

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 496 of 2000

BETHUEL MUIRURI BENJAMIN.....PLAINTIFF

VERSUS

DEVELOPMENT BANK OF KENYA.....DEFENDANT

JUDGMENT

The plaintiff, Bethuel Muiruri Benjamin, filed suit against the defendant, Development Bank of Kenya Limited, seeking to be paid the sum of Kshs 6,334,239/80 which he claims to be the interest due to him on account of the retention of the sum of Kshs 1,500,000/= by the defendant from the 25th of May 1993 to the 20th of March 2000. The plaintiff further prays to be awarded costs of the suit. In its defence, the defendant admits to have retained the said sum of Kshs 1,500,000/= but avers that it was ready to refund the said sum to the plaintiff in the year 1994 after the consideration for which the said sum had been paid had failed. At the hearing of this suit, the parties to this suit agreed that the only issue for determination by this court is whether or not interest ought to be paid to the plaintiff.

The facts of this case are not in dispute. The defendant was a chargee of a property known as *Nakuru Municipality/Block 3/857 (hereinafter referred to as "the said property")*. In exercise of its powers of sale as a chargee, the defendant advertised the said property for sale. The sale by public auction was scheduled for the 8th of April 1993. The plaintiff attended the public auction and bid for the property. He was successful in his bid. He was declared the highest bidder. The said property was sold to him. His bid sum of Kshs 1,500,000/= was accepted. The plaintiff paid the said sum of Kshs 1,500,000/= in two instalments. The first instalment of Kshs 700,000/= was paid at the fall of the hammer (i.e. on the 8th of April 1993). The second instalment of Kshs 800,000/= was paid on the 21st of April 1993. The plaintiff was however issued receipts by the defendant for the two instalments paid on the 31st of May 1993 and the 21st of April 1993 respectively (*receipts produced as plaintiff's exhibit No. 1 and 2 respectively*).

The plaintiff testified that he raised the said sum from two sources. The amount of Kshs 800,000/= was raised from his savings whilst the sum of Kshs 700,000/= was borrowed from Barclays Bank of Kenya Ltd. The defendant was however unable to transfer the said property to the plaintiff. The defendant was unable to transfer the said property due to the fact that the chargor (and the registered owner of the property) known as Mr Mathenge filed suit (to wit Nakuru HCCC No. 293 of 1993) whereby he obtained an injunction restraining the defendant from transferring the said property to the plaintiff. The plaintiff testified that he was not initially aware that an injunction had been obtained against the defendant restraining it from transferring the said property to him. He however later became aware of the existence of such an injunction.

In its evidence, the defendant's Customer Relationship Manager, Martin Kariuki Muragu (DW1) testified that the defendant had offered to refund the said purchase consideration of Kshs 1,500,000/= as early as the 31st of January 1994 (*letter produced as defence exhibit No. 1*). Although the said letter was sent to the plaintiff's postal address at Elburgon, the plaintiff denied having received the said letter. In his testimony before court, the plaintiff testified that he patiently waited for the defendant to transfer the said property to him. He was still interested in the property. However in 1999, the plaintiff lost his patience. He demanded to be refunded the said sum of money plus interest. By a letter dated the 8th of June 1999 (*produced as defence exhibit No. 2*), the defendant (*upon receipt of the plaintiff's letter demanding refund*) agreed to refund the said sum on condition that the plaintiff would not raise any further claims against the defendant in connection with the abortive sale. After protracted negotiations, where it appears no agreement was reached, the plaintiff was refunded the said sum of Kshs 1,500,000/= on the 20th of

March 2000.

The defendant's witness testified that when the said sum was paid to it by the plaintiff, it did not invest the money but rather deposited it in an account kept when it exercised its power of sale by chargee. DW1 testified that at the material time, the defendant was trading as a financial institution. It only became a bank in 1997. It did not therefore earn any interest on account of the plaintiff's money that was in its possession for a period of seven years.

As stated earlier in this judgment, the issue for determination by this court is whether or not the plaintiff should be paid interest as claimed in his plaint. I reiterate that the facts of this case are not in dispute. Whilst the plaintiff is saying that he lost business opportunities during the seven years that the defendant held the said sum of Kshs 1,500,000/= and therefore should be compensated by being paid interest, the defendant is stating that it had always been willing to refund the said amount to the plaintiff and therefore should not be held liable to pay the plaintiff any interest.

