



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 113 of 1994

KENYA COMMERCIAL BANK LIMITED..... PLAINTIFF

VERSUS

SAABAH BARAKA BAKERY LIMITED..... DEFENDANT

JUDGMENT

Kenya Commercial Bank Limited hereinafter referred to as the Plaintiff through Onyinkwa & Co. Advocates filed this suit in 1994 against the Defendant Company.

It was seeking to recover Ksh.2,762,424.75 being the principal sum; interest thereon at 28% p.a until payment in full and costs and interest.

The Defendant filed a defence and counterclaim asking the court to dismiss the plaint and counterclaimed for general damages for breach of contract.

The main suit was dismissed by the court on 24th July, 2003 with costs of the suit being awarded to the Defendant. No appeal was filed against that dismissal. The Defendant proceeded to prosecute the counter-claim. This is now the judgment in respect of the said counter-claim.

On Fataki Sheikh Mohammed testified on behalf of the Plaintiff in the counterclaim. She narrated to the court how her company borrowed money from the bank in question at an agreed interest rate of 13% - 15%. She contended that they paid for the loan in full and the bank refused to give a statement of accounts to show how much had been paid and how much had not been paid. One of the prayers in the counterclaim was for the plaintiff bank to issue the said statement of account. They did not do so as ordered by the court. Counsel for the defendant conceded that this prayer was no longer tenable since the Plaintiff's claim was dismissed. At the hearing of the counter-claim, PW1 asked the court to order that she be paid general damages for breach of contract and that the bank be ordered to release her securities. The claim for general damages was nonetheless not seriously pursued and in his final submission, counsel for the plaintiff(in the counterclaim) asked the court to only make orders for the release of the title deed which is still being held by the bank as security as that would be the fairest order to make since it will be difficult to quantify the general damages.

On its part, the bank called one witness who admitted that the bank is still holding the plaintiff's security. He denied that the bank breached its contract but admitted that the bank could not unilaterally change the terms of the charge. It will be noted that the defendants counsel did not file any submission in reply to the Plaintiff's written submission. I can only assume that they were in total agreement with the same.

I have carefully considered the evidence before me which includes the written submission by counsel for the plaintiff(in the counterclaim). It will not be necessary for me to discuss and make a finding on the

issue of the legality or otherwise of the exorbitant interest rate levied by the bank on the plaintiff's loan. This would have been an issue in the main suit which was nonetheless disposed off earlier. I will not deal with the issue of the general damages claimed by the plaintiff either since the plaintiff appears to have dropped it as indicated in the final submission. The only issue before me now is whether the bank should be ordered to release the security it continues holding to the plaintiff in the counterclaim.

To begin with, as the matter stands now, the bank cannot claim any money based on the charge dated 14th December, 1988 between itself and the plaintiff in this counterclaim or any other charge which formed the basis of the main suit herein. That issue was conclusively determined by the court when the main suit was dismissed. No appeal was filed against that dismissal and so that dismissal killed that suit and claim permanently. This therefore meant that the bank lost its power to foreclose or realize the security in respect of that claim. The bank has therefore no right to continue holding the plaintiff's security. I agree with the plaintiff's counsel that the only fair and just order that this court can make is to order for the discharge of the security and that both parties be freed from this transaction.

This in my view is a good case of any loss lying where it falls. Accordingly, I find in favour of the plaintiff in the counterclaim and enter judgment in its favour in the following terms:

a) That the bank (defendant in the counterclaim be and is hereby ordered to discharge and release the plaintiff's (in the counterclaim) title deed forthwith.

b) That this court makes no further orders as to costs and will abide by the earlier order made upon the dismissal of the main suit.

W. KARANJA

JUDGE

DELIVERED, Signed and Dated at Bungoma this 12th day of February, 2008

in presence of Mr. Kakoi for the Defendant/Plaintiff in counterclaim.