

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 374 of 1995

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

JOHN ELOY O. NYASORO.....DEFENDANT

JUDGMENT

The plaintiff, National Bank of Kenya Limited, filed suit against the defendant John Eloy O Nyasoro seeking to be paid the sum of Kshs 3,283,367/75 as at 31st of May 1995 which it claimed was owned to it by the defendant on account of money lent and or an overdraft advanced and money paid for the use of the defendant by the plaintiff at the defendant's own request together with the interest calculated on daily balances at monthly rates upon money due from the defendant to the plaintiff and for bank charges upon money due from the defendant to the plaintiff. When the defendant was served, he duly entered appearance. He filed a defence denying that he owned the said sum of money to the plaintiff. In paragraph 6 of the statement of defence the defendant stated as follows:

“The defendant denies having had an account with the plaintiff and that such an account was ran on an overdraft facility and denies that he owes the plaintiff Kshs 3,282,367/75 or any lesser sum as alleged or at all but avers that should any amount be owed to the plaintiff by him, which is denied, then the computation as appears in the plaint is erroneous”.

Paragraph 7:

“The defendant states that he never withdraw (sic) the said amount or any part thereof from the plaintiff and state that if any amount was ever withdrawn from the plaintiff on any account, then the same was fraudulently withdrawn by officers of the plaintiff and erroneously debited to the defendant's account.”

Issues were agreed and documents exchanged. The case was then listed for hearing before this court.

At the hearing of the case, the plaintiff called one witness, Richard Rotich, the officer in charge of the advances department of the plaintiff's Nakuru Branch. He testified that the defendant opened an account with the plaintiff's Nakuru Branch in 1992. The defendant was assigned current account number 301-049-572. The defendant signed all the documents that were required for the opening of a current account. He also provided the documents that were required from him to open the account. The said documents were produced as plaintiff's exhibit No. 1. He testified that in October 1992, the defendant applied for a loan of Kshs 400,000/=. His letter of application was produced as plaintiff's exhibit No. 2. The plaintiff accepted the defendant's application for a loan and by a letter of offer dated the 6th of October 1992, offered the defendant a term loan of Kshs 170,000/= which was to be repaid within a period of thirty six months at an interest rate of 21% per annum. The loan was to be secured by the defendant's parcel number North *Nyakach/Agoro West/1497*. The letter of offer was produced as *plaintiff's exhibit No. 3*.

He testified that after the approval of the loan, the defendant went ahead and withdrew the amount advanced to him through eleven cheques which he drew on his own account. The defendant withdrew

these sums even though he had not perfected the securities. He testified that the plaintiff requested the defendant to comply with the terms of the approval of the loan by perfecting the securities, but the defendant declined to do so. The said letters were produced as plaintiff's exhibit No. 5 & 6. He testified that the final demand letter was sent to the defendant on the 26th of September 1994 requiring him to pay the sum of Kshs 2,575,845/05 which was then outstanding. Demand letter produced as plaintiff's exhibit No. 7. The defendant did not respond to the demand hence the plaintiff's decision to file suit against him.

Mr Rotich testified that the cheques which the defendant drew on his current account and thereby overdrawing it were cheque Nos. 767765 dated the 25th of June 1993 of Kshs 50,000/=, No. 767764 dated the 6th of June 1993 of Kshs 120,000/=, No. 767759 dated the 20th of April 1993 of Kshs 160,000/=, No. 767758 dated the 1st of April 1993 of Kshs 250,000/=, No. 767755 dated the 9th of February 1993 of Kshs 70,000/=, No. 767754 dated the 9th of February 1993 of Kshs 100,000/=, No. 767751 dated the 5th of January 1993 of Kshs 100,000/=, No. 767752 dated the 14th of January 1993 of Kshs 60,000/=, No. 767750 dated the 9th of February 1992 of Kshs 60,000/=, No. 767744 dated the 17th of August 1992 of Kshs 60,000/= and No. 767742 dated the 24th of July 1992 of Kshs 20,000/=. The said cheques were produced as plaintiff's exhibit No. 4. He testified that all the statements in respect of the said account maintained by the defendant were sent to the defendant. In the said statements, the plaintiff factored in the interest that was charged to the defendant's said account. The statements were produced in evidence as plaintiff's exhibit No. 8.

PW1 conceded that the initial application which was made by the defendant was not signed by the defendant. He however testified that after the letter of offer was made to the defendant, he accepted the terms of the offer and signed a duplicate of the letter of offer which was produced as plaintiff's exhibit No. 3. The amount was then disbursed to the defendant. He testified that the amounts were overdrawn from the account of the defendant when he drew cheques on them, were meant to be temporary overdrafts which were supposed to be repaid immediately thereafter. He conceded that the defendant did not pay the amount hence the suit. He further testified that the security offered could not be charged because the defendant did not surrender the title to the plaintiff for the purposes of the same being charged. The plaintiff's witness conceded that the amount of interest charged was not stated in the plaint but he insisted that the defendant knew the rate of interest which was applicable because the statements were sent to him. He denied that the defendant had money in other accounts when he drew the cheques on them which were honoured by the plaintiff. He urged the court to enter judgment in favour of the plaintiff against the defendant of sum of Kshs 14,104,129/60 as at the 17th of April 2004. The plaintiff then closed its case.

