF

VERSUS

ALFAYO ONYANGO RIAKO..... DEFENDANT

JUDGMENT

1. This suit was heard on 8th March 2012. The defendant did not appear at the trial. The hearing date was taken by the plaintiff. A hearing notice was served on the defendant's lawyers of record on 17th January 2012 as per the affidavit of service of Simon Kamanguya sworn on 10th February 2012.
2. In the amended plaint dated 15th February 2008, the plaintiff claims Kshs 6,292,518.25 together with costs and interest at 25% p.a from 31st December 1999. The plaintiff's case is that at the request and instance of the defendant, it provided an overdraft of Kshs 2,500,000. The overdraft was secured by a legal charge over the defendant's property known as East Karachuonyo/Karabondi/560. The amount was to be repaid on or before 31st January 1999. The plaintiff defaulted. As at 30th December 1999, the sums due were Kshs 6,292,518.25 which continues to accrue interest at 25% p.a.
3. Initially, the defendant failed to file a defence within the prescribed time. On 23rd July 2004, the ex parte judgment was set aside and the defendant granted leave to defend. A statement of defence was filed on 9th August 2004. The defendant denies being indebted to the plaintiff in the sums claimed or at all. At paragraph 5 of the defence, the defendant challenged the interest levied by the plaintiff as being irregular and illegal. The defendant also took up cudgels on other non-contractual charges levied to his account and blamed the plaintiff for negligence. The defendant's case was that the plaintiff was negligent or imprudent by failing to sell the charged property to mitigate its losses. The defendant also denied receiving any pre-suit demand. By a chamber summons application dated 26th November 2010, the defendant had sought to strike out the plaintiff's suit under the provisions of section 74 (1) and (3) of the Registered Land Act. By a considered ruling made on 11th November 2011, that application was dismissed with costs. I shall then not revisit that element of defence in this judgment, the court having found that those provisions did not offer any defence to this suit or affect jurisdiction of the court.
4. I have taken into consideration all of those elements of the defence notwithstanding the failure of the defendant to present evidence at the trial. By a letter dated 5th September 1997 the defendant requested for an overdraft. On 7th January 1998, the defendant was granted an overdraft facility by the plaintiff for Kshs 2,500,000. The accounts relations manager John Kariuki testified that the defendant accepted the facility on 9th January 1998. From the letter of offer the amount was to be repaid on or before 31st

January 1999 and was to attract interest at 32% p.a. On the latter date, the sum due was Kshs 4,940,863.85. I am thus satisfied that the defendant was granted the overdraft in the principal sum and defaulted in repayment. The defence put forward of payment is thus a mirage. No evidence was tendered to controvert that of the plaintiff.

5. By a charge dated 31st July 1997 the defendant charged his property known as East Karachuonyo/Karabondi/560 to the plaintiff to secure lending and not to exceed Kshs 4,250,000. When default occurred, the plaintiff issued a statutory notice to realize the security. The plaintiff's second witness J.G. Muturi is an auctioneer trading in the name and style of Muga Auctioneers. He testified that he was instructed to sell the property on Friday 24th March 2000. He issued the requisite 45 days redemption notice. But he could not get suitable buyers at the auction. The bids submitted were too low as per his letter to the bank dated 27th March 2000. He testified that the property is in a rural area. Although it is registered in the name of the defendant, he was holding it in trust for his immediate family and who were in possession. That is why the bank has been unable to sell the property. I find it evasive that the defendant would then blame the bank for negligence or indolence in not selling the charged property. I think that defence is a red herring.

6. Parties are bound by the terms of commercial contracts they enter into. They must keep their bargain. See *Morris & Company Vs Kenya Commercial Bank* [2003] 2 E.A 605. It is also not the true province of the court to rewrite contracts for the parties. See *National Bank of Kenya Limited Vs Pipeplastic Samkolit and another* [2001] KLR 112.

7. Although the defendant had contested the rate of interest charged and other debits, he did not testify or tender any evidence to rebut the provisions of the letter of offer or the charge. And there is no evidence of payment of the principal sums either. From the statements of account (document number 26 in the plaintiffs bundle of documents) I am satisfied that as at 31st December 1999, the defendant owed the plaintiff Kshs 6,292,518.25.

8. In the result, I shall enter final judgment in favour of the plaintiff against the defendant in the sum of Kshs 6,292,518.25. Interest shall apply on that sum at court rates from 13th June 2002 (the date of the suit). I also award the plaintiff costs of this suit.

It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of April 2012.

G.K. KIMONDO

JUDGE

Judgment read in open court in the presence of

Mr. Sang for Mr. Ngugi for the Plaintiff.

No appearance for the Defendant.