



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILLIMANI LAW COURTS

Civil Appeal 532 of 2003

NATIONAL BANK OF KENYA LIMITED..... APPELLANT

VERSUS

AMIN H GWADERI. RESPONDENT

***(From the judgment of Hon. Mrs. Wachira Principal Magistrate in Milimani Commercial Courts
CMCC No. EJ 905 OF 1998)***

J U D G M E N T

In the original case at the lower court, the Respondent herein had been issued with the Appellant Bank's credit card on 29th September, 1996. The Respondent used the card variously until December, 1997 when the Appellant stopped the usage thereof. By then the outstanding sum due in favour of the Appellant was Ksh.276,399/-. With accruing bank interest as had been agreed between the parties herein, the sum above had grown to a total of Ksh.480,484/35 by October, 1998.

On 4th November, 1998 by a plaint dated 29th October, 1998, the Appellant claimed the above sum with the agreed interest. It, in February, 1999, obtained an interlocutory judgment and proceeded to execution by proclaiming on the goods of the Respondent. This triggered some negotiations between the Appellant and the Respondent which ended in an agreement that the execution should be called off. That was done.

The exact agreement reached between the two parties is what became the dispute. The Appellant stated that it agreed to call off the execution process on condition that Respondent would deposit a total sum of Ksh.250,000/- which was secured by six post-dated cheques of Ksh.25,000/- plus an immediate cash payment of Ksh.100,000/-. The facts on record shows that all the six but one cheque was honoured.

On the other hand, the Respondents case was that an agreement was reached during the negotiations that if he paid the sum of Ksh.250,000/- as above stated, his whole contractual obligation would have been satisfied and the case against him would be terminated. He further stated that he carried out his full obligation except for one cheque of Ksh.25,000/- which was dishonoured without the same being brought to his notice. That he was always ready to clear the outstanding sum of Ksh.25,000/- had the Appellants

called for payment when the cheque bounced.

The facts as they happened, however, are that the Appellant, thereafter insisted on being paid up, not only the Ksh.25,000/- in respect of the bouncing cheque but also a sum over Ksh.1,633,248/- which was the alleged balance still being reflected in the Respondent's Bank Account with the Appellant. The Respondent refused to pay the alleged sum and successfully applied for and succeeded in setting aside the ex parte judgment which had earlier been entered against him.

When the suit went into a full hearing inter parties and the parties testified, the trial court thereafter considered the evidence before it. It had opportunity to observe the demeanor of the witnesses. It perused and noted the nature of the pleadings before the court, noting further that the parties had amended their pleadings after the ex parte judgment had been set aside in order to each bring out the real and proper issues which the court should consider.

In her short judgment, the honourable trial magistrate noted that at the time of negotiations between the two pairs, the Appellant, who was a bank, had a judgment in its hands. It accordingly enabled it to stand in a position of strength in negotiating with the Respondent who could effectively be seeking for mercy. The honorable magistrate accordingly saw no reason why the Bank could have easily let-go its advantageous position of insisting on a higher figure of the sum due from the Respondent before calling off the process of execution. The court accordingly reached the conclusion that for whatever reasons, the Bank decided to allow the Respondent to undertake to pay the sum of Ksh.250,000/-, it could not have done so without securing the rest of the balance due in full and final settlement. Furthermore, there was no reason why the bank could not have recalculated the whole contractual sum due and requested the Respondent to undertake to repay under some agreed terms.

In addition, the trial court noted that in the amended plaintiff, the bank did not as much as concede or admit the sum of Ksh.225,000/- which the Respondent had undeniably paid to it. It was necessary to do so, the trial court noted, so as to reflect the correct position of accounts which would then support the final large figure the Appellant was still claiming from the Respondent. Failure to indicate the amount received, distorted the whole bank account, the court believed. It also led to failure to plead specifics required in cases of special claims. She went on to conclude that the Plaintiff/appellant in the process, failed to prove its case on the balance of probabilities.

I have perused the grounds of appeal raised by the Appellant. I observe that they all concern the burden of proof and the facts relating to the sum of Ksh.225,000/- paid by Respondent but not reflected in the amended plaintiff.

I have carefully considered the grounds of appeal together over and against the evidence by the parties as recorded. I have come to the conclusion, as did the trial court, that the Appellant/Plaintiff's pleadings were muddled and were incorrect. In failing to reflect the sum of Ksh.225,000/- paid by the Respondent the accounts were rendered completely unreliable. The evidence adduced by the Plaintiff/Appellant did not improve the situation. Several bank accounts were indicated as belonging to the Respondent. They were not carefully and clearly explained in evidence. The result was that it appeared that several different figures could be taken as the outstanding debt liable to be paid by the Respondent. In the same way applicant rates of interest were adduced in evidence. Even the Appellant's witnesses were not sure which interest rate applied at which time.

It was upon the Appellant/Plaintiff to prove its claims on the balance of probabilities. It failed to persuade the lower court that it had done so. I am myself not convinced and persuaded that a case was proved on the required civil standard. I have not found evidence which the honourable trial magistrate failed to take into account and which had she considered properly, would have enabled her to come to a different conclusion. More so because she saw and tested the demeanour of the witnesses. I accordingly, find no reason to come to a different finding. Indeed I have already stated that the Appellant's evidence, muddled as it stands, was not sufficient to prove the claim on the balance of probabilities.

In the circumstances this appeal must fail. It is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 26th day of September, 2012.

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D A ONYANCHA
JUDGE