

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 290 OF 1994

NATIONAL BANK OF KENYA LTD.....PLAINTIFF

VERSUS

DANIEL ONGECHI OSUMO.....DEFENDANT

JUDGMENT

The Plaintiff, National Bank of Kenya Ltd, filed suit against the Defendant, Daniel Ongechi Osumo, praying for judgment to be entered against the Defendant for:-

(a) the sum of Kshs. 1,435,259/90 due

(b) Bank charges and interest on principal sum at the Bank rate of 40% per annum and/or current Bank rate of interest calculated on daily balances at monthly rates from 1 st April 1994 until payment in full.

(c) Cost of and incidental to the suit and interest thereon at Court rates of 14% (Section 27(2) C.P.A. (19/85) and Value Added Tax (VAT) thereon.

(d) Any other further relief this Court may deem fit to grant.

The Defendant filed a defence denying being indebted to the Plaintiff. Discovery having been concluded, the Advocates for the Plaintiff Mssrs. Kamonjo Kiburi & Company Advocates invited the Advocates for the Defendant, Mssrs Konosi & Company Advocates vide a letter dated the 13th of January 2004 to attend the Civil registry with a view of having the case fixed for hearing. The letter was duly served upon the Defendants Advocates on the 15th of January 2004. The hearing date was fixed for the 12th of July 2004 on the 28th of January 2004 by the Advocates of the Plaintiff in the absence of the Advocates for the Defendant. Mssrs Konosi & Company Advocates were however served with a hearing notice of the aforesaid date on the 2nd of February 2004 and an affidavit of service duly filed in Court. On the 12th of July 2004, this Court having satisfied itself that the Defendant was duly served but failed to attend Court during the hearing of the case either by himself or his Advocate ordered the case to proceed to hearing.

The Plaintiff called one witness who testified on its behalf. Mr Chali Akuku Bwana, an officer of the Plaintiff working in the Advances department testified that the Defendant applied for a loan of Kshs 500,000/= from the Plaintiff. A copy of the said letter was produced as Plaintiff's exhibit No. 1. Mr Bwana testified that the said loan application was approved and a letter of offer duly issued to the Defendant. In the said letter of offer, were terms conditions of the acceptance of the application by the Defendant to be advanced a loan. The Defendant accepted the offer. The letter of offer was produced in evidence as Plaintiff's Exhibit No. 2. The Defendant provided a security of his property known as **Mugirango/Buisango/1430**. The charge was prepared but was however not executed for some reason. After the Defendants application to be advanced a loan was approved, he withdrew the said amount from his current account maintained with the Plaintiff. The Plaintiff produced copies of the said cheques which were presented by the Defendant and honoured by the Plaintiff. The cheques were marked as Plaintiff's Exhibit No. 3(a) to (m).

Mr Bwana further testified that to date the Defendant had not made any effort to repay the said amount. He produced Bank statements of the Defendant's account maintained by the Bank as proof that

the cheques which were presented by the Defendant were indeed honoured by the Bank. The Bank Statements were produced in evidence and marked as Plaintiff's Exhibit No. 4. It was further Mr Bwana's testimony that interest was charged on monthly basis. As the 31st of December 2002 the principal amount with the accrued interest was standing at Kshs 16,474,053/85. The Plaintiff prayed for judgment to be entered for the Plaintiff against the Defendant for the said sum together with the costs of the suit. The Plaintiff produced, the last statement of the Defendants account in evidence and the same was marked as Plaintiff's Exhibit No. 5.

I have read the pleadings filed by the parties in this suit. I have also considered the oral evidence that was adduced on behalf of the Plaintiff including the exhibits that were produced as documentary evidence. The issue for determination by this Court is whether the Plaintiff has established on a balance of probabilities that it advanced the said loan to the Defendant and further whether the Defendant defaulted in repaying the same. As started at the beginning of this judgment, even though the Defendant filed a defence, neither he nor his Advocate attended Court when this case had been fixed for hearing. Having been satisfied that the hearing Notice was duly served, this Court ordered the hearing of the case to proceed in the absence of the Defendant.

The Plaintiff, in its evidence was able to establish that the Defendant had applied for a loan from the Plaintiff which loan application was approved and a letter of offer issued by the Plaintiff to the Defendant. The Defendant's application was produced as Plaintiffs Exhibit No. 1 whilst the letter of offer was produced as Plaintiff's Exhibit No. 2. Upon the said loan being approved, the Defendant withdrew the amount from his current account maintained at the Plaintiff's bank. The copies of the cheques and the respective amounts withdrawn were produced as Plaintiffs Exhibit No. 3(a) to (m). Copies of the Defendants statements of accounts maintained by the Defendant at the Plaintiff bank were produced as Plaintiff's Exhibit NO. 4 and 5. The oral evidence by the Plaintiff and the documentary evidence produced clearly show that the Defendant applied for a loan, was advanced the same and defaulted in repaying the same. This evidence was not controverted.

I do find that the Plaintiff has proved its case on a balance of probabilities. I therefore enter judgment for the Plaintiff for the sum of Kshs 16,474,053/85 as at the 31st of December 2002. Interest will be applied as prayed in the Plaint. The Plaintiff will also have the costs of the suit.

It is so ordered.

DATED at NAKURU this day of 2004.

L. KIMARU

AG. JUDGE