



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

HCCC NO. 263 OF 2008

CHARTER HOUSE BANK LIMITED PLAINTIFF

VERSUS

FRANK N. KAMAU.....DEFENDANT

JUDGMENT

1. This suit involves a claim by plaintiff against the defendant for a sum of Ksh. `18,075,270/50 with interest at the rate of 14.75% from December 2007 until full payment. According to the plaintiff, the defendant operated two accounts namely current Account Number 01-000741 and Savings Account Number 10-1000564 . On diverse dates from 30.7.2005, the defendant requested for an overdraft facility amounting to Ksh.18, 000,000/- to develop a property at Ongata Rongai and signed the requisite credit facility request form, letter of offer, letter of installments and letter of undertaking and promissory notes.
2. It is further claimed that the plaintiff while relying on the defendant's request, allowed him to overdraw his account by honoring the defendant's cheques drawn on his current account and also transfer of funds from current account to his savings account. On 23rd June 2006, the plaintiff Bank was placed under statutory management and the manager demanded for the payment of the outstanding loan by a letter dated 7th February 2007. The defendant did not deny the indebtedness but contended that he expected to continue carrying on business with the plaintiff despite demand the defendant decided or ignored to pay the loan and thus the plaintiff filed this claim.
3. The defendant field a defence and denied having applied for an overdraft facility of Ksh.18,000,000/- and also signing a credit facility from, letter of offer as claimed by plaintiff. The defendant denied the total claim in general and specific terms.
Parties also filed a statement of agreed issues as follows:-

1. Was the Defendant operating Current account Number 01-00741 and savings account No.10-1000564 with the Plaintiff?
2. Did the Defendant request/apply for an overdraft facility for Ksh.18,000,000.00 to develop his property at Ongata Rongai.?
3. Did the Defendant sign the requisite credit facilities request form, letter of offer, letter of installment, letter of undertaking and promissory note? If so were they blank? Did the Plaintiff forge the entries without the defendant's knowledge?
4. Did the Plaintiff grant the credit facility and did the Plaintiff utilize the same by overdrawing the current account, issuing cheques and transferring funds to the savings Account?
5. Did the Defendant admit indebtedness to the defendant?
6. Is the Defendant indebted to the plaintiff in the sum of ksh.18,075,270.50 together with interest at the rate of 14.75% p.a. as claimed?
7. Who should pay the costs of this suit?

4. During the hearing John Maina Warikwa (PW1) testified that the defendant used to be a customer of the plaintiff Bank until it was placed under statutory management. He produced a letter dated 30th July 2005 in which the defendant applied for a loan of Ksh.18 million to develop a residential cum shopping facility at Ongata Rongai. This was followed by a formal application form that the defendant filled on 3rd August 2005. The plaintiff offered the defendant the facility by a letter dated 23rd August 2005 and the plaintiff duly signed the acceptance of the letter of offer and on 13th September 2005 he requested the plaintiff to allow him draw down on the loan account before finalizing the conditions precedent.

5. According to PW1, the defendant utilized the loan process and produced a statement of account that shows many cheques were issued by the defendant to transfer funds from his Account to Savings and also in payment to other third parties. The defendant did not adduce any evidence. Both parties filed written submissions in support of their client's cases. On the part of the defendant, it was submitted that the plaintiff failed to prove the claim against the defendant on account of the following:-

- a) The plaintiff did not exercise the application for credit facility. This is despite the fact that the letter of offer expressly stated that the loan was to be granted subject to satisfactory execution of the Bank's Standard form and that the offer would remain subject to contract.
- b) The promissory note produced as exhibit was blank.
- c) The letter of undertaking was undated blank as to the amount the defendant was allegedly undertaking to pay.
- d) Similarly the letter of installment was undated, blank as to the amount being borrowed and the installment to be paid.

