



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

Civil Suit 290 of 2006

IDB CAPITAL LIMITED

(Formerly Industrial Development Bank Limited.....PLAINTIFF

VERSUS

SARKISH FLORA LIMITED.....DEFENDANT

J U D G M E N T

The Plaintiff, IDB CAPITAL LIMITED, has sued the Defendant, SARKISH FLORA LIMITED for Kshs.2,044,071/81 with interest thereon at commercial rates from 1st September, 2005 until payment in full. The brief facts of the case are that the Defendant operated an overdraft account with the Plaintiff bank with a maximum limit of Kshs. 1 million from 16th April, 2002. The Defendant also had a long term loan account with the Plaintiff Bank. The Defendant used funds paid into its Euro Account from flower sales overseas to pay the Overdraft Facility. It is not disputed that in the year 2003, the Defendant's long term loan and overdraft was paid off by Barclays Bank of Kenya who took over both facilities.

The Plaintiff claims after the take over, the Defendant continued to enjoy Overdraft Facility with the Plaintiff bank by overdrawing on this account as a result of which on 1st September, 2005, the Plaintiff bank froze the Defendant's account with an outstanding balance of kshs.2,044,311/81. That is the sum claimed by the Plaintiff in this suit.

The Defendant case is that the loan and Overdraft Facilities that existed between the Plaintiff and the Defendant were fully taken over by Barclays Bank of Kenya. The Defendant denies that it subsequently requested, received, maintained or utilized Overdraft Facilities with the Plaintiff bank after the take over by Barclays. In the alternative the Defendant avers that the Plaintiff's claim is based on unlawful and illegal banking practices and procedures in breach of relevant provisions of the Banking Act as well as unconscionable and unreasonable interest, penalties and charges and should fail.

The Plaintiff filed statement of Agreed Issues dated 21st November, 2006 and filed in court on 22nd November, 2006. In the statement, seven issues are raised as follows:

1. Is the Plaintiff a limited liability company incorporated under the Companies Act Cap 486 of the Laws of Kenya?
2. Did the defendant continue operating the overdraft account with the plaintiff after take over by

Barclays Bank?

3. Does the defendant owe the Plaintiff Kshs.2,044,371.81 as at 1/9/2005 or any other sum(s) at all?
4. Is the plaintiff's claim based on unlawful and illegal banking practices and procedures in breach of relevant provisions of the Banking Act as well as unconscionable and unrecoverable interest, penalties and charges and must fail?
5. Does the defendant have documents as it transacted with the plaintiff?
6. Does the Plaintiff have a cause of action against the defendant?
7. Who should pay costs of this suit?

The Defendant has not filed any Statement of Issues. The court infers then that the issues raised by the Plaintiff in their statement were accepted by the Defendant. The issues shall be considered simultaneously.

The Agreement between the parties is what controlled the relationship between them. The court has been shown an Agreement for an Overdraft Facility between the Plaintiff and the Defendant for Kshs.1 million. Under the Agreement, the Overdraft Facility offered to the Defendant was to expire one year from the date of draw down.

I have looked at the Statement of Account of the Defendant's overdraft account with the Plaintiff. The date of draw down according to the statement is 17th April, 2002. Going by the Agreement, the expiry date was to be one year after 17th April, 2003. The parties agree that the Defendant approached Barclays Bank of Kenya which agreed to take over the Defendant's overdraft and loan facilities from the Plaintiff bank. The takeover was characterized by a Telegraphic Transfer of Kshs.12,000,000/- from Barclays to the Plaintiff Bank to clear both the Defendant's overdraft and loan Accounts. I have confirmed from the Defendant's statement of Account that Kshs. 12 million was transferred by Telegraphic Transfer into its account on 4th August, 2003. The transfer brought the Defendant's account to a credit balance of Kshs.649,210/62.

What is important is that the Telegraphic Transfer was made in August, 2003 four months after the expiry date of the Overdraft Agreement between the Plaintiff and the Defendant. That being the case, the Defendant cannot rely on the expiry date of April 2003 as the date the Overdraft Agreement expired since it is clear that the Defendant continued to enjoy the facility four months after it was to expire.

Even if for argument sake the court was to find that the Overdraft Agreement expired on April 2003, the evidence placed before the court clearly shows that the Defendant continued to enjoy the Overdraft Facility from its account with the Plaintiff bank. That brings us to the question what is an overdraft.

Mrs. Mbabu for the Plaintiff relied on Halsbury's Laws of England 4th ed. Vol. 3 paragraph 155 where overdraft is defined thus:

"A customer may borrow from a banker by way of loan or by way of overdraft. A loan is a matter of special agreement. In the absence of agreement, express or implied from a course of business, a banker is not bound to allow his customer to overdraw. An agreement for an overdraft must be supported by good consideration, and it may be express or implied.

Drawing a cheque or accepting a bill payable at the banker's where there are not funds sufficient to meet it amounts to a request for an overdraft."

