

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.102 OF 2004

KENYA SHOE COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

JUDGMENT

The Plaintiff herein, **KENYA SHOE COMPANY LIMITED**, sought in its plaint dated 20th February 2004 judgment against the Defendant, **KENYA COMMERCIAL BANK LIMITED**, as follows –

(a) Kshs.2,529,629.20.

(b) General Damages.

(c) Interest at commercial bank rates from date of filing suit until payment in full.

(d) Costs of the suit.

The Plaintiff's action is based on alleged breach by the Defendant of the bank/client relationship between them, particulars whereof are given in the plaint. The Plaintiff has also pleaded fraud and given particulars. As a result of the breaches and fraud, the Plaintiff further pleads, its account with the Defendant was wrongfully debited with excessive and illegal amounts of interest amounting to Kshs.2,529,629.20 as at 31st August 2002. Further, the Plaintiff was compelled to sell its properties charged to the Defendant on a forced-sale basis and at an undervalue, and thereby suffered loss and damage.

The Defendant was duly served with summons to enter appearance but neither entered appearance nor filed defence. Interlocutory judgment for the sum of Kshs.2,529,629.20 was entered against it on 13th April 2004. On 15th July 2004 I heard the Plaintiff's case *ex parte* in respect to the claim for general damages. The Plaintiff called one witness, **JOSEPH KAMAU NGUGI**, who is its director. The testimony of this witness is that the Defendant failed to calculate properly the amount due and owing to it from the Plaintiff and further failed to provide the Plaintiff with statements of account. He further testified that a certain payment by the Plaintiff of Kshs.3,903,000.00 made to the Defendant on 11th September 1995 was not credited until 1st March 1996. Had it been credited in time the outstanding balance would have been far less. As a result of all the above, the witness further said, the amount demanded by the Defendant was overstated, and because of it the Plaintiff was forced to sell its factory for only Kshs.7,000,000.00 whereas it was worth Kshs.10,000,000.00. No valuation report was produced.

But more importantly, the witness acknowledged that at the time the factory was sold the Plaintiff indeed owed money to the Defendant that it had been unable to pay and that therefore the factory had to be sold in order to pay off its indebtedness to the Defendant. Furthermore, the Defendant, rather than realize its debenture itself, allowed the Plaintiff to sell the factory by private treaty. In these circumstances, no general loss or damage is proved, and the claim for general damages cannot succeed. The only loss suffered by the Plaintiff was the overpayment that formed the basis for the liquidated claim, and it already has judgment for that. The claim for damages must therefore be dismissed.

The claim for interest at commercial bank rates is also not justified. Such claim will usually be founded on a contract, which is not the case here. The Plaintiff can therefore only get interest at court rates.

In the result I will enter judgment for the Plaintiff for the sum of Kshs.2,529,629.00 plus interest thereon at court rates from the date of filing suit until payment in full. The Plaintiff will also have costs of the suit and interest thereon at court rates. It is so ordered.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT

THIS 12th DAY OF AUGUST 2004.

H.P.G. WAWERU

JUDGE