REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1483 of 2000

VELEO (K) LIMITED ……. PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LIMITED ……..…. DEFENDANT

J U D G E M E N T

1. The Plaint herein was filed as long ago as 22 August, 2000. The Plaintiff company detailed that at all material times it was the customer of the Defendant bank and maintained two current accounts with the Defendant's Industrial Area Group of Branches at Enterprise Road, Nairobi. It continued to detail that monies were advanced to the Plaintiff by the Defendant bank by mutual agreement in 1995 on the strength of two securities offered namely a Charge dated 18 April, 1995 together with a further Charge dated 30 May 1996 registered as against the Plaintiff's property being L. R. No 209/5352, Nairobi. The second security was a Debenture dated 26 April, 1995 securing a maximum sum of Shs. 4 million. The Plaintiff maintained that the Defendant in relation to the monies lent charged penal rates of interest and charges details of which had not been given to the Plaintiff. It maintained that on 12 April, 1999 it tendered a banker's cheque for Shs. 1,347,323/-which the Defendant refused to accept in settlement of the monies owing and refused to discharge the securities taken by it. The second head of the Plaintiff's claim was with regard to a cheque for US dollars 130,000 received by the Defendant on 4 September 1998 on behalf of the Plaintiff but never credited to either of the Plaintiff's accounts with the Defendant bank.

2. The Plaintiff's Plaint sought a number of prayers as follows:

“i) An Account be taken of the Plaintiff’s Account with the Defendant in Account No. 5005303 and the amount due and owing to the Defendant be determined at Shs.1,347.323/= or such other amount as the court may determine after taking full account.

ii) An Order for payment of the monies being Shs.1,347,323/= or such other amount as the court may determine due thereon to the Defendant at such legal and lawful rate of interest thereon and for such period as the court shall think fit or orders that the amount due and owing to the Defendant be set off against the Plaintiff’s claim.

iii) Specific Performance by the Defendant to absolutely discharge the Charge and Further Charge being registered as I.R. 14046/20 and I.R. 14046/21 of the Defendant being L.R. 209/5352 and also to execute Memoranda of Complete Satisfaction of the Charges being Companies Form 246.

iv) General and exemplary damages for the non-discharge of the Plaintiffs property and for breach of contract.

v) An injunction prohibiting the Defendant, its agents and/or servants to advertise, sell, auction or otherwise exercise the rights under the Charges and the Debentures.

vi) Refund of US$ 130,000 (or its equivalent in Kenya Shillings at the rate prevailing on the date of payment) together with interest at commercial rates being amount had and received by the Defendant for and on behalf of the Plaintiff and/or special damages as stated in paragraphs 11 and 12 above.

vii) Damages for conversion and/or misappropriation for the value of the cheque being US$ 130,000 and/or general damages for breach of contract and damages for loss of the use of the monies held by the Defendant.

viii) General damages and exemplary damages for non-payment of US$130,000.

ix) Costs and interest.

x) Any other relief which the court may deem fit".

3. The Defendant's responded to the Plaint by filing a Defence, Set off and Counterclaim dated 17 October, 2000. Simply put, the Defendant acknowledged that it had been offered the said banker's cheque in the amount of Shs. 1,347,323/-but was under no legal obligation to receive the same in view of the full debt of Shs. 7,701,466.44. The Defendant details that there was an agreement in writing between the Plaintiff and the Defendant dated 15 April, 1995 and a further agreement dated May 1995 in which the Defendant agreed to make continuous advances to the Plaintiff up to a maximum of Shs. 6 million. The Plaintiff had exceeded its borrowing of the agreed amount and allowed its overdraft to go into excess of the allowed limit on both their accounts with the Defendant bank. The Plaintiff's Set off and Counterclaim demanded the said sum of Shs. 7,701,466 .44 together with interest thereon. In its Reply to Defence, the Plaintiff denied that it had operated any overdraft with the Defendant bank and maintained that the Defendant made unilateral entries to, charged penal rates of interest and charges and unlawfully consolidated and mixed up the Plaintiff's 2 accounts. It categorically denied owing to the Plaintiff the said sum of Shs. 7,701,466.44.

