



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 3088 OF 1992

PAN AFRICAN BANK LTD.....PLAINTIFF

VERSUS

BAZAAR EMPORIUM (KENYA) LTD1ST DEFENDANT
MOHANLAL LAKAMSHI SHAH2ND DEFENDANT
ZAVERCHAND RAMJI SHAH3RD DEFENDANT
AMRATLAL RAMJI SHAH4TH DEFENDANT
PREMCHAND RAMJI SHAH5TH DEFENDANT
MANSUKHLAL PREMCHAND SHAH6TH DEFENDANT

JUDGMENT

1. The plaintiff's claim against the defendants is as set out in the plaint which was filed in court on 8th June 1992. It is a claim for a sum of **Ksh.11,410,621.65/-** being monies lent out to the 1st defendant on diverse dates which the defendants failed to pay. The plaintiff's claim against the 2nd to 6th defendants is in respect of guarantees executed by those defendants in favor of the plaintiff to secure the 1st defendants advances. The 2nd to the 6th defendants are bound by the terms and conditions stipulated in the guarantee to pay any amount owing to the plaintiff by the 1st defendant. By a further guarantee dated 8th October 1985, signed by the 5th and 6th defendants they guaranteed to pay to the plaintiff a sum of Ksh.25 million with the interest and other charges upon demand.

2. The plaintiff's claim is denied by the defendants in Toto. It is specifically denied that there is any money owing and due to the plaintiff. It is also contended that there was no consideration to support the guarantee and in the alternative, if there was any consideration it was paid for. It was denied that demand was made. Moreover, the plaintiff gave a concession to the defendants in which a sum of Ksh.10 million was written off from the 1st defendants accounts. The defendants paid the outstanding amount, thus the plaintiff is seeking to recover none existing loans arising out of interest which were calculated outside the concession. The plaintiff having agreed to write off the debt, the 1st defendant acting on good faith repaid the discounted loan in full and final settlement thus the doctrine of estoppel applies to the plaintiff. In the premises the 2nd to the 6th defendants cannot be made liability for a guarantee that had been satisfied.

3. **Hannington Taabu Elly, PW1** gave evidence in support of the plaintiff's case. He confirmed that the 1st defendant operated an account with the plaintiff in which it was accorded banking facilities. The facility was guaranteed by the 2nd to the 6th defendants to the tune of Ksh.1 million. Subsequently, the 1st defendant applied for a further loan of 25 million which was guaranteed by the 5th to 6th defendants. In the course of time, due to reasons that the goods that the defendant was selling on behalf of the plaintiff were stolen, the defendants were given a concession by a letter dated 15th January 1990. By that concession the defendant's loan was reduced by a Ksh.10 million which was written off from the loan that was outstanding. The interest rate was also reduced to 10½% per annum. That concession was however on condition that the remaining outstanding amount would be adjusted within a period of two years and the defendants would conduct the account to the plaintiff's satisfaction.

4. According to PW.1 the plaintiff failed to comply with the conditions and the concession was waived and on 13th may 1992 the plaintiff re- debited Ksh.10 million back to the 1st defendants account. During Cross examination PW1 could not explain whether there was a resolution of the board of the 1st defendant to borrow the loans. He also could not explain the rate of interests that was applied to arrive at the claim. He was taken through the bundle of the statements of account and he agreed that as at 2nd January 1991 the 1st defendants account had an outstanding balance of Ksh.2,267/-.

5. On the part of the defence, M.P. Shah (DW1) and also one of the defendants gave evidence. He confirmed that he is one of the directors of the 1st defendant. He is also sued as the 6th defendant. He admitted that he signed the guarantee but confirmed that all the money that was borrowed from the plaintiff was paid thus the defendants have no obligations to the plaintiff. He testified that the defendant's banking relationship where they were assisted by the plaintiff to acquire and to sell second hand cloths which were in its possession. The plaintiff was owed money by another customer and they held the clothes as security. Because the defendants were known for trading in clothing, they agreed to purchase them for 25 million but the possessions of the goods remained with the plaintiff and were being released as and when they were being sold. The goods were stolen from the plaintiff's godown and that is why the plaintiff agreed to write off 10 million from the defendant's accounts and to charge the interests rate of 10½ percent. According to DW1 they complied with the conditions and as at 31st December 1990 the balance outstanding in the account was Ksh.2,267/-. Therefore they did not owe any money to the plaintiff.

