



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS).**

**Civil Case 687 of 1999**

**SWEETBITE MANUFACTURURERS LTD .....1<sup>ST</sup> PLAINTIFF**

**RAJENDRA K.G. GANATRA .....2<sup>ND</sup> PLAINTIFF**

**DINESH G. GANATRA .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**FIDELITY COMMERCIAL BANK LTD .....DEFENDANT**

**JUDGMENT**

In a Plaint filed on 31<sup>st</sup> May 2001 the Plaintiff pleaded that at all material times it had Hire Purchase Accounts with the Defendant namely H.P. No.256 and 456 of Kshs 2,104,910/= and 656,000/= respectively. The Plaintiff not only made good the said accounts but overpaid the same to the extent of Kshs 268,572/=. Despite this overpayment the Defendant on or about 18.5.99 demanded Kshs 1,283,272/= as outstanding amount on HP.A/C 256 and ordered for repossession of the Plaintiff's bakery equipment which demand was contrary to a statement of account supplied by the Defendant which reflected a credit of Kshs 13,891.75 on Hire Purchase A/C 256 as at 8.3.99. The Plaintiff then requested for an account of all deposits in respect of A/C Nos. 256 and 456 which the Defendant did not furnish. In consequence of the demand made by the Defendant, the Plaintiff closed its bakery business and has hence suffered Loss and Damages. In the premises the Plaintiff sought an order of accounts and a restraining order against the Defendant and its agents from interfering with the Plaintiff's property. The Plaintiff further sought damages for loss of business.

On 5<sup>th</sup> April, 2000 the Defendant filed an amended Defence and Counterclaim. In this amended Defence and Counterclaim the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were introduced. The Defendant averred that the 1<sup>st</sup> Plaintiff had three accounts and not two as pleaded in the Plaint. These were as follows:-

- (i) Hire Purchase Account Number 256 of Kshs 2,104,970/=.
- (ii) Hire Purchase Account Number 637 of Kshs 656,000/=.
- (iii) Bills Discount facility Number 456 of Kshs 600,000/=.

The Defendant denied the overpayment of Kshs 268,572/= alleged in the Plaint and averred that it consolidated the said accounts on 10.8.98 in A/C 256 with a resultant debit balance of Kshs 1,081,784.25 as at 3.6.99. In the premises the Plaintiff's claim was denied.

By its Counterclaim the Defendant averred that it granted to the 1<sup>st</sup> Plaintiff the said 3 financial facilities which the 1<sup>st</sup> Plaintiff agreed *inter alia* to settle with interest and other charges. The 1<sup>st</sup> Plaintiff expressly agreed that the Defendant could consolidate the said three accounts. The Defendant further pleaded that in consideration of the said financial facilities granted to the 1<sup>st</sup> Plaintiff, the 1<sup>st</sup> Plaintiff mortgaged its bakery equipment. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff jointly and severally executed guarantees wherein they covenanted to be personally liable to the Defendant for all monies due and owing to the Defendant from the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff defaulted and all the Plaintiffs became liable to the Defendant in the said sum of Kshs 1,081,784.25 as at 3.6.99 which sum continues to attract interest at the rate of 35% p.a. until payment in full. In the premises the Defendant claims *inter alia* delivery of the mortgage chattels, and Kshs 1,081,784/25 with interest therein at 35% p.a.

The 1<sup>st</sup> Plaintiff denied the Counterclaim and reiterated the averments in the Plaintiff.

The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff filed a joint Defence to the Counterclaim. They too reiterated the contents of the Plaintiff and averred that the 1<sup>st</sup> Plaintiff had settled its accounts with the Defendant. They further denied that they executed the guarantees alleged in the Plaintiff and prayed for dismissal of the Counterclaim.

At the close of the pleadings, the parties filed a statement of agreed issues.

1. Did the Defendant have a right to consolidate the Plaintiff's accounts? If yes, did it exercise this right.
2. Has the Plaintiff settled all loan accounts with the Defendant and if not how much is outstanding?.
3. Has the Plaintiff over paid the Defendant and if so to what extent.
4. Is the Defendant entitled to repossess the Plaintiffs goods?
5. Does the Plaintiff have a good claim against the Defendant?
6. Did the Plaintiff give the Defendant notice of intention to sue?
7. Is the Plaintiff entitled to the prayers sought?
8. What order should this Court make in terms of the prayers sought?

The matter was set down for hearing on 1<sup>st</sup> March 2004, 28<sup>th</sup> April 2004 and 13<sup>th</sup> October 2004. It was then fixed for submissions on 11<sup>th</sup> November, 2004. Parties opted for written submissions which were then filed.