4. Unfortunately for the Defendant, the Plaintiff filed an application by way of Chamber Summons dated 5 June, 2006 which application was based on the Defendant's failure to produce certain documents for inspection. On 6 December, 2006, my learned Brother Azangalala J. allowed the Application and the Court struck out the Defendant's statement of Defence, Set-off and Counterclaim as well is giving the Plaintiff liberty to set down its claim for assessment of damages. According to the typed copy of the proceedings before me, the Deputy Registrar recorded an order on twenty-sixth of February 2007 entering judgement for the Plaintiff in default of appearance and as prayed in the Plaint. He recorded that the award of costs should await judgement upon the remainder of the claim when the suit would be set down for formal proof. However and again according to the typed record of the proceedings, the Defendant filed a Notice of Motion dated 7 November, 2007 seeking orders that Azangalala J's Ruling of 6 December, 2006 should be reviewed, that the order that the Defendant's defence be struck off, be discharged and that the interlocutory judgement entered (by the Deputy Registrar) on 27 February, 2007 be set aside. The Defendant took the position that the interlocutory judgement entered was irregular, in that there was no provision in the Rules where power has been given to the Deputy Registrar to enter interlocutory judgement where the defence has been struck out. That application came for determination before my learned sister Lesiit J., who in a Ruling dated 31 October 2008 dismissed the prayer to review or set aside Azangalala J's Ruling of 6 December, 2006 but set aside the interlocutory judgement entered on 27 February, 2007.

5. Bearing in mind that at this stage, the court file had been through the hands of no less than 12 Judges, it arrived before the court of my learned brother Njagi J. on 19 July, 2010 when the matter came for Formal Proof. Mr. Kapoor, as the Managing Director of the Plaintiff Company, gave evidence on its behalf. He noted that the Plaintiff held two accounts in the initial name of the Plaintiff – **Valeo (K) Ltd** (which was subsequently changed to **Veleo (K) Ltd)** with the Defendant bank, both being current

accounts. He detailed that the Plaintiff borrowed money against account No. 5005303 in the amount of Shs. 6 million by way of overdraft. The witness then detailed as to the security given by the Plaintiff to secure the overdraft. Then it appears that on the 31 August, 1998, the Plaintiff issued a cheque for Shs. 12,620,000/- drawn on the Defendant bank's Enterprise Road Branch, Industrial Area, Nairobi. Payment was stopped twice on that cheque but on 4 September, 1998 in the Plaintiff received a credit of US dollars 130,000 on the account. The witness detailed that at the time of that US Dollar credit, the aforementioned cheque was still stopped. Mr. Kapoor said that he then issued a cash cheque for Shs. 7 million on 14 September, 1998 on the Plaintiff's account number numerals 5096651. That cheque was referred to drawer the next day. The witness further stated that on 16 September, 1998 the Plaintiff received a debit note informing it that the account had been debited with the sum of Shs. 12,620,000/- which was the amount of the cheque that had been stopped. The witness referred the court to the Plaintiff's bank statement which showed on 31 August, 1998 the debit of Shs. 12,600,000/- but also a credit in the same amount on the same day which meant that the Defendant did not pay that cheque. However, the witness drew the attention of the court that on 16 September, 1998, the Defendant bank debited the account with the same amount. Then on 1 October, 1998, the Defendant wrote to the witness stating that it would not honour further instructions because of an unauthorised overdraft.

6. At page 87 of the Plaintiff's bundle of documents the Plaintiff's advocates wrote to the Branch Manager of the Defendant's Enterprise Road Branch detailing that an unlawful and illegal debit had been made against the Plaintiff's account number 5096651 in the amount of Shs. 12,620,000/-. The letter also pointed out to the Defendant bank that it had refused to pay out a sum of US dollars 130,000 to the Plaintiff without any explanation. The letter noted that when the Plaintiff attempted to withdraw the money on 15 September, 1998 by cheque, the same was returned unpaid with the remarks "Refer to Drawer" when actually the proceeds for the foreign exchange were held by the Defendant bank. The witness thereafter summarised the correspondence that the Plaintiff exchanged with the Defendant bank and, later, correspondence as between the Plaintiff's advocates and the Defendant's advocates. The witness said that eventually the Plaintiff offered to pay the Defendant the sum of Shs. 1,347,329/-which he said was the indebtedness acknowledged by the Plaintiff as regards account No. 5005303.

7. Mr. Kapoor then stated that a banker’s cheque for the above sum was obtained and forwarded to the advocates acting for the Defendant bank. Such cheque was not accepted in full and final payment and was returned under cover of a letter dated 11 June, 1999 still claiming that there was an unauthorised overdraft. Later, the Plaintiff's advocates received a letter offering to waive interest and penalties which it had charged the Plaintiff on the so-called unauthorised overdraft. The witness noted that the Defendant bank had been demanding the sum of Shs. 7,701,446.45 as outstanding since April 1999 with respect to the 2 accounts of the Plaintiff. The witness continued by saying that the Plaintiff's 2 properties are still charged in favour of the Defendant bank. The Defendant never paid to the Plaintiff the said amount of US dollars 130,000. It accepted that money and was still holding it as from 4 September, 1998 to date. Finally, the witness stated that he would like his properties to be discharged together with a refund of the US dollars 130,000 at the current rate of exchange. He had also requested for interest thereon at commercial rates because the Defendant bank also charged commercial rates to the Plaintiff. Thereafter he produced the two bundles of documents as exhibits in the case.

