



**EDWARD W.W. MIACO .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD. .... DEFENDANT**

**JUDGMENT**

The pleadings show that the plaintiff was an employee of the defendant company (bank) for a long time and served faithfully to the time of normal retirement period. During the plaintiff's employment, the defendant had established for the benefit of members of staff, a scheme whereby the members of staff would be advanced money to purchase property at staff interest rate of 8%.

The plaintiff took advantage of this scheme and in January 1997, the plaintiff applied for a staff loan of Kshs.1,300,000/= to enable him to purchase a plot known as plot No. Ngong/Ngong/5786. The loan was secured by separate security not the plot proposed to be purchased.

It is alleged and there is no dispute that one of the condition of the loan was that upon purchase of proposed plot the plaintiff would deposit the Title Deed with the bank, not as security but for bank to know that the loan was used for the purpose intended. There was no fixed time within which the deposit was to be made. The period of the loan was 8 years and the repayment was by deductions of the plaintiff's salary.

On or about 30/3/1999 the defendant without notice to plaintiff converted the loan from staff interest of 8% p.a. to commercial rates of interest which was then between 28% - 36% and this was backdated to the date the loan was made. It is to be noted that that was contrary to the plaintiff's contract of borrowing. The change of terms of contract as aforesaid raised the outstanding loan from Kshs.1,050,662.60 to Kshs.1,937,064.10.

The defendant accused the plaintiff of breaching the terms of contract of borrowing. However, it was shown that the delay in depositing the Title was not of the plaintiff's making. There were difficulties in obtaining registration which had made the plaintiff to hire the services of bank's lawyers, Oraro & Rachier Advocates to assist in obtaining the Title. The evidence is that the title was eventually issued on 13/5/1999 and deposited with defendant on 19/5/1999 within 6 days of issuance. The matter was reported to the defendant a plea to refund the non contractual interest was raised but the defendant conceded only a sum of Kshs.557,055.79.

There was a balance unrefunded amounting to Kshs.587,367.55. The plaintiff then filed this suit to claim the said sum. In the cause of proceedings, the parties entered consent as to amount of unrefunded interest, special damages claim and loss to be Kshs.509,360/=. The court is to determine whether the defendant was liable to refund to the plaintiff that portion together with interest or whether the defendant was justified in retaining and failing to pay the refund.

From the evidence adduced by the plaintiff, the defendant acted in breach of the terms of contract of lending to the plaintiff. The plaintiff enjoyed the staff terms of lending. The loan was secured by a separate security and the repayment was not interrupted as it was through deduction by the defendant of the plaintiff's salary. Therefore, the defendant suffered no prejudice or loss.

The plaintiff explained his difficulties in getting his newly purchased property registered in his name. As soon as he obtained registration and new title he immediately deposited with the defendant. It appears that through negotiations, both parties agreed that a sum of Kshs.557,055/75 be refunded to the plaintiff. Then a consent before the court was entered:-

***“That subject to liability the special damages claimed by the plaintiff in prayer (a) of the plaint against the defendant is agreed at Kshs.509,360.60.”***

The parties now seek a decision of the court on the liability on the part of defendant to pay that sum. It is agreed that the plaintiff complied with the contract of lending on his part. However, the issue of depositing his new title with the defendant was delayed. The plaintiff had explained the cause of delay which the court finds reasonable. The document was to be deposited as soon as it was obtained. The plaintiff's contract was reviewed in May 1998 by defendant's credit, it was noted that the deposit of document was not yet complied with. But it was complied with on 19/5/1999. The lending contract was for 8 years. There was no time limit within which the deposit was to be made.

Considering that the new Title Deed was to be acquired through the loan advanced, the defendant must have meant that the deposit would be made after the completion of purchase which was subject to contract with third parties. It would not have been expected that the title would be deposited on the time of making the loan. The condition was unreasonable. It does not matter whether letters were sent or received. The defendant was not going to benefit or incur loss by non compliance with that condition by the plaintiff. The bank had arranged with staff to lend to them money at the rate of 8% p.a.. It is admitted that the defendant converted the plaintiff's loan to commercial rates of interest as from 30/3/1999 and the title documents were lodged on 19/5/1999.

Subsequently, parties came to a consent that the special damages pleaded and prayed under prayer (a) was Kshs.509,360/= and subject to liability is payable to the plaintiff by defendant. On the issue of general damages the plaintiff has proved that at the time of granting the loan the defendant was aware that the property was subject to sub-division and change of user and therefore the title could not be charged to secure the loan. The plaintiff had to provide alternative security to secure defendant's loan. Therefore, the defendant was not at risk at all over its loan.

