



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT (NAIROBI MILIMANI COMMERCIAL COURT)

CIVIL CASE 1135 OF 2000

COMMERCE BANK LIMITED

(formerly CREDIT AND COMMERCE FINANCE LTD).....PLAINTIFF

VERSUS

NIZARALI HASHAM MANGALJI.....DEFENDANT

JUDGMENT

The Plaintiff herein is Commerce Bank Limited which sues the Defendant, NIZARALI HASHAM MANGALJI for Kshs.16,401,550.77 being sum of monies lent by the Plaintiff to the Defendant at his request. It also claims interest at the rate of 35% per annum from 1st January, 1999 and costs of the suit with interest thereon. There is an amended defence and counterclaim on the record dated 14th June, 2002. The gist of the defence is as follows:

The Defendant avers in paragraph 3A that if the Defendant was indebted to the Plaintiff in sum claimed, then the Plaintiff rights to claim for the money could only arise under the Agreement dated 29th September, 1998 and not under the Loan Agreement.

Under paragraph 4A the Defendant sets out in general terms the terms of the Agreement of 28th September, 1998, whose signatures he avers were, the parties to the instant suit and, Messrs Bukumbi Coffee Growers and Processors Limited. The Defendant avers that under the contract, Bukumbi was to sell some property to pay off the Defendant's debt, including sum owed to the Plaintiff, and that if the sum was insufficient to meet the debt, then the terms under the Letter of Offer dated 6th April, 1994 would apply. The Defendant avers further that the said agreement of 28th September, 1998 created an equitable charge over the property plot No.3 Burahya Block 88 at Bukumbi Burahya Volume 2217 Folio 25.

The Defendant avers that the said Agreement superceded all previous discussions and agreements over the subject loan as provided under Clause 3 & 4 thereof and that therefore the mode of repaying the alleged loan was in accordance to the said Agreement. The Defendant further avers that the interest charged was excessive, harsh and unconscionable.

In the counterclaim the Defendant prays for a declaration that the rate of interest charged was excessive, that an account be taken to ascertain actual amount owed, and an order that the Plaintiff exhausts

remedies under the mortgage created in the Plaintiff's favour.

There is a reply to the defence. In it the Plaintiff avers that Agreement referred to in the Defence was only intended to provide security for the monies advanced and that further no monies have been received. The Plaintiff denies that any agreement exists which precludes it from recovering the debt due to it. The Plaintiff denies that any mortgage was even created as alleged and that any rights created therein were cumulative not exclusive of any rights or remedies provided in the law.

The Plaintiff set down the suit for hearing ex-parte, on 18th January, 2007. The Defendant was served with a hearing notice under certificate of posting, since his Advocates on record, Okundi & Co. Advocates, ceased acting for him on 17th May, 2006 pursuant to an application. The Defendant did not however attend Court on the hearing date. The case therefore proceeded exparte.

The Plaintiff called one witness. **MODALI PRABAKA SASTRY**, the General Manager of Giro Bank. He appraised the Court that **GIRO BANK** was the Successor Bank to **Commerce Bank Limited**, the Plaintiff herein, as from 1998. Mr. Sastry testified that the Defendant was a customer of the Plaintiff Bank, whom he knew as the one who borrowed a loan facility of Kshs.5 million in 1994. The letter applying for the facility was **P.exh 1** dated April 6, 1994. The Bank gave him an offer as per the Letter of Offer dated April 6th, 1994 in which the Bank offered Kshs. 5 million as per terms in the letter. The Defendant accepted the offer by signing on it. The Defendant also guaranteed the loan by a personal guarantee as per the guarantee documents **P.Exh.6**. Letter of Offer was Plaintiff **P.Exh.2**.

Mr. Sastry testified that the Defendant drew the money, as evidenced in the Statement of Account **P.Exh.3**. The statement shows that the Plaintiff withdrew a total of Kshs.4,296,000/=. The agreed rate of interest as per the Agreement was 30% subject to variation at any time.

Mr. Sastry testified that despite making repayments, the Defendant did not clear the loan since repayments made were in very small amounts of money. That after default in repaying the debt, the Defendant wrote **P.Exh.4** dated 9th October, 1994, in which he sought an extension of the repayment period. Mr. Sastry testified that the Defendant had not repaid the money by 8th May, 1997.

Mr. Sastry testified that when the Defendant failed to pay as expected, the Plaintiff Bank wrote to him demanding Kshs.8,965,368.63 as per the letter **P.Exh.5**. He did not repay the loan thus this suit.

