REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 72 OF 2006

STROMME MICROFINANCE E.A. LTD.....PLAINTIFF

VERSUS

KENYA ENTREPRENEURSHIP PROMOTION PROGRAMME.....DEFENDANT

JUDGMENT

By a Plaint filed in court on 24th February, 2006, the Plaintiff pleaded that vide a resolution made on 28/6/03 the Defendant resolved to borrow from the Plaintiff US$ 52,000/- in pursuance of which an agreement of cooperation was executed between the Plaintiff and the Defendant for US$52,000 equivalent Kshs. 3,770,000/-. That on the said Agreement the amount due from the Defendant was Kshs. 2,882,479/- that two further agreements for advances were entered on 3rd November, 2003 for Kshs.6,000,000 and 18/3/04 for Kshs. 2,180,000/- respectively. That all the said Agreements provided for interest at 15% p.a. on the advances and the repayment period was 24 months from the respective dates of the agreements. That the amounts due on the last two (2) Agreements was Kshs. 6,562,500/- and 2,466,125 respectively. The Plaintiff further pleaded that in attempting to repay the loans, the Defendant issued several cheques that were subsequently stopped by the Defendant. That the Plaintiff incurred expenses of Bank charges amounting to Kshs. 2,400/-. That demands to pay the said sum had fallen on deaf ears. The Plaintiff therefore claimed the sum of Kshs. 11,911,104/- together with interest of 15% p.a. and the said sum of Kshs. 2,400/-

The Defendant filed a defence to the claim and denied entering into any contract with the Plaintiff at all and denied the Plaintiff's claim in totality, it pleaded that if there was any agreement for advancement of loans the same had been fully paid and account settled, that payment of interest and penalties had not been agreed upon and if there was any such advances, the same was payable by 3rd parties, that the arrangement between the Plaintiff and the Defendant and 3rd parties had been frustrated by lack of legal structure for recovery, that any agreements between the Plaintiff and the Defendant for advancement of money was void ab initio for want of attestation and that the whole transaction was tainted with illegality

and was unenforceable in law. The Plaintiff filed a Reply to Defence stating that the rate and quantum of interest was computed in advance and agreed upon by the parties, that the agreements had not been frustrated and that the Plaintiff had not given facts or particulars constituting the alleged frustration, that the agreements were properly executed and properly witnessed by the Defendants directors/representatives or Advocates and finally that the Defendant having voluntarily executed the Agreements and willfully received the monies disbursed thereunder and having issued cheques in purported repayment therefor, the Defendant was estopped from alleging illegality that the agreements were either illegal or void.

The foregoing is the parties' respective cases as disclosed in their respective pleadings. At the trial, the Plaintiff produced its Bundle of documents as Plaintiff's exhibit 1.

In support of its case the Plaintiff called one witness **Edward Mkangi, PW1** who testifies that he is the Chief Executive Officer of the Plaintiff with operations in Uganda, Tanzania, South Sudan and Kenya, that the primary services of the Plaintiff is to offer wholesale financial services whereby it lends microfinance institutions who in turn engage in retail lending to ordinary people, Saccos and small businesses. That the Defendant was one of such microfinance institutions with whom the Plaintiff had entered into three (3) Agreements of Co-operation under which the Plaintiff lent various sums to the Defendant.

It was the testimony of PW1 that by a letter dated February, 2003 the Defendant applied for advances from the Plaintiff and submitted with the application the Defendant's Certificate of incorporation dated 14th April, 1994, a constitution that showed the Defendant's objects were in tandem with the objectives of the Plaintiff, other financial records of the Defendant including the Balance sheet and Accounts for the year 2001.

The witness referred the court to a board resolution made on 28/6/2003 by which the Defendant resolved to borrow US$ 52,000/- from the Plaintiff, the said resolution culminated in the execution of the first loan Agreement on 10th July, 2003 whereby the Plaintiff agreed to advance the Defendant a sum of US$ 52,000/-. Some of the terms and conditions of the said Agreement were, inter alia, that interest on the advances sum shall be 15% per annum on the declining balance on quarterly basis, the principal sum would be repaid in four equal installments on quarterly basis one year after funds were disbursed, repayment was to be made to a designate account No. 01520 590939 – 00 Standard Chartered Bank Kenya Ltd, Oginga Odinga Road Kisumu, that the said Agreement was executed by both parties at page 34 of the PExh.1 and witnessed by the Defendant's Advocate S.P. Punja of Thika, the hometown of the Defendant, that a schedule of repayment was also prepared and attached to the said Agreement which the Defendant saw before executing the said Agreement, that according to the schedule, the total amount repayable by the Defendant on the first loan Agreement was Kshs. 4,701,375/- which constituted the principal sum plus interest.