Mr. Mogere for the Defendant on his part argues that after the expiry date of the Overdraft Agreement as provided in the Agreement, the securities provided by the Defendant to the Plaintiff were discharged upon

payment of the overdraft and loan accounts. Counsel argued that having discharged the securities, the Defendant had no Overdraft Facility with the Plaintiff as there was no consideration and therefore the Plaintiff cannot claim overdraft as cheques were paid against cash in the Defendant's Account. Counsel relied on the Court of Appeal case of National Bank of Kenya vs. Pipeplastic Samkolit (K) Limited & Another [2001] KLR 112.

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or unique influence are pleaded and proved.”

Mr. Mogere also challenges the exhibit relied upon by the Plaintiff, the computer print out of the Defendant's Statement of Account with the Plaintiff. Counsel argued that the statement did not show how the claim was computed and interest rate applied or even whether there was any money due from the Defendant.

To start with the last issue first, the computer print out was a Statement of Account generated from the computer and it clearly indicated the transactions that went through the account, the interest charged, the balances in the account at any one time and whether the balances were credits or debits. The Plaintiff also produced all cheques drawn on the account as the primary evidence to show how the debit balance was arrived at. The Defendant did not challenge the cheques or the balances on the Defendant's accounts as shown.

The Defendant relied on the account to prove that Barclays Bank of Kenya credited Kshs. 12 million to clear the outstanding overdraft it had with the Plaintiff. No sufficient cause has been shown why the court should not rely on it.

Regarding the issue of the Overdraft Agreement having expired, the evidence placed before the court is that the Plaintiff discharged all securities given to it by the Defendant for the Overdraft Facility under the Overdraft Agreement dated 16th April 2002. The discharge was made after the outstanding balance on the account of Kshs.11,350,789/38 was paid off.

The Plaintiff has not denied that it discharged the securities to the Defendant after the outstanding overdraft balance was paid to it. Having discharged the securities, the relationship between the Plaintiff and the Defendant changed. That change cannot serve as a novation since the Plaintiff and the Defendant maintained the banker/customer relationship. A novation would arise only where there is a new contract between different parties from those in the original agreement. In the instant case the Plaintiff and the Defendant remain the only parties to the Agreement. Besides, after a period of the Overdraft Agreement lapsed, under section 75 of the Bills of Exchange Act Cap 27 Laws of Kenya, the Plaintiff had authority to pay to the various payees of the cheques drawn by the Defendant, there not having been any countermand of payment. Having so paid, can the Defendant escape liability to satisfy the value of the cheques paid by the Plaintiff where the Defendant's accounts had insufficient funds to meet the order of the cheque?

I do not think that the Defendant can escape liability to pay to the Plaintiff the value of the honoured cheques against which the Defendant's account with the Plaintiff could not meet.

Mrs. Mbabu relied on definition of overfed in Halsbury's Laws of England 4th edn. Vol. 3 supra. That text provides that 'drawing a cheque or accepting a bill payable at the bankers' where there are not funds sufficient to meet, it amounts to a request for an overdraft. That is the common law position which also applies here in Kenya. The Defendant by drawing cheques with funds that were insufficient to meet them amounted to a request for an overdraft. An Agreement for an overdraft could be express or implied. In the instant case, there was an express Overdraft Agreement between the Plaintiff and the Defendant between April 2002 and April 2003. After April 2003, it is my view the Overdraft Agreement was implied since the Defendant continued drawing cheques against insufficient funds in its account and the Defendant's overdraft account remained in debt. After the payment of the overdraft by Barclays Bank of Kenya in August, 2003, that implied Overdraft Agreement may have terminated. Thereafter, it is my view that the Plaintiff was entitled to recover from the Defendant for any cheques drawn on insufficient

funds but which the Plaintiff honoured, as a debt rather than as an overdraft.

It is my view then that the Plaintiff deserves to recover the amount shown to have been drawn by the Defendant for which the funds in the Defendant's accounts could not meet. The Plaintiff is entitled to recover the said sum as a debt. That means it will not be entitled to claim interest as per the Overdraft Agreement between it and the Defendant.

The parties gave no submissions regarding the interest payable. It is my view that interest should be determined by the court as provided under Section 26(1) of the Civil Procedure Act. The interest should be at such rate as the court deems reasonable to be paid on the principle sum and at a period the court determines in its discretion to be reasonable.

I note from the Statement of Account that the Plaintiff bank loaded onto the outstanding balances various charges and interest charges. The Plaintiff bank, being a commercial bank performing banking business, and as is the normal trade and banking practice, was entitled to levy interest on the sums due to it from the Defendant. That interest should suffice for the period between the time the sums became due and the time the case was filed in court. I will allow interest to be charged at the court rates from the date of filing suit to the date of full and final payment of the outstanding sum

In conclusion, I enter judgment for the Plaintiff against the Defendant in the following terms.

1. Kshs. 2,044,371.81
2. Interest on (1) above at court rates from date of filing suit to the date of full and final payment.
3. Costs of the suit.

Dated at Nairobi this 14th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mrs. Mbabu for the Plaintiff

Mr. Mogere for the Defendant

LESIIT, J.

JUDGE