



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 121 of 2005

VIJAY MORJARIA.....PLAINTIFF

VERSUS

KENYA AKIBA MICRO-FINANCE LTD.....DEFENDANT

JUDGMENT

On or about the 18th of October, 2004 the plaintiff applied to the defendant for a loan facility in the sum of Kshs.15 million for the purpose of purchasing and developing a residential property known as **L.R. No. 7785/841 Nairobi**. As a condition precedent to the approval of the said sum the plaintiff was required to deposit with the defendant a sum of Kshs.322,000 as loan charges. On or about the 25th of October, 2004 the defendant approved the loan facility and caused the plaintiff to sign an acceptance of the defendant's terms and conditions of the loan agreement and on 29th October, 2005 the plaintiff executed the loan agreement with the defendant.

The loan agreement (**P. Exh.4**) provided that the defendant was to advance to the plaintiff a loan of Kshs.15 million secured by a first charge over **L.R. No. 7785/841 Nairobi** which the plaintiff was purchasing. The plaintiff executed the charge and the defendant's in-house lawyers undertook to register the same after which the said loan sum was to be disbursed to him.

On execution of the loan agreement, the plaintiff made it clear to the defendant that he was required to settle the purchase price of the said property on or before 30th November, 2004 which was the contractual completion dated and that in the event of default, he was liable to pay liquidated damages in the sum of Kshs.850,000 which was 10% of the purchase price of the property. The defendant promised to disburse the loan sum of or before 18th November, 2004 but the defendant did not disburse the money as promised, it told the plaintiff that it would release the same on 14th January, 2005.

The plaintiff kept on pursuing the release of the loan as agreed but the defendant would not even let him have access to their premises in Lonrho House, Nairobi. He eventually made a complaint to the Central Bank of Kenya and the Treasury and the said institutions commenced their investigations.

On 8th December, 2004 the defendant wrote to the plaintiff and informed him that it was unable to advance him the loan and asked him to collect a refund of his deposit of Kshs.322,000/- on or before 15th December, 2004. The plaintiff was therefore forced to look for money from other sources to complete payment of the purchase price for the property which he was buying in Nairobi, albeit out of time, and so he not only paid the sum of Kshs.8,500,000/- as the purchase price but also liquidated damages of Kshs.850,000/- in terms of **clause E** of the special conditions of the sale agreement. Evidence of such payment was given to court by way of cash deposit slips into the vendor's bank account by the plaintiff and a letter from the vendor's advocates **M/S Sheth & Wathigo** dated 6th April, 2005 confirming that their client had received the sum of Kshs.850,000/-.

The defendant had by then not refunded to the plaintiff his deposit of Kshs.322,000/- as promised and after fruitless effort to get the defendant to honour its undertaking, the plaintiff filed this suit on 29th April, 2005 and sought from the defendant:-

(a) Refund of Kshs.322,000/- plus interest at 20% per annum from 18th October, 2004 until payment in full.

(b) Payment of Kshs.850,000/- being the liquidated damages which the plaintiff paid due to the defendant's

breach of the loan agreement.

(c) General damages for breach of agreement.

(d) Costs of the suit.

The defendant filed its statement of defence on 12th May, 2005 and admitted having received from the plaintiff a sum of Kshs.322,000/- but stated that the same was paid to facilitate preparation and approval of the intended loan and added that the payment of the said sum was not a guarantee that the loan would be disbursed.

The defendant further denied liability with regard to the plaintiff's claim for liquidated damages in the sum of Kshs.850,000/-. It further stated that the loan was to be disbursed subject to availability of funds and when all the terms and conditions of the loan advancement were fulfilled including registration of a charge in favour of itself and time was never of essence in the contract. It therefor reiterated that it was not liable to pay any damages as claimed. With regard to the claim for refund of Kshs.322,000/-, the defendant averred that it was all along prepared to pay the same but the plaintiff had refused, failed and/or neglected to collect his cheque.

Subsequent to the filing of the suit, the defendant paid to the plaintiff the sum of Kshs.322,000/-. The payment was effected on 16th June, 2005. The plaintiff had paid the same on 18th October, 2004 and so he told the court that he was entitled to interest on the said sum for the period when the defendant held the same.

The only other issues that were left for this court's determination were the claim for Kshs.850,000/- as liquidated damages suffered by the plaintiff due to the defendant's breach of the loan agreement, claim for general damages for breach of the loan agreement and interest on the paid sum of Kshs.322,000/-.

During the hearing, the defendant's advocate told the court that the defendant had no evidence to offer. On the other hand, the plaintiff explained in great details how the loan agreement was entered into and produced many supportive documents. The loan agreement dated 29th October, 2004 (**P. Exh.4**) was executed by both parties.

The defendant undertook to advance the plaintiff a loan of Kshs.15 million to be repaid together with interest at the rate of 12% per annum over a period of 36 months. The defendant was to hold a charge

over **L.R. No. 7785/841** whose development it was to finance. The defendant had promised the plaintiff that the loan would be disbursed within two weeks from the date of signing the loan agreement aforesaid which meant it ought to have been released around 12th November, 2004. The completion date for the purchase of **L.R. No. 7785/841** was 30th November, 2004 and the plaintiff had duly notified the defendant about that fact.

On 18th November, 2004 the defendant wrote to the plaintiff and informed him that they were in the final states of security perfection and rescheduled disbursement of the loan to 14th January, 2005; (*see P. Exh.6*). Upon receipt of the said letter, the plaintiff wrote to the vendor of **L.R. No. 7785/841** and enclosed a copy of the defendant's letter of 18th November, 2004 and requested for extension of the completion period to a date between 15th and 30th January, 2005 so that he could pay the full purchase price in default of which he was to pay the penalty of Kshs.850,000 (*see P. Exh.17*).

When the defendant failed to disburse the loan as promised, the plaintiff was unable to meet the deadline in payment of the balance of the purchase price for the property and on 11th February, 2005 M/S Sheth & Wathigo Advocates wrote to the plaintiff demanding payment of the balance of the purchase price and the sum of Kshs.850,000/- (P.Exh.13) and he had no alternative but to look for finances else where and pay the same.

In the circumstances, is the defendant liable to pay the plaintiff Kshs.850,000/- as claimed? I believe so. The plaintiff suffered loss of the aforesaid sum due to the defendant's breach of the said agreement in failing to disburse the agreed loan to the plaintiff, even after it had received a deposit of Kshs.322,000/- from the plaintiff. The plaintiff had also executed a charge over the property which he was offering as security. No evidence was offered by the defendant to controvert that of the plaintiff and consequently I enter judgment for the plaintiff in the sum of Kshs.850,000/-.

With regard to the sum of Kshs.322,000/- which the plaintiff had paid to the defendant, although the same has now been repaid, the plaintiff had to file suit and wait until 16th June, 2005 when the money was repaid. The defendant should therefore pay interest on the said sum at the rate of 20% per annum from 18th October, 2004 to 16th June, 2005. The plaintiff did not demonstrate that he is entitled to general damages for breach of contract and I will not therefore award any. The plaintiff will also have the costs of the suit.

SIGNED, DATED AND DELIVERED at Nakuru this 4th day of April, 2006.

D. MUSINGA

JUDGE

4/4/2006

Judgment delivered in open court in the presence of Mr. Kimitta and N/A for the respondent.

D. MUSINGA

JUDGE

4/4/2006