The witness identified a credit advice at page 37 of PExh1 dated 10/7/03 from Standard Chartered Bank Kisumu advising that the Defendant had been paid Kshs. 3,770,000/-. He explained that whilst originally the amount supposed to be disbursed was Kshs. 3, 780,000/- equivalent to the US$ 52,000/- agreed, as at the time of disbursement the exchange rate of the shilling to the dollar had changed thereby making the amount payable to the Defendant to be Kshs.3,770,000/-, that the Defendant acknowledged receipt of the said funds by a letter dated 17/9/03 wherein the Defendant issued a total of six (6) post dated cheques for the total repayment of the amount advanced.

The Plaintiff further testified that there were subsequently two (2) other similar loan agreements entered on 3rd November, 2003 referred to as the 2nd loan Agreement for a disbursement of Kshs. 6 million and a 3rd loan agreement entered on 18th March, 2004 for Kshs.2,180,000/-. The witness identified the said Agreements together with the respective schedules of payment. He also referred the court to the letters dated 11/11/03 and 24/03/04 at pages 47 and 53 respectively of PExh1 wherein the Defendant acknowledged receipt of the disbursements in respect of loan II and III aforesaid.

From the record, the total amount disbursed to the Defendant and acknowledged amounted to Kshs.

11,950,000/- which attracted total interest of Kshs.2,564,537/- making a total sum of Kshs.14,514,537/-. That out of the said sum the Defendant had only repaid a total sum of Kshs.2, 681, 475/- leaving a balance of Kshs 11,833,062/- as at 31/3/05. From correspondence, the Defendant showed that in November 2004 the Defendant pleaded with the Plaintiff to postpone banking of the cheques it had issued to the Plaintiff since the Defendant was allegedly experiencing problems in making recoveries from its borrowers. The Plaintiff however banked several of the said cheques when they fell due all which were returned unpaid since the Defendant had stopped payment therefor. The Plaintiff suffered bank charged of Kshs.2, 400/-

Regarding the Defence filed by the Defendant, the Plaintiff's evidence was that it would be absurd for the Defendant to allege that it had not entered into the subject agreements yet the three agreements produces in court had been properly executed by the Plaintiff and witnessed appropriately, that the witnessing of the Agreements was arranged by the Defendant and returned to the Plaintiff as properly executed. The Plaintiff denied that the Agreements were either invalid, void or that the arrangement between the Plaintiff and the Defendant had been frustrated as alleged by the Defendant in its Defence.

The Plaintiff filed a list of issues eleven (11) in number which I shall reduce to six (6) as follows: -

a) Whether there were various Loan Agreement between the parties as pleaded in the Plaint and if so what advances were made thereon and at what interest.

b) Whether the Defendant has fully repaid the loans.

c) Whether the said Agreements were frustrated, or void ab initio for want of attestation or illegality.

d) Whether the Defendant is estopped from alleging invalidity of the agreements.

e) Whether the Defendant's Defence is tenable.

f) Whether the Plaintiff is entitled to the reliefs sought and what order should be made as to costs.

On the 1st issue, the Plaintiff produced three loan Agreements dated 10/07/03, 3/11/03 and 18/3/04 respectively. The said agreements were for advancement of Kshs. 3,770,000/-, Kshs. 6,000,000/- and Kshs.2, 180,000/- by the plaintiff to the Defendant. The said Agreements specified that the rate of interest payable thereon was 15% p.a. and contained schedules specifying the dates and amounts payable by the Defendant in repayment thereof. In addition, the Plaintiff produced, correspondence to show that apart from the Defendant applying to the Plaintiff for funding, in February, 2003, the Defendant did acknowledge receipt of the various sums set out in the said Agreements and did issue postdated cheques for the repayment thereof. I have found that the dates of the said cheques as set out in the subject letters by the Defendant correspond with the dates set out in the schedules to the agreements as the repayment dates. I have also found out that the amounts in the cheques included the amounts set out in the schedules to the said agreements as interest.

On the foregoing, I am satisfied that there were three (3) loan Agreements between the Plaintiff and the Defendants for which the Plaintiff advanced to the Defendant a total sum of Kshs 11,950,000/- which was repayable at an interest of 15% per annum on a reducing balance on quarterly basis. This disposes the 1st issue.

On whether the Defendant fully repaid the loans, the Plaintiff's uncontroverted evidence was that out of the total sum of Kshs. 11,950,000/- together with interest of 15% p.a. thereon, the Defendant had only paid a total sum of Kshs. 2,681, 475/-.