8. PW2 Mr. Nelson Kipkoel Ruto, an Economist and Statistician working for the CBK as the Manger in charge of Micro-Economic Stationer Division, testified with regards to rates and interest. He gave evidence on the tabulation of claims of interest rates from the Defendant from 4th September, 1998 to 27th November, 2011. He further testified that the setting of interest rates is liberalized and can change according to market trends. In cross-examination, he testified that CBK lending rates are different from Commercial Banks’ lending rates.

9. In its submissions dated 7th March, 2012, the Plaintiff reiterated the contents of its Plaint. It is contended that the debiting of account No. 5096651 by the Defendant was without basis and unlawful and that the Plaintiff did not create the alleged overdraft or at all. The Defendant’s application of the remittance of USD 130,000 to off- set the alleged overdraft was wrongful and amounted to conversion and misappropriation of the Plaintiff’s money. The Plaintiff relied on the authorities of **Salim & Another v Kikava (1998) KLR 534, Air East Africa v Kenya Ports Authority, Nairobi H.C Misc App No.**

1312 of 2000, David Chege Mwangi v Mugambo wa Gachocho, Nairobi H.C.C.C No. 260 of 2008 (UR), Tate & Lyle Food & Distribution Ltd v Greater London Council & Another (1981) 2 All E.R 716 and **Hungerfords v Walker (1989) 171 CLR 125 F.C 89/008** in support of its claim.

10. As detailed above, the Defence, Counter Claim and Set-Off were struck out by the Honourable Court by way of an application dated 5th June, 2006 which was granted in favor of the Plaintiff by Azangalala, J on 6th December, 2006. Interlocutory judgment was entered on 26th February, 2007 against the Defendant and matter proceeded to formal proof. In its submissions dated 1st October, 2012, the Defendant denies the allegations leveled against it by the Plaintiff. It contended that the suit is not premised on the cause of action that the Defendant failed to honour the Plaintiff's instructions to stop the payment of the cheque No. 000060 for Kshs. 12,620,000/- but that the Defendant failed to credit a sum of USD 130,000 into its account No. 5096651.The allegations by PW1 that the cheque in favour of Indo Africa Automobiles Ltd to guarantee the transaction between Pamba Industries Ltd and Kisumu Blankets Ltd are unfounded. It is further contended that the instructions to stop the cheque were received on 31st August, 1998 which were duly complied with and that the cheque was re-presented for payment. However, there were no further instructions to stop payment and that under Clause 9(q) of the Debenture instrument, the Plaintiff was under a duty to advise the Defendant in writing of any event or situation tending or likely to have substantially adverse effect on the Plaintiff Company's business in relation to the security created. The Defendant further submitted that the Plaintiff's cause of action, if any at all, would be against the CBK and Reliance Bank. The cases of **Heptulla v Noormohamed (1984) KLR, Priscillah Nyambura v Marathon Corporation Kenya Ltd & Others, Nairobi H.C.C.C No. 221 of 2007, Robert Njenga Ndichu v Brush Manufacturers Ltd, Civil Appeal No. 144 of 200, Standard Chartered Bank (K) Ltd v Intercom Services Ltd & Others Civil Appeal No. 37 of 2003, North Western Salt Company Ltd v Electrolytic Alkali Ltd (1914) AC 461, Alexander v Rayson (1935) All E.R 185** and **Dr. Enonchong, N Illegal Transactions*: Meaning of Illegal Transactions*, 1998** were cited in support of its denial of the Plaintiff's allegations.

11. From the onset it needs to be clarified what proceeding by formal proof means. In the case of **Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR**, Emukule, J observed thus;

"… I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings-refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is "that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption." (emphasis own).

12. From the foregoing it is clear that formal proof doesn't necessarily mean that the facts as adduced in the pleadings are admitted, but that the matter now has been set down for the Claimant to prove his case. The rules of evidence and procedure are to be observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes into the merits of the case. In considering a formal proof hearing, the matter is determined based on the evidence that is presented before the court by parties. If therefore, at a formal hearing, the party with the onus of adducing evidence fails to satisfy the evidential threshold, the matter would stand to be dismissed on the plain fact that it was unmeritorious and did not raise any issues of fact or law. Each case is to be heard and determined on its merits.

