



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 2932 of 1996

TRANSNATIONAL BANK LTD..... PLAINTIFF

VERSUS

ANDREW MAKORI ONGAU..... DEFENDANT

JUDGMENT

This suit was initiated by plaint filed on 25.11.96 to which the defendant filed defence on 09.01.97 essentially denying liability. Subsequently the plaintiff filed amended plaint on 04.02.97 praying for judgment against the defendant for:-

- a) Kshs.1,123,344/05.
- b) Interest on (a) at the rate of 32% per annum from 30.09.96 until payment thereof.
- c) Damages.
- d) Costs of this suit.
- e) Interest on (c) and (d) above at court rates.
- f) Any other or such further relief as this honourable court may deem fit and just to grant.

In response to the amended plaint, the defendant filed amended defence on 14.04.97 praying for dismissal of the plaintiff's suit.

When the suit came up for hearing before me on 05.07.05, the plaintiff was represented by learned counsel, Mr F.K. Athuok. There was no appearance for the defendant.

Plaintiff's counsel informed the court that the hearing date had been taken by consent on 27.01.05 after Messrs Akoto & Company Advocates for the defendant invited plaintiff's advocates to take a hearing date whereupon the parties took the hearing date of 05.07.05, only for the defendant or his advocates not to appear before court. Plaintiff's counsel sought to proceed with the hearing notwithstanding non-appearance of the defendant and the court allowed the hearing to proceed.

The plaintiff called only one witness, Jackline Onsando (P.W.1) to testify for the plaintiff. The essence of her evidence is as under. She was the Manager, Legal and Human Resources in the plaintiff

company. The plaintiff's case arose from a facility granted to the defendant on 25.07.91 amounting to Kshs.757,700/= for purchase of motor vehicle KAC 048 C. The defendant was to repay the loan in 24 monthly instalments of Kshs.29,600/= each. Defendant made repayments which became sporadic until 1994 when he defaulted. After the defendant's default, the plaintiff repossessed the motor vehicle and sold it by public auction. According to P.W. 11 the vehicle fetched Kshs.800,000/=. I pause here to note that paragraph 6 B of the amended defence avers that the vehicle was sold for Kshs.986,000/=. No explanation was given by the witness for the discrepancy between the figure she gave and the figure pleaded in the amended defence. The plaintiff is bound by its pleadings and the court takes Kshs.986,000 to be the sale price of the motor vehicle.

It was P.W.1's further evidence that after the sale of the motor vehicle on 19.05.94, the sale proceeds were credited to the defendant's account on 03.10.94, leaving a loan balance of Kshs.448,289/50. I pause again to note that in view of my finding above that the sale proceeds amounted to Kshs.986,000/= instead of Kshs.800,000/= as testified by P.W.1, a question arises as to whether the outstanding balance after the sale proceeds were credited to the defendant's account was Kshs.448,289/50 or whether it was Kshs.448,289/50 less Kshs.185,000= (being the difference between Kshs.800,000/= and Kshs.986,000/=), i.e. Kshs.262,289/50? If the latter figure was the balance, it was bound to have a lowering effect on the cumulative interest thereafter. Be that as it may, P.W.1 proceeded to tell the court that as at 30.09.96, the outstanding balance was Kshs.1,123,344/05, which is what the plaintiff bank has claimed vide its amended plaint filed on 04.02.07. P.W.1 produced a bundle of documents in support of the plaintiff's case. Thereafter plaintiff's counsel announced that to be the close of the evidence for the plaintiff and closed the plaintiff's case.

I have duly considered the evidence adduced before court. I note that the defendant did not appear at the hearing either in person or through counsel. He did, however, file defence to the suit, essentially denying liability. It was incumbent upon the plaintiff bank to prove its claim to the standard required by law.

It is not in dispute that the defendant took the loan in question. His defence is, however, basically that he repaid it all. The plaintiff insists that the defendant did not clear the loan plus accumulated interest. What is the correct position?