Having carefully considered the facts of this case, I find that the plaintiff was not at all to blame for the failure of the sale of the said property. The defendant offered the said property for sale by public auction in exercise of its powers of sale as chargees. It advertised the property for sale. The plaintiff saw the advertisement. He attended the public auction. He was declared the highest bidder and the said property knocked down to him. He immediately paid the bid price of Kshs 1,500,000/=. The defendant accepted the payment of the said sum. The fact that the defendant was unable to transfer the said property to the plaintiff, as far as this case is concerned, is of no interest to the plaintiff. What emerged from the evidence adduced in court is that, the defendant (*inspite of its understandable difficulty in having the said property transferred to the plaintiff*) was not willing to refund the said sum of Kshs 1,500,000/= to the plaintiff unconditionally. The defendant sought to protect itself by insisting that the plaintiff fulfils certain conditions, (*including the insistence that the plaintiff would not claim anything from the defendant on account of the aborted sale*) before the said amount was released to the plaintiff. It is these demands by the defendant that led to the defendant to hold the said sum of Kshs 1,500,000/= for a period of seven years.

I therefore hold that the defendant is liable to pay interest to the plaintiff. The defendant insisted on holding the said sum to the detriment of the plaintiff. The defendant did not appear anxious to refund the said sum to the plaintiff. This attitude was exemplified by the fact that in the period of seven years, the defendant, a bank of no mean repute communicated to the plaintiff only twice, and only in response to the inquiries made by the plaintiff. I agree with the plaintiff that as a businessman, he could have utilised the said sum of money to expand his business and make more profit. I did not believe the defendants evidence that for the period of seven years it did not trade with the money but left it to lie in some dormant account. The defendant is a bank. It did not physically keep the money in a safe. Its core business is money. It traded with it.

For the above reasons, I find that the plaintiff has established its case to be awarded interest on a balance of probabilities. I do not agree with premise of the defence case that it was the plaintiff who ought to have accepted its terms as to the refund of the said amount when the sale was frustrated. The plaintiff was not a customer of the defendant. Neither was he responsible for the frustration of the sale. The defendant is therefore liable.

What basis should this court adopt to assess the interest payable to the plaintiff? In its submission, the defendant urged this court to adopt the then prevailing rate of interest paid on deposit of the rate of between 5-10% per annum. On its part, the plaintiff adduced evidence that it should be paid interest according to the lending interest rate prevailing then which in his plaint, he pleads to be at the rate of 28% per annum. PW2 Isaac Watoro Njoroge, the Operations Manager of Barclays Bank Nakuru East branch testified that the base lending rate fluctuated between 19% per annum in the year 1993 and 26% per annum in 1998. PW2 further testified that it was better to invest in business which was profitable than depositing the amount in the bank. He stated that although the risk in business was higher, the rewards were higher as commensurate with the risk.

As stated earlier in this judgment, the plaintiff was not a customer of the defendant. He was not depositing the said sum of Kshs 1,500,000/= with the defendant to earn interest. He paid the said sum as purchase consideration for the said property. He expected returns from his investment in form of rent. As it were, the plaintiff did not receive any income from the said property. The agreement was frustrated. The plaintiff borrowed part of the purchase consideration from Barclays Bank. He paid the prevailing lending rate. Part of the money was from his savings. As a businessman, he could have invested the said amount in business, which could have earned him profit.

In the circumstances of this case, and in view of the evidence adduced by the plaintiff, I will adopt the average base lending rate then prevailing between 1993 and 2000 as the basis upon which interest will be awarded to the plaintiff. The average of the then prevailing base lending interest rate was 23% per annum. I therefore assess the interest rate to be paid to the plaintiff for the period that the defendant held the said sum of Kshs 1,500,000/= to be Kshs 2,415,000/=. I enter judgment for the plaintiff as against the defendant for the sum of Kshs 2,415,000/=. The plaintiff shall have the costs of the suit. Since this assessment is in form of general damages awarded to the plaintiff, the amount shall attract interest from the date of this judgment until the payment in full of the decretal sum.

DATED at NAKURU this 14th day of July 2005.

L. KIMARU

JUDGE