13. That being said, the Plaintiff's claim or cause of action arises out of the issue as to the remittance of USD 130,000 into one of its accounts, namely A/C No. 5096651 which the Defendant allegedly converted and misappropriated for its own use in order to set-off an alleged overdraft in the account. In its Plaint at paragraphs (vi) and (vii), the Plaintiff prays for judgment that;

(vi) Refund of USD 130,000 (or its equivalent in Kenya Shillings at the rate prevailing on the date of

payment) together with interest at commercial rates being amount had and received by the Defendant for and on behalf of the Plaintiff and/or special damages as stated in paragraphs 11 and 12 above;

(viii) Damages for conversion or misappropriation for the value of the cheque being USD 130,000 and/or general damages for breach of contract and damages for loss of the use of the monies held by the Defendant.

The issue in contention therefore is not whether the Defendant followed its instructions to cancel the cheque No. 000060 for Kshs, 12,620,000/- drawn in favour of Indo Africa Automobiles Ltd but for the determination of what happened to the USD 130,000 remitted into the Plaintiff's said account. It is the Plaintiff's contention that the issue with regards to the issuance of instructions was already dealt with at the interlocutory stage and judgment entered in its favour on 27th February, 2007.

14. In its submissions, the Defendant alleged that the cause of action is based on an illegality and as such had no basis in law and is unfounded. The illegality that the Defendant alleges is that of 'cheque kiting' which has been defined as;

"…the unlawful practice of drawing cheques against a bank account containing insufficient funds to cover them, with the expectation that the necessary funds will be deposited before such cheques are presented for payment."

In Blacks' Law Online Dictionary, cheque kiting has been defined as:

"Fraudulent scheme. Additional cheques are issued against funds that a bank has already credited into an account for deposited, but as-yet, uncleared cheques (refer to cheque clearing). If it is played as an interest free and unauthorized loan, with careful timing of deposits and withdrawals, it can be turned into a large sum."

15. The Plaintiff had issued a cheque for Kshs. 12,620,000/- to guarantee a third party though its sister company. It knew that it did not have sufficient funds in its account to cover the amount that it had made out on the cheque, but made it out anyway. When it was evident that no amount was forthcoming from the purported buyers of the commodities i.e. Kisumu Blankets Industries Ltd, they cancelled the cheque. From that series of transactions, it may seem that it pegged the remittance of USD 130,000 to cover for the deficit on the cheque issued but things did not work out as it had expected. In summation, it can be deduced that it was engaged in a 'gamble' of sorts whereby it was floating or kiting non-existant funds.

16. The Defendant went ahead to present a number of authorities that determined the question of illegality. The illegality alleged by the Defendant is that the Plaintiff's conduct in the issuance of the cheque for Kshs. 12,620,000/- in the manner it did was not only illegal but also against public policy. It submitted at length in describing the events and processes in which the Plaintiff had issued the cheque. It submitted that the Plaintiff made out a cheque in favour of Indo Africa Automobiles Ltd, its sister company, which held an account at Reliance Bank (under Statutory Management) which in turn was connected to Kisumu Blankets Industries Ltd which had made a purchase order for cotton from Pamba Industries Ltd. It defined the process by which the Plaintiff issued the cheque as *'cheque kiting'* which, in its opinion, is an offence from which one should not be allowed to benefit.

17. The Defendant in submitting on illegal transactions, relied on the words in **Illegal Transactions by Nelson Enonchong** which at page 14, the learned author observed that;

"…where a transaction is found to be illegal, the effect of the illegality on any civil law claims connected with the transaction is often expressed in Latin maxims, the most common of which include ex turpi causa non oritur action (no one can found a cause of action on an illegal cause), in pari delicto potior est condition defendentis (where both parties are equally guilty the position of the defendant is stronger) or nemo allegean suam turpitudinem est audiendus (no one would be heard to plead his own turpitude)….and if we fillet out the Latin tags it will be seen from the authorities that the effect of illegality in civil claims flow from two general propositions (a) that no court will lend its aid to

a Plaintiff who founds his cause of action upon an illegal transaction and (b) that no one should be allowed to profit from his own wrong doing."

