



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
Civil Case 1740 of 1995

NATIONAL BANK OF KENYA..... PLAINTIFF

VERSUS

GICHURU WA KAMOTHO

T/A NAIVASHA GARMENTS DEFENDANT

JUDGEMENT

The case was partly heard by Onyango Otieno J. as he then was, when PW1 – TERESA MUCHIRA – gave her evidence in chief, but before she could be cross-examined, Onyango Otieno J. had left Milimani Commercial Courts and the parties had to proceed from there before Mutungi J., after the proceedings up to PW 1's evidence in chief were typed.

The facts from which this suit arises are, by and large, undisputed and are briefly as under.

On 19/7/89 the defendant applied for a Kshs.250,000/= overdraft from the Plaintiff Bank, which facility was granted, for 12 months at 30% p.a. interest, on a daily balance. The overdraft was to expire on 31/7/1990 and it was for the defendant's business – NAIVASHA GARMENTS. When the facility was granted, the defendant's account was in arrears by Kshs.300,518/05. The defendant gave, as security, his land L.R. NYANDARUA/KIPIPIRI/136 which was charged, with the charge being registered on 28/7/89. Defendant defaulted in payment and despite efforts to realize the security the charged property did not attract any buyers, hence, this suit, dated 2/6/1995, and filed in court on 5/6/1995 wherein the plaintiff claims Kshs.1,016,647/60 being unpaid balance plus interest.

When the case commenced, plaintiff called only one witness, PW1 – TERESA MUCHIRA, the plaintiff's Accounts Manager at Moi Avenue Branch, Nairobi who after taking the oath, testified on how the defendant's application was received, processed, and the facility granted, vide a letter of offer dated 21/7/89, which was duly signed – accepted – by the defendant, with the terms herein earlier mentioned. The overdraft was secured by the property herein earlier described. The witness further told the court how upon default, the plaintiff wrote to the defendant several letters asking him to pay, but to no avail. The matter was then referred to the plaintiff's lawyers who ultimately filed the suit herein. But before the suit was filed the defendant had written and asked for some time to pay. Some of the letters include the following: 5/12/91; 14/5/93; 9/5/94 and 7/6/94, which proposals and indulgencies were never lived up to by the defendant.

PW1, also gave evidence on the defendant's account and the cashflow in and out of the same, including the dishonoured cheque and the penalties that went with it. The witness further stated to the court that remittances as on 6/4/94 added up to Kshs.319,000/= and not Kshs.369,000/= owing to the dishonoured cheque. The witness told the court that the defendant tried to renew the facility but the request was turned

down by the Plaintiff Bank; and that the Plaintiff was sending regular monthly statements to the defendant.

Cross-examined by the defendant's lawyer, Khamala, PW1 stood her ground and stated that the claim by the defendant that he had fully repaid the facility was not true, as the payment referred to was in respect of a debt in the Nakuru Branch of the Plaintiff, not Moi Avenue Branch, and had nothing to do with the present case.

On re-examination, PW1 stated that of the 369,000/= paid by the defendant through the plaintiff's lawyers, only Kshs.319,000/= was received by the plaintiff, with the rest going to the lawyers for the bounced cheque.

That was the end of the evidence by PW1, and close of the plaintiff's case.

On the defence side, the defendant, himself, DW1, GICHURU wa KAMOTHO – gave evidence, after taking the Christian Oath. He testified that he was not disputing that he received the overdraft facility from the plaintiff but that the agreement was that the repayment was through cheques/payments from his customers, KGGU and the Kenya Cooperative Creameries who had given him – his business – Naivasha Garments contracts for their staff uniforms. DW1 further told the court that all the proceeds from the uniforms – cheques – were deposited in the defendant's account with the plaintiff and from there the plaintiff was to get his repayments, and that DW1 believed that that was happening, as he was allowed to withdraw money from the account and at no time was he told that he was in arrears until he saw auctioneers on his land in Naivasha, seeking to sell his property. DW1 went on and stated that he had faithfully performed his promise to the Plaintiff. As far as he was concerned, he had not only paid fully the overdraft facility but that the Bank is the one which owed him money.

DW1 claimed that the only time he had difficulties in payments is when his business went down, but he had fully paid the overdraft through the plaintiff's lawyers – Mereka and Co. Advocates whom he felt were extorting him. He further stated that despite demand he never received his statement of accounts, either from the plaintiff's lawyers or the plaintiff itself, to show how much he had paid and how much was still owing from him. DW1 admitted that he had given his land as security for the overdraft and that the plaintiffs had not been able to sell the same.

