



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO.146 OF 1997

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

JACKSON MBORO OLWENDA.....DEFENDANT

JUDGMENT

This suit was instituted by the National Bank of Kenya Limited (the plaintiff) against the defendant, Jackson Mboro Olwenda claiming Kshs.605,575.05 being the amount of loan advanced to the latter, bank charges, interest and costs outstanding as at February, 1997.

In his defence, the defendant admitted obtaining an overdraft of Kshs.15,000.00 but denied owing the plaintiff Kshs.605,575.05. He has also denied any agreement on the interest and bank charges. Instead he has averred that the plaintiff contravened **section 44** of the **Banking Act**.

At the trial, the plaintiff's case was advanced by Jeniffer Melli, Bank Manager, Nakuru Branch, who informed the court that the plaintiff and the defendant had a bank-customer relationship spanning several years, from, 27th October, 1987 when the defendant opened his account at the plaintiff's Kisii Branch; that the defendant applied for and was advanced loans and overdraft facilities as follows:

- i) 29th December, 1987 – Kshs.15,000.00
- ii) 4th July, 1989 – Kshs.100,000.00 – (only Kshs.80,000.00 approved and issued)
- iii) 27th September, 1989 – Kshs.150,000.00

That the funds were disbursed through the defendant's account held with the plaintiff; that the defendant offered his parcel of land known as No.SUNA EAST/WASWETA 1/3916 valued at Kshs.160,000.00 as security.

On 23rd March, 1994, the plaintiff demanded the immediate repayment of the facility which stood at Kshs.224,611.05. Subsequently, the plaintiff issued to the defendant a notice of sale of SUNA EAST/WASWETA 1/3916. A further valuation was carried out and the property estimated value assessed at Kshs.45,000.00 or Kshs.25,000.00 forced sale. It was at this stage that the plaintiff instituted this suit.

The defendant is said to have made several proposals personally and through his advocates. The plaintiff's witness told the court the debt stood at Kshs.1,778,404.75 as at April, 2004. She confirmed that the defendant made payments amounting to Kshs.160,023.00 between 3rd May, 1991 and 23rd July, 1992. The interest rate charged between 1st April, 1990 and 1997, when the suit was filed varied from

16½ to 31%.

The defendant on his part while admitting that he applied for bank facilities (overdraft and loans) and although his applications were accepted by the plaintiff, the facilities were never released. That being his position, the only question falling for determination is whether the plaintiff disbursed to the defendant the funds that have now accrued to Kshs.1,778.405.00.

I reiterate that the plaintiff's claim is that the defendant applied and was disbursed funds as follows:

- i) 29th December, 1987 – Kshs.15,000.00 (overdraft)
- ii) 4th July, 1989 – Kshs.100,000.00 – (only Kshs.80,000.00) disbursed
- iii) 27th September, 1989 – Kshs.150,000.00
- iv) Total disbursed – Kshs.265 ,000.00

The plaintiff contends that at the time this action was brought, the above sums plus interest stood at Kshs.605,575.50, the sum claimed herein. To date the defendant has only paid Kshs.160,023.00 The amount outstanding as at 17th April, 2004, according to the plaintiff, was Kshs.1,778,404.75. In support of this evidence, the plaintiff produced a bundle of bank statement in respect of the defendant's account No.0103020129100, defendant's application dated 29th December, 1987 for an overdraft of Kshs.15,000.00, a letter of offer for that sum from the bank and a letter of acceptance by the defendant, an application dated 4th July, 1989 by the defendant for a loan of Kshs.100,000.00 secured by the defendant's parcel of land No. SUNA EAST/WASWETA 1/3916, a letter granting Kshs.80,000.00, a charge dated 25th June, 1992, a valuation of the said parcel No.SUNA EAST/WASWETA 1/3916 and numerous letters exchanged between the plaintiff and the defendant as well as the defendant's advocates.

In order for the plaintiff to succeed in this claim, it was incumbent for it to satisfy the court on a balance of probability that indeed funds were disbursed as claimed. As **section 107** of the **Evidence Act** provides, the burden is upon the plaintiff to prove its claim against the defendant. It stipulates that:

“107. (1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

In the entire bundle of statement relating to the defendant's account, there is no reflection of Kshs.15,000.00 overdraft, or Kshs.80,000.00 and Kshs.150,000.00 loans. All banking transactions, withdrawals, deposits, overdrafts, loans etc can only be reflected in the account holder's statement.

Jennifer Meli on behalf of the plaintiff was candid enough to admit the following in cross-examination:

“First was an overdraft of 15,000.00. An overdraft is shown in the computer (sic) as a negative balance. It is reflected in the statement. I do not have the statement of 1987 as the account was with Kisii Branch

In 1989 a loan of Kshs.80,000.00. I do not have that reflected in the statement. Loan – Kshs.150,000.00 – not reflected in the statement. Statement of 29.3.1997 – Kshs.605,575.05 which the bank was demanding when the case was filed.”

It follows from this testimony that there was no nexus between the figure claimed in the plaint (Kshs.605,575.05) or even Kshs.1,778.404.75) and the money advanced to the defendant.

I have no doubt whatsoever, that the defendant owes the plaintiff some money. And of course I do not believe the defendant's evidence that he could not recall any transaction with the plaintiff. That cannot be so in view of his letters or his advocate's letters making various proposals for repayment to the plaintiff, but the burden remained on the latter to prove its claim. After seeing the evidence brought by the plaintiff he found it safe to feign ignorance.

For the reasons stated, this action fails and the same is dismissed with costs.

Dated, Delivered and Signed at Nakuru this 13th day of May, 2011.

**W. OUKO
JUDGE**