



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 149 of 2002

STEPHEN NDICHU..... PLAINTIFF

VERSUS

MONTY’S WINES AND SPIRITS LTD..... DEFENDANT

CONSOLIDATED WITH CIVIL CASES 170 OF 2002

LORENZO VENTURA.....PLAINTIFF

VERSUS

MONTY’S WINES AND SPIRITS LIMITED.....DEFENDANT

AND

CIVIL CASE 171 OF 2002

JACKPOT ENTERPRISESPLAINTIFF

VERSUS

MONTY’S WINES AND SPIRITS LIMITED.....DEFENDANT

JUDGMENT

HCCC Nos:149, 170 and 171 of 2002 have been consolidated for hearing. The same were listed for hearing before me on 8.11.2007. The defendants’ representatives and their counsel did not attend. The cases therefore proceeded ex-parte. This is not the first time the defendants and their counsel have failed to attend for the hearing of these cases as I had previously heard the plaintiff and entered judgment against the defendant exparte. That judgment was set aside after counsel for the defendant satisfied me of the cause of her failure to attend.

All the suits were instituted against the defendant Monty’s Wines and Spirits Limited. Stephen Ndichu instituted HCCC No.149 of 2002, Lawrence Centura instituted HCCC No.170 of 2002 and Jackpot Enterprises Limited instituted HCCC No.171 of 2002. In this consolidated suit Stephen Ndichu will be the 1st plaintiff, Lawrence Centura the 2nd defendant and Jackpot Enterprises the 3rd plaintiff.

The 1st plaintiff claims against the defendant recovery of KShs.373,749.70 in respect of a written agreement dated 12.5.2000 whereby the plaintiff lent and assigned to the defendant the said sum which sum was to be repaid by 24 monthly installments w.e.f. 1.6.2000 in default of which the said sum would attract interest at the rate of 3% above the base lending rate per annum.

The 2nd plaintiff claims against the defendant recovery of KShs.1,042,387.10 in respect of a similar agreement on the same terms.

The 3rd plaintiff claims against the defendant recovery of the sum of KShs.3,986,074.18 due and payable by the defendant again in respect of a similar agreement and on the same terms.

The defendant denied the plaintiffs' claims and filed similar defences against the three claims.

The evidence in support of the plaintiffs' cases in the three suits was tendered by Stephen Ndichu the 1st plaintiff. In support of the said claims he told the court that he was a director of the 3rd plaintiff and so was the 2nd defendant. He referred to the evidence which he produced at the first time he testified when the case was first heard *ex parte* and relied upon the same. He resubmitted the following documents to buttress his evidence: The Loan Agreements as P.EXs. 1(A) (B) and (C); Deeds of Assignments as P.EXs 2(A) (B) and (C); Letters of demand as P EXs 3 (A), (B) and (C) and the defendant's letter addressed to Trust Bank as P.Ex.4. The 1st plaintiff further testified that he had dealings with the defendant and as its customer he bought supplies therefrom. He recalled that the defendant's Chairman and Managing Director one Rupin Rajani was well known to him. On behalf of the defendant, he admitted owing money to Trust Bank and sought the plaintiffs' assistance. At that time, the plaintiffs had deposits at the same bank. The 1st plaintiff's deposit was of Kshs.373,749.70. The 2nd defendant's was of KShs.1,042,387.10 whereas that of the third plaintiff was of KShs.3,986,074.18. The plaintiffs agreed to surrender those deposits to Trust Bank in reduction of the defendant's indebtedness to the said bank. Their understandings were reduced into writing culminating in the said loan agreement, and deeds of assignment. The 1st plaintiff further testified that by Clause 3 (a) and (c) of the Loan agreements the parties agreed that the loan amounts would be paid by 24 equal monthly installments w.e.f 1.6.2000 and thereafter each succeeding month until payment in full and in default the sums lent would attract interest at the rate of 3% above the base lending rate per annum.

It was the 1st plaintiff's further testimony that at the time of execution of the above documents, Rupin Rajani appeared to be in good health. He however died about a month later. The defendant according to the plaintiffs made no single payment despite demands made in that regard. The 1st plaintiff denied that the said agreements and assignments were executed by the Chairman and Managing Director on his deathbed. Indeed according to him the defendant's Chairman/Managing Director went to his office where he executed the documents. To the 1st plaintiff he looked normal and in good health. It was the 1st plaintiff's further testimony that there was consideration for the said contracts and it was not true that the same were void. In the 1st plaintiff's view the averments in the defences filed were not true. He therefore prayed for judgment as prayed in the plaints.

In his oral submissions counsel for the plaintiffs emphasized that the defendant's Chairman/Managing Director was not acting in his individual capacity. He had full authority to agree on behalf of the defendant company. Counsel further submitted that the transactions between the plaintiffs and the defendant were normal commercial transactions and the defendant took benefit of the same. In those premises the defences taken by the defendant were unconscionable. Counsel further submitted that the provisions of the Banking Act and the Transfer of Property Act were irrelevant.

I have considered the oral testimony of the 1st plaintiff and the documentary evidence produced. The evidence conclusively establish that the plaintiffs lent to the defendant the sums claimed in the plaints. The Loan Agreements speak for themselves. Each Loan Agreement provided for payment by twenty-four equal monthly installments w.e.f. 1.6.2000 and thereafter each succeeding month until payment in full. In default all the agreements provided that interest would accrue at the rate of 3% above the base lending rate per annum. The agreements further provided that in the event the defendant failed to remit to the plaintiffs any one or more of the installments on any due dates as stipulated in the agreements the full amount then due and owing plus interest would immediately become payable and the plaintiffs would be at liberty to institute proceedings against the defendant for the recovery of those sums. There was default. So the plaintiffs were perfectly entitled to institute these proceedings as demands for payment were not fruitful.

The clear documentary evidence and the oral testimony of the 1st plaintiff is not controverted. The defences put forward by the defendant remained unsubstantiated. In my view, however, the same have no merit in view of the evidence tendered by the plaintiffs.

As regards the issue of interest although the rate agreed was indicated in the agreements, the same was pegged on the base lending rate. The plaintiff's evidence did not clarify what the base lending rate was. The base lending rate was therefore not demonstrated and remained unproven. The interest on the sums claimed will therefore be at the court's discretion. In the circumstances of this case, I award interest at court rates from 1.6.2000.

I find therefore that the plaintiffs have proved their claims on a balance of probabilities against the defendant. I will therefore enter judgment for the plaintiffs as prayed in their plaints save for interest which will be at court rates from 1.6.2000.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF NOVEMBER, 2007.

F. AZANGALALA

JUDGE

Read in the presence of:

Satish Gautama/Khamala for the plaintiff.

F. AZANGALALA

JUDGE

26/11/07