6. According to the defendant, the case against defendant was not proved, the statement that was produced by PW1 who testified that it was properly handed to him a bank clerk, Margaret Thuku as he did not personally verify whether they were true copies of the original. Moreover the cheques that were produced in evidence were drawn on Account Number 01100564 which was in credit balance of Ksh.6,145,62/- and therefore the cheques have nothing to do with account number 0100741 which has the debit of Ksh.18,075,270/50. On the part of the plaintiff, counsel filed written submission and contended that the plaintiff proved the claim against the defendant on a balance of probability. It was argued that the defendant wrote and signed an application letter. He also completed and signed a letter of offer form and

he went ahead to utilize the funds which were transferred to his account. The court was asked to find that the defendant operated the two accounts, as evidenced by payment cheques, which the defendant does not deny issue. Although the plaintiff did not sign the letter of offer the defendant requested to utilize the facility.

7. The above is the summary of the salient matters raised in evidence and the pleadings in this case. The plaintiff's claim as I understand it, is simple and straight forward claim of a sum of Ksh.18,075,250/50 which the plaintiff applied for from the defendant and was granted. In support of their claim the plaintiff produced a letter of offer by the plaintiff dated 23rd August 2005 which set out the conditions for the facility. The defendant signed the letter of offer but the plaintiff did not sign. The conditions set out in the letter of offer were also not fulfilled. According to PW1, the defendant authorized the plaintiff to drawdown on the account despite the fact that the conditions were not fulfilled. The plaintiff produced a statement of account although PW1 could not show the court whether the funds that were transferred from the defendant's account No. 564 to 741 were the proceeds of the loan. The credibility of those statements of account is also in doubt bearing in mind the evidence of PW1 that they were merely handed over to him by another bank official.

8. During cross examination PW1 stated that he had no direct dealings with the defendant. He could not explain whether the defendant complied with the formalities of opening an account with the plaintiff. He also was not aware of the mandate that was given by the defendant to the plaintiff regarding the operations of the loan account. This is a serious anomaly because there were several transactions as evidenced by the transfer of funds from the defendant's accounts to another account. The credibility of the transactions needed to be supported by cogent evidence that the defendant applied for the loan, was granted the loan, and he utilized the amount. The payment cheques that were produced in evidence are principally drawn from the account No.564 which is a savings account and which according to the statement had a credit balance.

9. The sums being transferred was from the defendants own account to another. Another issue to determine is whether there was a relationship of a borrower and lender. Looking at the documents namely the letter of offer, there is no contractual relationship that is evidenced by the documentary evidence produced in court by the plaintiff, these do not point to a contractual relationship. The documents produced by the plaintiff were all from the defendant and it is incomprehensible that the defendant on his own could have granted himself a loan and accessed so much money on his own. According to the plaintiff the account was opened by the defendant verbally. However, PW1 stated that accounts are operated according to Accounts Operation Instructions. The way the plaintiff claims the defendant operated the account is very odd and lends credence to the submissions by the defence that this claim was perhaps fictitious.

10. The last issue for consideration is whether the defendant admitted liability when he was served with a demand notice by the statutory manager. The letter said to be an admission of liability is dated 27th February 2007 and it reads as follows:-

"Dear Madam,

It is intriguing that a letter dated 7th February 2007 and containing a 14 days notice of payment should read me on 21st February 2007. Further, it is interesting that since taking over management of the bank, this is your first ever communication to me.

In my humble understanding and according to the Finance Minister's statement, your appointment was to continue running and managing the bank, instead the bank was closed immediately you moved in. How would I be expected to conduct business with you when the bank has remained closed for the past eight months?

If your letter is an expression of interest in resuming business, then I am prepared to carry on with my banking business with you.

Yours faithfully,
F.N. Kamau"

11. This letter in my understanding does not constitute an admission of liability by any stretch of imagination. An admission is clear, plain and without any ambiguity. In the upshot I find the evidence

adduced by PW1 and the documentary evidence produced by the plaintiff in support of their claim are incomplete. The plaintiff has failed to prove on a balance or probability that it lent the sum claim to the defendant. Accordingly, the plaintiff's suit fails with costs to the defendant.

JUDGEMENT READ AND SIGNED ON 28th DAY OF JANUARY 2011 AT NAIROBI.

M.K. KOOME

JUDGE