The 1<sup>st</sup> Plaintiff called one witness Rajendra K.G. Ganatra who is also the 2<sup>nd</sup> Plaintiff and a director of the 1<sup>st</sup> Plaintiff. The Defendant called two witnesses, Philip Mwoka its Legal Officer and one Abian Khamati its Assistant Credit Manager.

P.W.1 Rajendra K.G. Ganatra gave evidence that the 1<sup>st</sup> Plaintiff was in food processing business until 1999 when it was put in Receivership. It borrowed funds from the Defendant under two Hire Purchase Agreements and a Bills Discounting facility. The first facility was granted on 28<sup>th</sup> March, 1995. It was for Kshs 2,778,576/= inclusive of interest of Kshs 673,606 which was negotiated at the time of the Loan. He produced the Hire Purchase Agreement dated 28<sup>th</sup> March 1995. He signed the agreement and so did the Defendant. The Defendant opened Account No.HP/95/20256 hereinafter referred to as A/C 256. The facility was to be repaid within 24 months by monthly instalments of Kshs 115774/=. There was no further interest or other charge agreed. The Defendant by post furnished a copy of the Agreement to the

1<sup>st</sup> Plaintiff.

The Defendant again granted the 1<sup>st</sup> Plaintiff a second Hire Purchase facility on 2<sup>nd</sup> February, 1996 of Kshs 833,130/= inclusive of interest of Kshs 177,130/=. This facility was repayable in 18 months by equal monthly instalments of shs 46,285/=. The Hire Purchase Agreement was again executed by both parties. A copy of the agreement was forwarded to the 1<sup>st</sup> Plaintiff by a letter dated 13<sup>th</sup> April, 1996. This facility was also not to attract additional interest or any further charge. The Defendant allocated Account No. HP/96/20456 (hereinafter referred to as A/C 456) for the 2<sup>nd</sup> facility. The Plaintiff paid these accounts in full and in fact the accounts were in credit in the sums of Kshs 13,891/75 and 28000/= respectively. The 1<sup>st</sup> Plaintiff received statements from the Defendant in respect of A/C 256 but not A/C 456. In addition to the Chattels purchased by the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff gave their personal guarantees for these loans.

The 3<sup>rd</sup> financial facility granted to the 1<sup>st</sup> Plaintiff was a Bill Discounting Facility of Kshs 600,000/= which was granted on 2<sup>nd</sup> October 1996. Account No.637 was opened for the facility. The 1<sup>st</sup> Plaintiff settled this account fully together with interest of Kshs 42,600/=.

According to P.W.1, the 1<sup>st</sup> Plaintiff owed nothing to the Defendant. Yet on 18.5.99 the Defendant claimed Kshs 1,283,272/= which sum the Plaintiffs denied. P.W.1 claimed that there was overpayment on the accounts as follows:-

A/C 256 – Kshs 240,572/=

A/C 456 – Kshs 28,000/=

Total Kshs 268,000/=

There was however Kshs 72,500/= due on A/C 637. According to P.W.1 the total overpayment was Kshs 196,072/=. This was pointed out to officers of the Defendant when the demand for Kshs 1,283,272 was made who were to verify their accounts and pay back the overpayment but the Defendant has made no payment.

P.W.1 denied that the said 3 accounts were consolidated as claimed in the defence and Counterclaim. He also denied that Hire Purchase Agreements provided for additional interest and in his view the additional interest rate of 40% p.a. was added by the Defendant and was not with the Plaintiffs' approval or agreement. According to P.W.1, the Defendants accounts were not well kept and are full of discrepancies. In his view as the 1<sup>st</sup> Plaintiff overpaid the accounts, the 2<sup>nd</sup> Plaintiff and 3<sup>rd</sup> Plaintiff were discharged from their personal guarantees.

In cross-examination P.W.1 admitted that the 3 financial facilities were not paid within the period agreed. He also admitted being given a statement of Account by an officer of the Defendant which statement remained unaltered. The Plaintiffs then closed their case.

Philip Mwoka P.W.1 testified on behalf of the Defendant. He told the Court that the 1<sup>st</sup> Plaintiff was granted the three financial facilities referred to by PW.1. In respect of A/C 256 and 456 the 1<sup>st</sup> Plaintiff provided its bakery equipment as security and the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs gave their personal guarantees. The Hire Purchase Agreements provided for variable rates of interest. In respect of the 3<sup>rd</sup> financial facility i.e. the Bill Discounting facility interest on the facility was 32% p.a. This interest rate increased to 48% p.a. on arrears. This facility also provided for consolidation of accounts.