When the defendant took the stand, he admitted that he maintained a current account with the plaintiff bank. He further admitted that he had drawn the cheques which were produced in evidence as plaintiff's exhibit No. 4. He however testified that the said amounts were legally withdrawn from his account because he had money in the account. He testified that he had applied to be granted a loan by the plaintiff of the sum of Kshs 170,000/=, but the said loan was not advanced to him because there was a problem with the security. He denied that that plaintiff had advanced him the sum of Kshs 170,000/=. He further denied that he had borrowed any money in form of an overdraft from the plaintiff. He testified that the firm of Jones & Jones advocates had not returned the title in respect of his parcel of land to him. It was his further testimony that as a civil servant, he could not have borrowed the kind of money that the plaintiff was now demanding from him. He however conceded that the cheques which were produced as plaintiff's exhibit No. 4 were genuine because he had withdrawn the money from his account maintained with the plaintiff bank. He testified that he had sufficient funds in his account. He testified that he did not owe any money to the plaintiff and therefore could not be called upon to pay any sum of money to the plaintiff.

I have read the pleadings filed by the parties to this suit. I have also carefully considered the evidence that was adduced by the parties to this suit. The issue for determination by this court is whether the plaintiff has proved to the required standard of a balance of probabilities that the defendant overdrawn his account and thereafter refused to make good the said overdrawn amount. The evidence adduced by the plaintiff is that the defendant overdrawn the said amounts from his account and which amounts together

with interest was Kshs 14,104,129/60 as at the 17th of April 2004. On the other hand, the defendant denies that he borrowed the said amount from the plaintiff. He denies that he overdraw his account. He however admitted that the cheques which were produced as plaintiff's exhibit No. 4 were drawn by him and the amounts thereon paid by the plaintiff. He testified that at the time he had sufficient funds in his account and that is why the said cheques were honoured. He denied that he had made any arrangements with the plaintiff to be granted an overdraft facility.

According to the evidence adduced, which is not in dispute, the defendant opened a current account at the plaintiff's Nakuru branch on the 14th of July 1992. Thereafter the plaintiff applied to be advanced a loan by the plaintiff. Although he did not sign the said loan application, on the 6th of October 1992 the plaintiff offered to advance the defendant a loan of Kshs 170,000/=. The said amount was to attract an interest of 21% per annum for a period of thirty six months. The security for the said loan was to be the parcel of land known as North Nyakach/Agoro West/1407. However it is apparent that the defendant was advanced the said sum of money before the said security was charged. Subsequently thereafter, by some agreement between the plaintiff and the defendant, the defendant was allowed to withdraw the sum of Kshs 1,050,000/= from his account. It is apparent from the statements which were produced as plaintiff's exhibit No. 8 that the defendant made no deposits in the said account and therefore when he drew the cheques on the said account, he was in effect overdrawing it. The defendant issued the said cheques which were honoured by the defendant knowing very well that at some point in time he was going to be called upon to account for the said amount advanced to him by way of overdraft.

In that regard therefore, I find the evidence by the defendant that he was drawing money from his account because he had sufficient funds in the said account to be a mere falsehood. It is clear that the defendant operated the said account irregularly and did so with the consent of the plaintiff. It is apparent that the defendant took advantage of the situation which was in existence then where banks could advance money to customers without strictly complying with the requirement that there should be a sufficient basis upon which such a customer could be advanced money.

I therefore hold that the plaintiff has proved its case on a balance of probabilities that it had advanced the sum of Kshs 1,220,000/= to the defendant and which sum has not been paid to date by the defendant. It is clear that the defendant was aware that he would be required to repay the said amount advanced to him with interest. He cannot now claim that the said money was advanced to him on unknown terms and conditions. It is clear that the basis upon which the original amount was advanced to him was his application to be advanced a loan of Kshs 170,000/=. The said letter of offer clearly indicated that the defendant was going to re-pay the said amount with interest at the rate of 21% per annum. In the circumstances therefore, I find the protestations of the defendant that the said amount was not advanced to him to be a cry in the wild.

The plaintiff having proved its case, I enter judgment in its favour for the sum of Kshs 14,104,129/60 as at the 17th of April 2004 together with interest at 21% per annum until the payment in full of the said sum. The plaintiff shall have the costs of the suit.

DATED at NAKURU this 15th day of June 2006.

L. KIMARU

JUDGE