Mr. Sastry testified that the Defendant entered into an agreement with the Plaintiff Bank dated 29th September, 1998 in which Bukumbi Coffee Growers and Processors Limited would pay the Plaintiff Bank the debt he owed. The Agreement is **P.Exh.7**. Mr. Sastry testified that the Bank received no money out of that Agreement.

Mr. Sastry urged the court to given Judgment to the Plaintiff Bank against the Defendant, in the sum claimed with interest at 35% per annum, which was prevailing market rate in 1998.

Mr. Gitonga gave brief submission in which he urged the Court to find that the Plaintiff had proved its claim on a balance of probabilities.

I have carefully considered this case, the pleadings filed therein and the evidence adduced by the Plaintiff's witness. The Plaintiff's case was uncontroverted. Infact, the Defendant admitted, in the statement of defence, that he took the loan from the Plaintiff as claimed. The only difference the Defendant has introduced in this case is the Agreement dated 29th September, 1998 which the Defendant avers, was the sole basis upon which the Plaintiff could claim. The Defendant avers that the Plaintiff could not claim under the Letter of Offer dated April 6th, 1994 which is **P.exh.2**.

I have considered both the Letter of Offer **P.exh.2**, and the Agreement dated 29th September, 1998. **P.exh.7** The latter Agreement dealt only with the mode of the repayment of the loan owed by the Defendant to the Plaintiff under clause (A) the Agreement stipulates:

“(A) The Bank granted a short term loan (“loan”) to NHM pursuant to the terms and conditions contained in the letter of Offer dated 6th April, 1994 (Ref: CCF/TM/ADV/3/94).”

That clause acknowledges that the Plaintiff granted a loan to the Defendant and that the terms and conditions contained in the Letter of Offer dated 6th April, 1994 applied. Under clause 3.3 it is stipulated:

“3.3 The rights and remedies of each of the parties in connection herewith are cumulative and are not exclusive of any rights or remedies provided by law.”

This clause acknowledges that under the Agreement, the rights of the either party to the same are cumulative to any rights or remedies provided by the Law. Mr. Sastry, in his evidence stated that the Plaintiff Bank’s right under the Agreement of 1998 were cumulative to those under the Letter of Offer of 1994. I agree with him. The agreements entered into by the parties herein are very clear indeed. The Letter of Offer governed the terms and conditions under which the loan was advanced. The Agreement of 1998 did not set aside, revoke or cancel these terms and conditions under the Letter of Offer. The agreement of 1998 and be interpreted as a security provided to the Bank by the Defendant, over the debt he owed the Bank. It was not a Loan Agreement by any standard. The Plaintiff’s rights over the loan advanced to the Defendant, and guaranteed by him are spelt out clearly under the Letter of Offer which is valid and binding to the parties. The Defendant’s defence contradicting that position is untenable and is rejected.

Having considered this case I find that the Defendant applied for a loan of Kshs. 5 million from the Plaintiff Bank, which he accepted from the Bank under the terms contained in the Letter of Offer. The Letter of Offer provided for interest on the loan at 30% per annum. It also gave the Plaintiff the right to vary the interest rate at any time. The Defendant’s defence that the interest charged was excessive, harsh, unconscionable and inequitable is equally untenable. The interest rate charged of 30% was in agreement with the Letter of Offer which the Defendant signed, therefore binding himself to it. To ask the Court to rule that the interest rate was harsh, inequitable or excessive, is asking the Court to re-write the agreement between the parties, which a Court of Equity and/or Law cannot do. That argument is also rejected.

The Defendant did not adduce any evidence to substantiate his defence and counter claim. To the contrary the Plaintiff’s case is unchallenged. I find that the Defendant enjoyed the Loan facility advanced to it by the Plaintiff Bank but failed to repay as agreed between the parties. I therefore find that the Plaintiff’s claim has been proved on a balance of probabilities. The upshot of this case is as follows:

- 1) The Defendant’s defence and counter claim is dismissed with costs.
- 2) Judgment be and is hereby entered for the Plaintiff Bank against the Defendant.
 - a) In the sum of Kshs.16,401,550.77.
 - b) Interest thereon at Kshs.35% per annum from date of filing suit until payment in full.
 - c) Costs of the suit.

Dated at Nairobi this 16th day of November, 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in the presence of:

Ms. Mburu holding brief Gitonga

LESIT, J.

JUDGE