Furthermore, there was no specific time set for depositing the new Title Deed. This condition must mean that the new Title Deed must be deposited within a reasonable time of their acquisition, which in this case, was six days. The plaintiff was anxious to complete the purchase he engaged lawyers at his own cost to process the purchase. In any case it is shown that the loan was for a period of 8 years. The title was deposited within 2 years. This was a reasonable time.

The defendant has not shown any default on the part of the plaintiff that the defendant stood to suffer any loss or risk by the delay in depositing the title. There is admission by the defendant of injuring the plaintiff by payment of half of the interest due to the plaintiff. The plaintiff was subjected to financial punishment by raising his deductions to his salary to Kshs.53,336/= from Kshs.18,400/= per month. He was put into financial hardship and loss.

The defendant has submitted on general damages, the case of **Dharamshi vs. Karsan [1974] EA 41** and **Securicor Courier (K) Ltd. vs. Benson David Onyango & another 2008 e KLR** where the court stated:-

***“As for award of Kshs.25,000/= as general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract.”***

However, the injury caused to the plaintiff was caused by malice and ill will. There was no reason to subject the plaintiff to such financial deprivation. The condition of deposit was not part of lending contract but a disciplinary measure by the defendant to its staff to ensure that the staff did not misuse the facility offered.

On the issue of interest the defendant relies on the decision in the case of **HCC No. 8 of 1997 – Ihenya Agencies & another vs. Kenya Posts & Telecommunications and New Tyres Enterprises Ltd. vs. Kenya Alliance Insurance Co. Ltd. [1987] KLR 380** where it was held:-

***“In this case the liability of the respondent to pay for the appellant’s loss was not determined until the date of judgment and that is the date from which the interest should be payable.”***

In the case of **Valero Properties Ltd. vs. Sky Structures Ltd. & 2 others**, where Gicheru, J.A. (as he then was) quoted Broome’s Legal Maxim:-

***“that no man shall take advantage of his own wrong to gain interpretation of law ... and applies absolute peculiar force to that extensive class of cases in which fraud had been committed by one party to a transaction to the other- that author of the wrong who was to put a person in a position in which he has no right to put him shall not take advantage of his own illegal act in other words, shall not avail himself of his own wrong.”***

A careful examination of the facts and evidence of this case clearly shows that the plaintiff has done no wrong to the defendant. Even if it was to be said that the plaintiff had to comply with such condition of deposit, he had no power to do so since he had not acquired the document. He would not have been able to produce the document by the time the defendant decided to commit the wrong of converting the staff loan to commercial terms, thereby breaching the basic promise that the loan was on staff terms.

In **Dharamshi vs. Karsani [1974] EA**, the Court of Appeal (E.A.) stated:-

***“The fundamental principle by which the courts are guided in awarding damages is restitution in intergrum.”***

In the case of **Dharamshi** the amount of works remaining to be done was deducted from decree awarded in the Superior Court. This was a contract of building works in which on wrongful termination by the employer, the builder was entitled to damages – the loss of profit he would otherwise have earned. Facts of each case have to be considered on merit.

In the case of **Securicor Courier (K) Ltd. vs. Benson David Onyango & Margaret R. Onyango** (mentioned above), the contract was for courier services. The Court of Appeal said:-

***“In this case the first respondent admits that he signed the consignment sheet which forms the contract between parties. He also retained the client’s copy of the consignment sheet. We have reproduced the above part of front page of the contract.”***

The court could see that the conditions of service included an exemption clause in such a way that clients could see clearly.

***“He (the courier) will be protected if he demonstrates that he did what was reasonably sufficient to bring the clause to the attention of the other party and the damage was limited to the exemption clause.”***

Upon considering the above matters, I am convinced that special damages as pleaded at paragraph 15 of the plaint, the same are agreed at Kshs.509,360/=. The liability to pay is on the defendant with interest at court rates from the date of consent on 18/2/2004 until payment in full. Following general principle that the general damages are not awarded in wrongs arising out of contract, however, in cases where the unjustified wrong is committed to one party by another, it is proper that compensation should be compensated. Impunity ought not to be permitted.

For this reason, I allow the plaintiff a sum of Kshs.150,000/= for inconvenience he suffered without any justification. The court is empowered under **Section 26 Civil Procedure Act** to award interest to be paid on principal sum for any period before institution of suit. The rate of interest applicable is for the

period from 30/3/99, date of conversion to the date of payment in full. The rate of interest shall be court rates, namely 14% p.a.

Judgement is entered for the plaintiff in the sum of Kshs.509,360/= plus interest at the rates of 14% p.m. until full payment and costs of this suit.

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 27<sup>th</sup> day of October 2009.

**JOYCE N. KHAMINWA**

**JUDGE**