On cross-examination by Mr. Ojiambo, counsel for the plaintiff, DW1, stated that from August 1989 he could not remember how much money the plaintiff got from the account – No.011/040/866 – towards the recovery of the loan/overdraft. This, DW1 said, was because the plaintiff Bank never used to give him his monthly statements; and when such statements came, they were for 3 to 4 months.

When shown the Bank statement as on 31/8/89, he agreed that only Kshs.63,380/= had been paid and the outstanding balances were shown in subsequent sheets – Nos. 12 to 28. He also admitted that by the end of the 1989 year, no banking had been done by him – the DW1. He stated that that was because his business had gone down. However, DW1 stated that he banked all the cheques for 1989, as he had promised the Plaintiff Bank.

The witness reiterated that the loan was to be repaid from receipts from uniform customers only, and not from other sources. Asked why he had attached an LPO from his customers, DW1 said that without that, the plaintiff bank would not trust him or give him the facility.

DW1 admitted that it was guess work for him when he said, in his letter of 14/5/1993, that he had paid Kshs.300,000/= to plaintiff's lawyers since he had not taken any account. In the letter of 14/5/1993, he also promised to pay, even though he had paid the lawyers 300,000/=, said DW1.

Asked why he had not sold his plot to repay the loan as proposed to the plaintiff in his letter of 21/4/1998, DW1 said he had not sold the land nor sub-divided it because he had already come to court to defend himself.

On why he wrote the letters he did after the auctioneer's visited his land, DW1 said that it was because the auctioneers had a court order, which DW1 said was irregularly obtained. But all the same, DW1 said he wrote those letters, admitting the indebtedness because he did not wish to disobey a court order. Finally, DW1 prayed that the letters he wrote after the auctioneers' visit to his land should not be taken into account, but those prior to that are okay and can be taken into account.

That was the end of the defence evidence and the close of the case, other than the submissions.

During submissions, the learned counsel for the plaintiff was very brief, I guess because the defendant was, at this stage, appearing in person.

Mr. Ojiambo, counsel for the plaintiff, after summarizing the evidence – both documentary and oral submitted that through the correspondence from the defendant to the plaintiff – all put in as exhibits – had undertaken to repay the overdraft, from whatever sources. That is why the defendant had secured the overdraft by charging his land in Kipipiri. Further, through the statement of accounts, the defendant had not identified any payment which had not been taken into account. The defendant had admitted indebtedness to the plaintiff through his letters to the plaintiff [dated between 5/12/1991 through 21/4/1998] totaling seven (7) in number].

On the defendant's claim that the plaintiff/bank owed the defendant any money, the plaintiff's counsel submitted that in the face of the letters and the statement of account, such claim was unfounded.

I agree with the plaintiffs' submissions. There is no sense in the letters written by the defendant, making various proposals and requesting for indulgencies, if there was any doubt about the indebtedness.

My evaluation of the evidence leaves me with no doubt that the defendant's efforts to deny liability are nothing but mere denials with no merit whatsoever in the face of both the plaintiff's evidence and the defendant's own admissions, both in writing and orally, in the cause of cross-examination.

As I stated when giving the facts of the case before me, there is no dispute that the defendant requested for, and the plaintiff afforded the defendant, an overdraft facility for the purposes of meeting LPO's given to the defendant by various bodies in need of their staff uniforms. The terms of facility are not in dispute either, save when the defendant claims that the overdraft was to be repaid from proceeds of the uniforms business.

Such claim is not supported by any written term in the contract between the parties. Besides, the giving of the land as security is sure evidence that the overdraft was not repayable only from the proceeds from the uniform business.

Further, the evidence on record shows that defendant's claims of having repaid fully the overdraft were fabrications. Without consulting his account statements, there is no way that the defendant could have known how much he had paid and what the outstanding balance was. All through his defence, the defendant took the position that he had never received or been getting statements of account from the plaintiff Bank. Yet he was willing to pay! On what basis would anybody do that?

When cornered on his written admissions, the defendant sought to have all those letters by him subsequent upon the visit by the auctioneers, with a court order, not taken into account! This was strange and impractical.

On the evidence before me, especially the statement of accounts and the letters of admission by the defendant, I have reached the firm conclusion that since there was no money put in the account by the defendant after 1989, and given the interest rate of 30% p.a. what is claimed by the plaintiff is beyond reproach.

I have accordingly reached the conclusion that the plaintiff has proved its case on all probabilities.

Accordingly, I hereby enter judgment in favour of the plaintiff, and against the defendant, as prayed in the Plaint: that is –

(a) Kshs.1,016,647/60 with interest at 30% p.a. with effect from 1/5/1995 until payment in full, calculated on daily balances and applied monthly with effect from the above date.

(b) Costs of this suit plus interest at court rates.

DATED and delivered in Nairobi, this 22nd day of July 2005.

O.K. MUTUNGI

JUDGE