I am satisfied from PExh1 pages 60 to 69 that the amount paid by the Defendant under the loans was only

Kshs.2, 681, 475/- and that from the totals of the amounts set out in the schedules to the Agreements and the Defendants own letter acknowledging receipt of the loans as referred to elsewhere in this judgment, there is a balance of Kshs.11, 833,062/- which remains unpaid.

As to whether the said loan agreements were frustrated for lack of legal mechanisms for repayment or were void for non attestation, I believe the evidence tendered on behalf of the Plaintiff to the effect that the said loan Agreements were between the Plaintiff and the Defendant. I have perused the said Agreements and I have not found any requirement or inference of a requirement for a legal mechanism for repayment of the loans by 3rd parties. The Defendant entered into the Agreements willfully and bound itself to repay the same to the Plaintiff. The issue of non repayment or lack of legal framework for repayment of monies lent by the Defendant to 3rd parties does not therefore arise.

I have also perused the said agreements at their respective places of execution and I have seen that they were properly executed and witnessed by the Defendant's advocates as well as its representatives.

In any event, the Plaintiff's case is that the said Agreements were returned to them by the Defendant as having been duly and properly executed and attested. That the Plaintiff believed that fact, acted on them and released the funds to the defendant.

Section 120 of the Evidence Act provides that:-

"When one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceedings between himself and such person or his representative, to deny the truth of that thing."

In the case of **Nurdin Bandali –Vs- Lombark Tanganyika Ltd (1962) E.A 304** At page 317 the Court of Appeal for East Africa when considering the then Section 115 of the Indian Evidence Act which is similar with our own Section120 a of the Evidence Act stated:-

"The word 'thing' is a word of the widest ambit, capable of embracing either an existing fact or a present or future relationship, and I see nothing in S.115 which leads me to the conclusion that the meaning of the word 'thing' in that section should be restricted to an existing fact. In Sarat Chunder Dey V. Gopal Chunder Laha (9) (1892), 19 I.A. 203. LORD SHAND in delivering the judgment of the Privy council said at P. 215:

"The learned counsel who argued the present case on either side were agreed that the terms of the Indian Evidence Act did not enact a law in India anything different from the law of England on the subject of estoppel, and their lordships entirely adopt that view….. What the law and the Indian statute mainly regard is the position of the person who was induced to act; and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation, has induced him to act as he would not otherwise have done, the person made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it".

The court in essence was of the view that once a party to a transaction induces another by either its conduct or otherwise of the existence of certain facts, and that other party acts on the said representation to its detriment, the party making a representation is estopped from denying the position it represented to that other party. At Pg 318 of **Nurdini Bandali** case, **Sir Newbold J.A.** held;-

"The Precise limits of an equitable estoppel are, however, by no means clear. It is clear, however, that before it can arise one party must have made to another party a clear and unequivocal representation of a legal relationship, which may relate to the enforcement of legal rights with the intention that it should be acted upon and the other party, in belief of the truth of the representation acted upon it."

The above position was again upheld by the E.A. Court of Appeal in the case of **Century Automobiles Ltd. –vs- Hutchings Ltd. (1965) EA 304.**

From the evidence on record, the representation by the Defendant to the Plaintiff that the Loan Agreements had been properly executed and in it proceeding to receive funding under the said loans Agreements led the Plaintiff to act on that fact. Accordingly, I hold that the Defendant is estopped from resiling from the position that the Loan Agreements were proper and enforceable.

As regard frustration, it is clear the 3rd parties were not party to the Agreements and I reject that line of defence.

From the foregoing, it is clear that the Defendant's defence is not tenable. It seeks to deny transactions that were as clear as day light. In paragraph 4 of the Defence, there is reference to none existent paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 12, 12, 13, 14 and 15 of the Defence. It is contradictory and I hold that it is untenable.

In conclusion, I am satisfied that the Plaintiff has proved its case on a balance of probability and therefore succeeds. The Plaintiff is therefore entitled to the reliefs sought in the Plaint and I enter Judgment for the Plaintiff against the Defendant for Kshs. 11,833,062/- and Kshs.2,400/- bank charges bringing the total sum to Kshs.11,835,462/- together with interest thereon at the rate of 15% per annum from 1st April, 2005 until payment in full. I have ordered interest at 15% p.a. from 1/4/05 because it was one of the terms of the contract between the parties that interest would be charged at 15% p.a. and the Defendant defaulted in payment from March 2005.

I also award the costs of the suit to the Plaintiff.

DATED at Nairobi, this 18th day of October, 2011.

JUSTICE A. MABEYA