



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1193 of 2001

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

WHEELS ELECTRICAL COMPANY LIMITED1ST DEFENDANT

JACKSON MAC MOGAKA2ND DEFENDANT

JUDGEMENT

The Plaintiff's claim against the Defendants jointly and severally is for the sum of Kshs.2,009,614.45 being the balance due in respect of monies lent by the Plaintiff to the 1st Defendant and whose payment was guaranteed by the 2nd Defendant under the aforesaid personal guarantee with interest applied up to 31st March, 2001. It also claims further interest at the rate of 26% per annum as from 1st April 2001 until payment in full.

The defendant's claim against the plaintiff has been captured in paragraph 8 of the defence which states as follows:

“The plaintiff was in breach in that it;

- (i) Failed to disburse the loan facility to the First Defendant as agreed.**
- (ii) Failed to keep the Defendants duly informed of the status of the First Defendant's account.**
- (iii) Wrongfully demanded for further payments from the Defendants without rendering an account for a total sum of Kshs.2,500,000/= or thereabouts which the Defendants have paid to the Defendants in settlement of the said facility.**
- (iv) Failed to render proper, accurate and lawful accounts to the defendants.**
- (v) Wrongfully debited the First defendant's account with inflated charges for the Plaintiff's Advocates, Auctioneers, Valuers, Surveyors and other agents without firstly seeking the Defendants' concurrence.**
- (vi) Levied interest, commissions, penalties and other charges that contravene the provisions of the law.**

(vii) Failed to discharge its duties to the Defendants in a professional and business like manner.

(viii) Prepared invalid and defective securities to secure the said debt.

The defendant was initially represented by the firm of **E. N. Omotii & co.** Advocates who later made an application dated 18th June, 2005 for leave to withdraw to act on behalf of the defendant in the present suit. The said firm was also granted leave to effect service on the defendants by way of registered post. The said application was allowed by **Ochieng J** on 26th June, 2005. The plaintiff then set down this suit for hearing on 28th January, 2008 after making service through the last known address of the defendants. As a result, the plaintiff proceeded *ex parte* and called one witness in the names of **John Bett Tarus**. The witness stated that he is employed by the plaintiff as a customer service for many years and that he is aware of the account held by the defendants. He stated that the 2nd defendant applied for overdraft facility on 31st March, 1993 for Kshs.350,000/=. And by a letter of offer dated 14th April, 1993 the defendant's application was allowed with requisite terms and conditions.

The witness also stated that the 2nd defendant requested for an enhancement of the overdraft facility from Kshs.350,000/= to Kshs.500,000/= which was allowed with all the requisite terms and a charge registered over the suit property. The facility was then utilized by the defendants. However the defendants did not service loan as agreed hence there was a default. The 2nd defendant then asked for the restructuring of the loan which the bank did not agree to. The bank then issued a demand letter dated 31st October, 1994 asking the defendant to pay immediately. The defendants did not comply with the demand but asked to pay a sum of Kshs.50,000/=. Through a letter dated 20th December, 1994 the bank informed the defendants that their proposals to pay Kshs.50,000/= is not acceptable to the bank. Thereafter the defendants made several and various proposals to settle the debt which did not bear any fruits. The witness produced the letters exchanged between the bank and the defendants as a bundle. Some of the letters were written by the defendants' previous advocates. In a letter dated 9th December, 1996 **M/S Maingi & co.** Advocates gave an undertaking to pay the full sum after discharge of security title. The documents were released to the said advocate but they did not honour their undertaking. It is also clear the said advocate registered a new charge over the suit property but did not release the money to the bank. The bank then filed suit No.HCC 973 of 1997 seeking the cancellation of the charge and the discharge effected by the firm of **Maingi & company** advocates. The court allowed the prayers of the bank by reinstating the charge in favour of the bank. Hence the bank is still holding the title. It is also clear that there is a charge dated 18th October, 1996 between the 2nd defendant and **Industrial Commercial & Development Corporation (ICDC)**.

From the facts narrated by the plaintiff's witness, it is clear there existed a bank/customer relationship between the plaintiff and the 1st defendant as the 1st defendant operated a current account No.021045100 through the 2nd defendant who was its principal director. It is also clear that the 2nd defendant was the man actually behind the 1st defendant as is evidenced by the various correspondences and letters exhibited before this court by the Plaintiff's witness. There is also no doubt that the plaintiff granted the defendants overdraft facility in the sum of Kshs.500,000/= which was utilized by the said defendants. The defendants defaulted in repaying the facility and the plaintiff demanded payment. Upon receipt of demand letters, the defendants admitted their indebtedness to the plaintiff and sought indulgencies in several occasions. The plaintiff's witness exhibited before this court letters of admission by the defendants.

I am therefore satisfied that the existence of the debt has not been denied by the defendants and the plaintiff has proved on a balance of probabilities that the defendants were jointly and severally indebted to it in the sum claimed in the plaint. The plaintiff's witness produced statements of account which show that the defendants did not properly and sufficiently repay the loan advanced. There is also material to show that the plaintiff has employed or used all diligent efforts to realize its security over L.R. No.9474 Molo Township without any success making the filing of this suit as the only avenue to recover the debt in the books of the plaintiff.

In conclusion I am satisfied that the plaintiff has proved its case on a balance of probabilities and the defence as filed is composed of generally denials which does not raise any valid defence capable of resisting the plaintiff's claim. The averments in the defence of the defendants is no evidence.

In the premises, I am satisfied that the plaintiff is entitled to judgement as prayed and as proved by the evidence of PW1. I therefore enter judgement for the plaintiff against the defendants for the sum of Kshs.2,009,614.45. Interest shall be at court rate from 14th April, 2001 till payment in full. The plaintiff shall also have the costs of this suit to be borne by the defendants.

Dated, signed and delivered at Nairobi this 5th day of May, 2008.

M. A. WARSAME

JUDGE