



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 73 of 2000**

**MOHAMMED OSMAN MAALIM .....PLAINTIFF/DECREE HOLDER**

**VERSUS**

**EURO BANK LIMITED.....DEFENDANT/JUDGMENT DEBTOR**

**J U D G M E N T**

The plaintiff who now acts in person was served with hearing notice, on 15<sup>th</sup> march 2006, notice for hearing on 11<sup>th</sup> May 2006.

On the 11<sup>th</sup> May 2006 the plaintiff failed to attend court for the hearing of the case and defendant proceeded to prove its counter claim.

The defendant's counter claim is for kshs 20, 023, 044. 07 together with interest of 34% per annum, as at 31<sup>st</sup> May 2002. The said amount is in respect of banking facility in respect of principal monies and interest.

The defendant's evidence was adduced by Joshua Muricho (D.W. 1). He said that he works at the Central Bank of Kenya who have seconded him to the deposit protection fund as assistant liquidation agent of the defendant.

That in August 1994 the plaintiff opened an account with the defendant and also signed the defendant's terms and conditions governing the account.

That the plaintiff occasionally needed over draft facilities to do his business such as in October 1997 when he applied and was granted an overdraft of kshs 5 million. D W 1 produced a letter of offer dated 2<sup>nd</sup> October 1997 signed by the plaintiff. As security for the said facility the plaintiff charged his three properties;

- (i) L.R. 36/11/44;
- (ii) L.R. 209/8294/355 and
- (iii) L.R. 13/39/296.

The plaintiff applied for another facility on 12<sup>th</sup> October 1998 for kshs 4.9 million. The application was accepted by the defendant and a letter of offer was given to him which he signed. That by the time

this second facility was given to the plaintiff, the plaintiff had withdrawn L.R. 13139/296 as security and the remaining properties held by defendant secured the plaintiffs loan.

D W 1 said that the plaintiff did not service the loans and continually defaulted and demands were sent to him. D W 1 referred one of such demands dated 23<sup>rd</sup> June 1999.

That despite that default the defendant continued to give the plaintiff further facilities such as guarantee to cover his expenditure in Athi River mining Ltd, National Bank of Kenya Ltd, and Co-operative Bank of Kenya Ltd card visa.

That the defendant did eventually seek the assistance of their advocate to recover the amount due from the plaintiff. That when the said advocates gave notice for the sale of the charged property the plaintiff sought for an injunction but also instructed his advocate S.M. Kivuva to write a letter to the defendant's advocate and in the said letter committed the plaintiff to pay the amount demanded.

That the plaintiff obtained an injunction in the court of appeal which injunction was to subsist up and until the disposal of this court.

D W 1 referred to the letter of offer of facilities dated 12<sup>th</sup> October 1998 which indicated that the interest applied to the facilities afforded to the plaintiff was at the rate of 36% per annum and if the plaintiff exceeded the overdraft facility or payment was not received on its due date interest was charged at 8% per annum. The plaintiff also paid 4% of the total amount as commitment fee.

D W 1 stated that the defendant's claim against the plaintiff was for kshs 20, 023, 044. 07 as at 31<sup>st</sup> May 2002.

I have considered the defendant's case. The evidence of D W 1 was supported by exhibited documents and the same has proved the defendant's counterclaim on a balance of probability.

There being no evidence to rebut the defendant's evidence the court is of the view that judgment as prayed can be entered for the defendant. The plaintiff having failed to prove his case the same shall be dismissed.

The judgement of this court is that judgment be and is hereby entered for the defendant on the counter claim for kshs 20, 023, 044. 07 with interest at the rate of 34% per annum compounded from 1<sup>st</sup> June 2002 until payment in full, the defendant is granted costs of the counter claim. The plaintiff's case having not been proved is dismissed with costs to the defendant.

**MARY KASANGO`**

Dated and delivered this 19<sup>th</sup> June 2006.

**MARY KASANGO**

**JUDGE**