



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 726 of 2000

NATIONAL BANK OF KENYA LIMITED.....
....PLAINTIFF

VERSUS

PATRICK SIMIYU KIMOI.....DEFENDANT

J U D G M E N T

The plaintiff has brought the present suit against the defendant seeking to recover the sum of kshs 1, 026, 453, which amount the plaintiff alleges is owed to it by the defendant, in respect of unpaid overdraft facilities. The plaintiff alleges that the said overdraft facility was granted to the defendant at his own request. The plaintiff claim that the amount claimed attracts interest at the rate of 28% per annum from the 1st March 2000 until payment in full.

The defendant defended this action by stating that he had a current account at the plaintiff's Bungoma branch but did not have an overdraft facility or a loan from the plaintiff. The defendant further contends that the amount claimed by the plaintiff was money used by the then plaintiff's bank branch manager. The defendant therefore denied liability for the said debt.

The plaintiff's evidence was adduced by PIUS KIPCHUMBA KINIGA. He said that he works for the plaintiff as an advances officer, and has so worked since 1996. That his position entails dealing with lending and recoveries.

He said that the defendant by his letter dated 20th February 1998 applied to the plaintiff for an overdraft facility of kshs 200, 000/. The plaintiff, he said granted the defendant the said overdraft facility which was secured by kshs 700, 000 fixed deposit held in the plaintiff's bank.

That the defendant sought to exceed the overdraft limit of kshs 200, 000 and this he was again allowed.

That the defendant failed to make repayment of the overdraft facility and accordingly the plaintiff directed demand to him by their letters, one dated 21st October 1998, which demanded kshs 1, 160, 534. 30 and the other letter of demand was dated 5.11.98 demanding for kshs 1, 190, 543. 65.

That the defendant by his letter dated 11th November 1998 instructed the plaintiff to uplift kshs 200,000 and apply the same to reduce his indebtedness on the overdraft account. P W 1 said that the defendant

added a note on the said letter, which stated as follows:

“NB I would like all fixed deposit to be transferred to my current account”

P W 1 said that after crediting that amount into the overdraft account, the defendant’s account still had a debit balance of kshs 683, 122. 90.

After the plaintiff’s demand letters failed to yield payment from the defendant, the plaintiff instructed their lawyer to make demand of payment from the defendant. The defendant responded to the plaintiff’s advocate’s demand by his advocate’s letter of 12th August 1999 whereby he stated:

“Our client is so desirous of servicing the overdraft. However the desire notwithstanding his business is doing poorly.

He appeals through you to your good client to be given a further facility of around kshs 250, 000 to enable him have his business back on truck (sic) so that he can clear his instalments to the bank.”

P W 1 produced in exhibit cheques drawn by the defendant for the period of March to October 1998 and defendant’s bank statement.

On being cross-examined P W 1 stated that the defendant’s bank statement for the month of May 1998 was missing. He accepted that a bank would ordinarily in granting a facility such as the one granted to the defendant; issue a letter containing all the conditions of that facility. P W 1 accepted that the plaintiff had not produced as an exhibit such a letter. In response to a question on the interest rate claimed, P W 1 said that the rate of interest applicable to the defendant’s facility fluctuated from time to time. He also accepted that the plaintiff had not produced documentary evidence to show that the defendant had requested for the limit of the facility to be increased.

P W 1 said that the defendant had made payment to his overdraft account by requesting the debiting of his fixed deposit by an amount of kshs 200, 000 in May 1998. That he further made another payment on 24th November 1998, by crediting into his overdrawn account that is kshs 526, 328. 95.

P W 1 accepted as correct that although the defendant’s bank statements for the month of October 1998 reflected withdrawals of kshs 455, 546/- the plaintiff had only produced cheques drawn by the defendant for kshs 37, 572 for that month.

P W 1 in further cross examination stated that the then bank manager of plaintiff’s Bungoma branch was charged in court and was no longer in the plaintiff’s employment.

The defendant gave evidence and stated, that he is a resident of Bungoma, presently not employed. That before December 1997 he worked for Kenya Power & Lighting Company. He chose to retire in December 1997 and received a golden handshake of kshs 1, 570, 000/-. That he invested kshs 400, 000 in a retail shop and the balance of that money he deposited at the defendant’s bank in Bungoma. That he deposited kshs 700, 000 in the defendant’s bank in a fixed deposit account.

He said that he applied from the defendant an overdraft of kshs 200, 000 by his letter dated 20th February 1998. He said that the plaintiff approved the overdraft application by a letter, which he did not produce in evidence, for a period of three months, but that letter did not state the rate of interest applicable. He denied that he ever applied for extension of the overdraft limit beyond the kshs 200, 000 limit.

The defendant denied receiving the letters of demand in pages 10 and 11 of the plaintiff’s bundle. The court will however reject this evidence because in the court’s view it is an afterthought since the plaintiff’s witness was not questioned on the mode of transmission of those letters to the defendant.

Defendant faulted the bank’s statements produced in evidence by the plaintiff by drawing out the inconsistency with the cheques also produced hereof. The defendant stated in evidence that in March 1998

he drew a cheque of kshs 575/- only, yet the bank statement shows that the withdrawals were kshs 348, 109/-. He concluded by stating that he believed the bank had done something wrong in his account. He therefore denied being indebted to the plaintiff and stated that he cleared the overdraft.

The plaintiff in submission stated that it relied on section 176 of the Evidence Act, which provides that entry in a bankers book shall be received in proceedings as prima facie evidence of such entry. Plaintiff argued that since “the defendant did not lead any contradictory evidence to challenge the validity of these accounts,” the court should accept the bank statements as prima facie evidence of such entries. Defence in his submissions differed with the argument of the plaintiff. Defence argued that the burden of proving those statements still lay with the plaintiff.

