



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 731 OF 2003

ALEX KIARIE THIRU.....PLAINTIFF

VERSUS

CANNON ASSURANCE (K) LIMITEDDEFENDANT

JUDGEMENT

1. When this suit came up for hearing on 21st April, 2010, counsel for the plaintiff applied to withdraw the plaintiff's suit under the provisions of order 24 Rule 1 of the Civil Procedure Rules. The plaintiff's suit was withdrawn with costs to the defendant. The defendant proceeded to prosecute the counter claim filed on 17th December, 2001. Edith Nyambura Muchiri (DW1) gave evidence in support of the defendant's counterclaim. She testified that the plaintiff applied for a loan of Ksh 1 million from the defendant according to the application received by the defendant. The defendant approved a sum of KSh. 750,000/= as per the agreement signed between the plaintiff and the defendant on 7th March, 1995.
2. The facility was secured by a legal charge dated 24th October, 1995 which was created on the plaintiff's property known as L.R Dagoreti/Thogoto/477. The terms and conditions of the borrowing are contained in the letter of offer which the plaintiff duly accepted. The loan was supposed to be paid within 5 years by 60 equal monthly installments of Ksh.24,500/= each calculated at annual rates at an interest rate of 27.5 per annum . The loan was advanced to the plaintiff in November, 1995 he accepted the terms and conditions of lending by signing the letter of offer.
3. Moreover it is the plaintiff who applied for the land control board consent to charge his piece of land. After the consent was issued, the charge was registered in favor of the defendant. The plaintiff also assigned his life policy to the defendant as further security. Pursuant to the loan agreement, the plaintiff paid only eight installments and by August 1996, he stopped repaying the loan. Demand letters were issued to the plaintiff, who made several promises to settle the account but failed to do so. The last communication from the plaintiff was in 1997 before the defendant started the process of exercising the powers under the charge.
4. The defendant instructed their Advocates to recover the loan by selling the property that was charged. Several attempts to sell the property by public auction were made but they failed. The plaintiff made a further proposal to sub-divide the plot and sell one half of the portion to repay the loan but he did not honor the proposal, he only paid Ksh. 250,000 on 15th June, 2003 but by that time the loan had accumulated to 3 million.
5. DW1 produced a bundle of documents which show the history of the plaintiff's loan account from

the time the loan was applied for, the security documents, the various letters exchanged between the plaintiff and the defendant and the statement of account. The witness further explained that due to the plaintiff's default, the loan escalated due to interest charges and penalties. The plaintiff filed this suit and the defendants filed the counter claim in which they are seeking for a sum of Ksh. 4,026,033/= with interest at the rate of 20% on the principle and 5% per month on the defaulted amount from 1st August, 2003 until payment.

6. Both counsel for the plaintiff and defendant filed very detailed written submissions in respect of their respective positions. According to the submissions by counsel for the plaintiff, the defendant being an Insurance Company does not have legal capacity or authority to engage in the business of lending money which is the preserve of the Banks. Counsel extensively referred to the Banking Act especially sections 2(1) and 3(1). Reference was also made to the Insurance Act especially section 2, which defines what constitutes **insurance business**. Thus it was submitted the contract of lending was illegal null and void and the court cannot enforce it.

7. Moreover, the plaintiff contends that he repaid Ksh. 850,000/= and the defendant is merely trying to enrich themselves unfairly by inflating the claim. Counsel also challenged this suit which he submitted was filed outside the limitation period. The cause of action he contended arose of 22nd April, 1997, and the suit was filed after six years. The court was urged to find the plaintiff's claim time barred. Counsel referred to the Limitation of Actions Act to support the contention that a suit for recovery of money should be filed within 6 years from the date of the cause of action. Several authorities were also cited among them the cases of **Mapis Investment (K) Limited v Kenya Railways Company Corporation {2006} eKLR** the case of **Charles Mwangi Kagonia V Dhraj D. Ropat & 2 others {2006} eKLR**. The defendant also filed written submissions which I have taken into consideration.

8. The issues for determination in this counterclaim as I see them, is whether the defendant is entitled to the sum claimed in the counter claim; or whether the contract of lending is null and void in view of the provisions of the Banking Act. The Court should also determine what interest rates if any should be awarded to the defendant. It is common ground that the plaintiff applied for a loan of 1 million from the defendant, the defendant granted the plaintiff a loan of Ksh. 750,000/= against the conditions set out in the letter of offer. Thos conditions included a charge that was created against the plaintiff's property known as Title No. Dagoreti/Thogoto/477 which was the security for the loan. The loan itself was to be re-paid within a period of 5 years by 60 monthly installments of Ksh. 24,500/= calculated at the rate of 27.5 per annum. It is also not in dispute that the plaintiff defaulted in the repayment and did not comply with terms as set out in the contractual documents.

9. Is the defendant entitled to the sum claimed or is the contract a nullity in law? It was submitted (and I agree with that submission) that under the Insurance Act Cap 487 an Insurance Company can invest its assets by granting mortgages on immovable property. It is common ground the defendant is not a Bank and it is not even carrying out banking business which involves accepting money from members of public as deposits payable on demand. The loan was granted to the plaintiff from the defendants own funds, thus in my view the lending did not contravene the Banking Act.

10. The defendant produced documents to support their claim. The plaintiff wrote several letters to the defendant seeking indulgence and making proposals which he never fulfilled. There is even a letter dated 15th June, 2002 and 2nd July, 2003 thus the defendants counter claim cannot be said to be barred by the limitation of Actions Act. The plaintiff also did not offer any evidence to controvert the plaintiff's case he relied on submissions by his counsel which can be accepted on points of law but cannot respond to facts. The factual evidence could not be challenged by way of submission which is tantamount to giving evidence from the bar.

11. Accordingly I enter judgment for the defendant as prayed in the counterclaim as follows;

a. Judgment for the defendant against the plaintiff for Ksh. 4,026,033/=.

b. Interest at court rates from 1st August, 2003 until full payment.

c. Costs to the defendant.

Ruling signed and submitted for delivery on the 9th day of NOVEMBER 2010

MARTHA KOOME

JUDGE

Delivered and countersigned on 12TH day of NOVEMBER 2010.

P KIHARA KARIUKI

JUDGE