18. Is the claim by the Plaintiff based on an illegality? The Plaintiff's claim is for USD 130,000 which was remitted into its account No. 5096651. It is the Plaintiff's contention that the amount was not credited into the account but was instead used by the Defendant to set-off the overdraft for Kshs. 12,620,000/- after the consolidation of its accounts as provided for under Clause 8 of the Debenture. Is it thereby the Plaintiff's fault that cheque No. 000060 in favour of Indo Africa Automobiles Ltd was debited into the former's account at Reliance Bank? PW1, one of the Directors of the Plaintiff Company, admitted that he was not conversant with the cheque clearing processes at Clearing Houses but that they had issued tacit instructions to the Defendant to stop the cheque being paid out. The Defendant on its part said that the transaction was cancelled once previously but later remittance was made to Reliance Bank for the amount of Kshs. 12,620,000/- as the Defendant had not received instructions to cancel the same. In my opinion, both parties are inadvertently at fault for the situation that came about and in which they both find themselves now. The Plaintiff issued a cheque knowing that it did not have sufficient funds in its account and admitted as much that the account in which the cheque was drawn against was only in credit for Kshs. 13,805/80. The Defendant acted on the instructions of the Plaintiff to stop the payment of the cheque on 3rd September, 1998. The cheque was however represented for payment a second time round but the Defendant alleged that it did not receive any further instructions countermanding the payment to the Reliance Bank Account of Indo Africa Automobiles Ltd. With the Kshs. 12,620,000/- debited into Reliance Bank, should this claim be against the Defendant or include the Central Bank of Kenya as the Statutory Manager of Reliance Bank, for conversion and misappropriation?

19. The Plaintiff had clearly written to the Defendant to cancel the payment of the cheque in the amount of Kshs. 12,620,000/- by its letter dated 31st August, 1998 which read;

"We would like you to stop payment of the cheque No. 000060 issued to Indo Africa Automobiles ltd dated 29th August, 1998 for the amount of Kshs.12,620,000/-"

In evidence, it was clearly demonstrated that the cheque no. 000060 was cancelled after the Clearing House sent it back to Reliance Bank for the reason that the cheque had been stopped. The Defendant has tried to pass the blame for the loss of Kshs. 12,620,000/- onto the Plaintiff by alleging that it was engaged in cheque kitting. In my opinion, these aspersions are unfounded and I am disappointed that the Defendant has employed such underhanded insinuations to try cover up for its own mistakes thus unjustly enriching itself. By the Defendant claiming that the cheque was re-presented for payment as there had been no further instructions from the Plaintiff, it would be unjustly trying to evade its obligations and duties as expressed in the Customer-Banker relationship. The Defendant has alleged that the claim arises out of the issued instructions to stop payment of the cheque by the Plaintiff, whereas by the remittance of USD 130,000 into the account, it would be further trying to avoid any liability for its own folly in allowing the payment of the cheque to the account of Indo Africa Automobiles Ltd. In my opinion the Defendant bank cannot avoid liability for the mishap of allowing firstly a stopped cheque to be paid into an account by alleging that the Plaintiff had engaged in illegal practice of cheque kitting and secondly by snaffling the USD 130,000 ostensibly to set off the Plaintiff's overdraft in another account. The Defendant has failed to show how the Plaintiff engaged in cheque kiting in enunciating that the entire process in which the cheque was drawn was not in the ordinary course of business. In the affidavit of Faith Majiwa, the Corporate Recoveries Officer of the Defendant, sworn on 7th November, 2007, at paragraph 5, it is contended that the cheque had been returned 'uncleared' but thereafter its value had been passed to Reliance Bank. In the affidavit the deponent failed to address the issue that the instructions to stop payment had already been issued **BEFORE** the cheque was presented to the Clearing House and as the paying bank, the Defendant should have been more diligent in exercising due care. In my opinion, it has failed to formally prove any sort of Defence as against the Plaintiff's claim and as such I hold the Defendant liable for the amount of USD 130,000 remitted to account no. 5096961 held in the name of the Plaintiff.

20. The up-shot of all the above is that I enter judgement for the Plaintiff against the Defendant in the amount of US$130,000 (or its equivalent in Kenyan shillings at the rate prevailing on the date of

payment) together with interest at the rate of 18 percent per annum which I consider to be a reasonable commercial rate covering the period of this suit. Interest will be payable from the date of the filing of this suit being 22 August, 2000 until payment in full. Further, I grant prayer iii) of the Plaint and order the discharge of the Charge and Further Charge being registered as I.R. No. 14046/20 and I.R. No. 14046/21 in relation to L.R. No. 209/5352. The Defendant will execute Memoranda of Complete Satisfaction of the said Charges being Companies Form No. 246. The Defendant will also discharge the said Debenture dated 26 April 1995. Finally, I award the Plaintiff the costs of this suit.

DATED and delivered at Nairobi this 20th day of December 2012.

J. B. HAVELOCK
JUDGE