The plaintiff sent P.W.1, Jackline Onsando to testify and she did testify on its behalf. It was her evidence that Kshs.1,123,344/05 was outstanding against the defendant as at 30.09.06. This is the figure claimed vide the amended plaint filed on 04.02.97. The defendant did not appear in court to counter that claim. In the circumstances the court cannot speculate on behalf of the defendant. I accept P.W.1's testimony that the outstanding amount against the defendant was Kshs.1,123,344/05 and so find. Prayer (a) is, accordingly, granted.

Vide prayer (b), the plaintiff applied for interest at 32% from 30.09.96. The only document on that point in the plaintiff's bundle of documents produced before this court is the plaintiff's letter of 28.06.96 to its lawyers, Mohammed Ibrahim & Associates instructing the said lawyers to demand full settlement from the defendant. According to the amended plaint, it was a term of the agreement that interest would be charged at the rate of 19% per annum with powers to vary the same without notice reserved, etc. It is not clear from the letter of 28.06.96 to the plaintiff's lawyers alluded to above what event provoked the raising of the interest from 19% per annum to 32% per annum. Was it the default pleaded? According to the amended defence, the rate chargeable on default was far below that reflected in the amended plaint. The defendant did not, however, elaborate on the lower rate in his pleadings. On the evidence as it stands, the contingency which brought about the rise in the interest rate and its effective date has not been disclosed. That gives the rise a ring of arbitrariness. The court will not endorse that. Accordingly, the court hereby awards an interest rate of 19% per annum under prayer (b).

Vide prayer (c), the plaintiff bank claimed damages. This case is founded on contract. The claim for damages did not specify if the damages are general or special. It is trite law that special damages must be pleaded and specifically proved. The latter is not the case here, so it must be assumed that the damages claimed are general. Other than the mere plea for damages in the amended plaint, no evidence was

adduced in support of the claim for damages. There is controversy in this area and judicial opinion seems divided as to whether damages are or are not payable in the law of contract, which the present case falls under. I would be guided on the matter by the observations made in Hadley -vs- Baxendale (1854) 9 EX. 341 that damages would only be awarded to compensate the claimant for and to the extent of losses that arise naturally from the breach of contract. To give but one illustration, if a bank dishonours a customer's cheque without due cause and unjustifiably brings the name of the customer into disrepute, the breach itself lies in the realm of contract but its adverse effects extend to the realm of tort and such breach would in my view warrant bringing into play the remedy of damages ordinarily available under the law of tort. In the present case, not much trouble has been taken by the plaintiff bank to demonstrate what injury it suffered as a result of the defendant's breach of contract. The matter has been left for the court to speculate upon. That is not the court's role. I find prayer (c) for damages to have no merit and the same is dismissed.

Prayer (d) asked for costs of the suit. Costs usually follow the event and there is no good reason why that should not be so in this case. Accordingly, I grant prayer (d) for costs.

Vide prayer (e), the plaintiff asked for interest on the damages claimed under prayer (c) and on the costs claimed under prayer (d). Since prayer (c) for damages has been dismissed, no question of costs thereon arises. On the issue of interest on costs of the suit, it is to be recalled that costs are incurred at different times in this type of case. If the prayer were to be granted, which would be the effective date from which interest would be calculated? I see no merit in the prayer for interest on costs. Accordingly, prayer (e) claiming interest on damages and interest on costs is dismissed in its entirety.

The upshot is that I give judgment for the plaintiff, grant the prayers in part and make the following awards:-

1. Prayer (a) is granted in the sum of Kshs.1,123,344/05.
2. Under prayer (b), I award interest on prayer (a) at 19% per annum from the date of filing suit until payment in full.
3. Prayer (c) for damages is dismissed.
4. Under prayer (d), I award costs of the suit.
5. Prayer (e) for interest on prayers (c) and (d) is dismissed.

Orders accordingly.

Delivered at Nairobi this 12th day of October 2006.

B.P. KUBO

JUDGE