6. The defendants requested **Wilfred Ambija Onono** working with the Interests Rate Advisory Centre to re-calculate the account. DW2 testified and produced the reports of the re-calculation of the interests. He relied on the banks statements of the defendant's accounts from the period 1st January 1990 to 31st December 1991. The agreement dated 25th October 1985, the correspondence with the bank as well as the court pleadings. He based the calculation of interest on the agreement dated 25th October 1985 by which the 1st defendant was granted a loan of 25 million with interest at 15% per annum. He also relied on the letter dated 15th January 1990 in which the plaintiff gave concessionary rates of 10½% per annum with effect from 1st January 1990 on the outstanding account. Applying that interest rate DW2 said that there was a credit balance of **Ksh.588,994.66/-** in favor of the defendants. He produced the detailed report on how it was calculated.

7. Both counsel for the plaintiff and the defendants filed written submissions. According to the plaintiff the plaintiff proved their case to the standard and judgment should be entered as prayed. It is submitted that the defendants failed to comply with terms of the concession thus the account was r-debited with 10 million. The court was also urged to disregard the evidence by PW2 which does not show the formula that was used to arrive at the calculation of the report.

8. I have considered the evidence before court. The issue for determination is whether the plaintiff has proved to the required standard that the sum prayed in the plaint is due and owing as claimed. The plaintiff produced a huge volume of statements dating as far back as 1983. However, on 15th January 1989 by a letter written by the plaintiff's chairman and managing director it is indicated as follows:-

“Dear Sir,

Please refer to your letter dated 17th October, 1989, enclosing therewith cheques amounting to Kshs.2,250,000/- (two million two hundred fifty thousand only) of Ksh.150,000/- (One hundred and fifty thousand only) each towards adjustment of your Bazaar Emporium Account with us.

Considering your appeal, the Board has decided to write-off Ksh 10 million (ten million only) over a period of few years. Please note that your appeal has been accepted because of the losses you have suffered in your business for which the Bank has financed your company. The Board has also decided to charge you interest at the rate of 10½% per annum, with effect from January 1st 1990 on your outstanding overdraft account.

This concession has been granted to you on the condition that the remaining amount out-standing in your account shall be fully adjusted within a period of two years and you will conduct the account to our entire satisfaction. Any default on your part shall prompt the Bank to with-draw this concession forth-with and recover the amount of Ksh.10 million (ten million) from you which is being kept in a special loan account under your Company's name.

We hope this concession shall enable you to generate more business and your account is conducted to our entire satisfaction.

***Yours faithfully,
MAHAMMAD ASLAM”***

9. According to PW1 the defendants failed to honor the conditions set out in the concession letter thus Ksh.10 million was re-debited to the account and the 2nd and the 6th defendants are called upon to honor the guarantee. It was also claimed that the defendants post dated cheques that were paid on the account were returned unpaid. However, PW1 could not point out in the statement the cheques that were returned unpaid, the statements are incoherent and this was not helped by PW1 who said he could not tell the interest rates that was applicable. PW1 could also not explain the point at which they claimed the defendants had defaulted to pay a sum of Ksh.583,002.60 and how the sum was arrived at after the defendant had made several payments which were credited.

10. On the other hand the defendants submitted the statements on the calculation of interest and the evidence by DW1 to show that the plaintiff was charging interest above the concession. This evidence was also not challenged by the plaintiff. The letter that gave the concession is also general in that it was not stipulated how the defendants were to adjust the accounts and what constituted a satisfactory conduct of the account. For that I agree with counsel for the defendant that they had relied on the concession and acted in good faith to comply with the conditions set out in the letter of concession. As it was held in the case of *Chase International Investment Corporation and Another vs Laxman Keshra and Other KLR 143 where the Court of Appeal held that:-*

“Since O, who knew that the company was effectively without funds had given an assurance that if the lodges were completed payment would be made in full and since that representation had induced the firm L to complete the work to the ultimate benefit of Chase (which as equitable owner of the land on which the lodges build and in all the circumstances had a sufficient interest in the land), an estoppels in the nature of a proprietary estoppel had arisen and it was unconscionable for the firm L to be left without a remedy in the alternative (per Madan and Wambuzi JJA), since Chase had been enriched by the receipt of benefit at the expense of the firm L and it would be unjust to allow Chase to retain the benefit at the expense of the firm L, a claim could properly be founded for restitution.”

11 For the aforesaid reasons I find the plaintiff has not been able to prove their case on a balance of probability. Accordingly the plaintiff's suit fails with costs to the defendants.

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

M.K. KOOME

JUDGE