In the court’s view section 176 of the Evidence Act is subject to the fulfilment of the conditions found in section 177 of the Evidence Act. One ought to understand that both sections 176 and 177 talk about a banker’s book, and in this day and age of computers, one wonders what use such sections are. That as it may be the requirements of section 177 requires a party invoking section 176 to state that the bankers book is one the ordinary book of the bank, that the book was in the custody and control of the bank, that the entry was made in the usual and ordinary course of banking business, and that the copy has been examined with the original entry and is correct. The plaintiff did not satisfy section 177 and therefore cannot rely on section 176.

But of greater concern to the court is the discrepancies in the statements relied upon by the plaintiff. The statements running from the period of February 1998 to September 1998 reflect the defendant’s account number to be 01-0-01-38811-00-4. For the period from 3rd September 1998 to October 2000 the defendant’s account is reflected in those statements as No. 010/10/38811/00. Are those the same accounts?

The other concern is that the plaintiff having chosen to produce in evidence the cheques allegedly drawn by the defendant for some months, the cheques so produced do not match the reflected drawings reflected in the statement. For the month of March 1998 the cheque produced by the plaintiff showed that the defendant’s drawing in that month is kshs 575/-. The statement, on the other hand, shows that the total drawings from the defendant’s account total kshs 348, 109/-. Similarly in the month of October 1998, the cheque produced show that the drawing by the defendant was for shs 37, 572/-. The statement reflects a total drawing for that month of kshs 455, 546/-.

But perhaps the greatest failing of the plaintiff’s case is failure to prove, by statements the amount claimed in the plaint. The plaintiff’s claim is for shs 1, 026, 453/- with interest at 28% as at 1st March 2000. The court examined the statements produced by the plaintiff and there is no page showing the amount due as at 1st March 2000. In addition regarding the rate of interest, the plaintiff’s witness stated that the rate of interest applied in the defendant’s account varied from time to time. In saying so the witness failed to prove the rate of interest that had been agreed between the plaintiff and the defendant and having failed to so prove, even if the defendant had produced a statement showing the amount claimed in the plaint the plaintiff’s claim would have failed for application of interest not agreed upon.

In its submissions the plaintiff argue that since the defendant had failed, by his defence sufficiently ‘meet’ the plaintiff’s case, the plaintiff was entitled to judgment as prayed. That argument would be correct if the plaintiff had proved its case on a balance of probability. As stated herein before the plaintiff failed to prove the amount claimed, by way of documentary evidence and failed to prove that there was an agreed rate interest. The court of appeal has had occasion to decide on issue where the rate of interest is not stipulated in the case of SHAH – V – BUILDERS INTERNATIONAL BANK LTD [2003] KLR page 8, and the court had this to say:

“.....but we must hasten to add that in some other circumstances, banks which fail to stipulate particular rates of interest in lending agreements run the risk that the court will fall back on the exercise of their discretion conferred by Section 26, and when it comes to the exercise of discretion, the rate of interest can be as low as 14% per annum which is currently the court rate.”

The defendant in evidence stated that he repaid the amount owed to the plaintiff but failed to prove such payment with documentary evidence. He further denied to have authorised the bottom note in the letter dated 11th November 1998, which authorised the plaintiff to uplift the credit balance in his fixed deposit account and apply the same on his overdraft account. I have examined the said writing and compared it with the writing in defendant's letter dated 20th February 1998 and the other dated 18th May 1998 and I find that the writings are not inconsistent. I find that the note on the letter of 11th November 1998, in comparison with the aforesaid letter is written by the same hand, that of the defendant.

The plaintiff's case, must however, fail for failure of proof on a balance of probability.

The parties drafted issues for consideration by this court.

1. Whether the defendant's current account with the plaintiff could be lawfully overdrawn, and if not, whether the plaintiff improperly allowed the same to be overdrawn.

The evidence adduced by the plaintiff's witness and by the defendant did not dispute that the defendant requested for an overdraft, which the plaintiff granted for a limit of kshs 200, 000/-.

2. Whether, as a fact, the defendant overdrew the account, or was granted an overdraft facility, and if so, in what manner and for what amount

The evidence of both plaintiff and defendant was that the defendant, at his request, was granted an overdraft facility for the limit of kshs 200, 000.

3. Whether, if the defendant's account was overdrawn, any interest is payable by him to the plaintiff, and if so, the rate applicable.

There was no evidence adduced on what the rate of interest, if any, was payable by the defendant on the overdraft account.

4. Whether the plaintiff's officers have fraudulently withdrawn monies from the defendant's account for their own use, without the defendant's consent or knowledge.

The only evidence relating to the plaintiff's officer adduced is what was stated by P W 1 when he accepted that he plaintiff's bank manager, Mr Odibbo was charged in court of law and was no longer in the plaintiff's employment. The parties did not address themselves on whether monies were withdrawn from the defendant's account without his consent.

5. Whether the plaintiff is seeking unjust enrichment in this suit.

The parties evidence did not address itself to this issue.

6. Whether any monies are lawfully due from the defendant to the plaintiff.

The evidence adduced cannot assist the court to answer in the affirmative to this issue. The court however finds that the plaintiff failed to prove that the defendant is indebted for the amount claimed.

7. Who should pay the costs of the suit?

The plaintiff will pay the costs of the suit for having brought a claim against the defendant yet failing to sufficiently prove its case on a balance of probability.

The judgment of this court is that the plaintiff's case is hereby dismissed with costs to the defendant.

MARY KASANGO

JUDGE

Dated and delivered this 16th March 2006

MARY KASANGO

JUDGE