The 1<sup>st</sup> Plaintiff also executed a document headed Right of Set off which provided for consolidation of accounts and set off or transfer of sums to the credit of the Plaintiff's in any account in debit.

In cross-examination D.W.1 confirmed that the Hire Purchase Agreements forwarded to the Plaintiffs

did not have the 40% p.a. interest rate. He also admitted that the agreements did not provide for consolidation which appear in A/C 637.

The Defendant also called one Fabian Khamati D.W.2. He told the Court that the 1<sup>st</sup> Plaintiff enjoyed the 3 financial facilities referred to by the other witnesses. He testified that in respect of A/C 256 as at 5.8.98 it had a debit balance of Kshs 153,000.25 and in respect of A/C 456 there was a debit balance of Kshs 349,895/= D.W.2 further testified that even the Bill Discounting facility had a debit balance. On 10.8.98 all the accounts of the 1<sup>st</sup> Plaintiff were consolidated and operated in one account i.e. Account No.256. As at 3.6.99 the net debit balance was 1,081,784.25. By this time the Plaintiff knew that they were operating this one account in which they made deposits. According to D.W.2, the 1<sup>ST</sup> plaintiff still owes this sum.

In cross-examination, D.W.2 admitted that the statements produced by either side were different. He however, maintained that all the deposits made by the Plaintiffs had been accounted for in all the 3 accounts and in the consolidated account. He denied that the statements produced by the Plaintiffs were true statements of account.

The Defendant then closed its case and both sides submitted in writing by consent. The Plaintiffs maintained that all the financial facilities granted to the 1<sup>st</sup> Plaintiff had not only been paid in full but had indeed been overpaid by Kshs 196,072/= which sum the Plaintiff claims. It was submitted for the Plaintiffs that the interest rate of 40% applied in respect of A/Cs 256 and 456 was not agreed and is not binding on the Plaintiffs and further that the purported consolidation of accounts was arbitrary and did not reflect the true position of the Plaintiff's accounts with the Defendant.

It was further submitted for the Plaintiff's that the Defendant filed HCCC No.1765 of 1997 against the 1<sup>st</sup> Plaintiff in respect of the bill Discounting facility on 21.7.97. This was before the alleged consolidation. The filing of this former suit disentitled the Defendant from consolidating A/C 256 and 456 with the Bill Discounting facility i.e. A/C 637.

In sum Counsel for the Plaintiff prayed that the Plaintiff's suit be allowed and the Defendant's Counterclaim be dismissed.

The Defendant's Counsel on his part submitted that the Plaintiff had not established its case on a balance of probabilities. The same should therefore be dismissed with costs. Regarding the Defendant's Counterclaim, Counsel submitted that the same had been proved beyond the balance of probability and should be allowed. He argued that the Defendants had consolidated the accounts with the express approval of the Plaintiff's and the statements of account produced by the Defendant were the true accounts to be relied upon.

I have carefully perused the record of this case. I have also carefully considered the evidence adduced by both sides. At the center of the dispute is the issue of accounts. The Plaintiffs allege that the three accounts i.e. the two hire purchase accounts and the Bill Discounting account were not only paid in full but were over paid. The Defendant on its part maintain that the three accounts were all in arrears as at the time of filing this suit and the Plaintiffs owed it a sum of Kshs 1,081,784.25 which it has claimed in the Counterclaim.

The two Hire Purchase Accounts were governed by Agreements dated 28<sup>th</sup> February, 1995 and 2<sup>nd</sup> February, 1996 made between the Defendant and the 1<sup>st</sup> Plaintiff. The Defendant maintains that these Hire Purchase Agreements provided for interest at the rate of 40% p.a. on all overdue Hire rentals from the due date to the date of payment. The Defendant produced copies of the agreements which showed this rate. The 1<sup>st</sup> Plaintiff on its part testified that it negotiated the interest payable for the entire period of the Hire Agreements which interest was put together with the principal and monthly repayments agreed. The 1<sup>st</sup> Plaintiff produced copies of the agreements which were sent to it by the Defendant under cover of the Defendant's letters dated 11<sup>th</sup> April, 1995 and 12<sup>th</sup> April 1996. These agreements do not show the 40% p.a. interest rate. Indeed the places for interest rate are blank in the copies of agreements produced

by the 1<sup>st</sup> Plaintiff. These agreements were prepared by the Defendant. It is the Defendant which furnished the 1<sup>st</sup> Plaintiff with the copies it has produced. I believe the 1<sup>st</sup> Plaintiff that the interest rate of 40% p.a. on overdue Hire rentals was arbitrarily and unilaterally inserted in the Hire Purchase Agreements by the Defendant after the Defendant had released copies of the agreement to the 1<sup>st</sup> Plaintiff. There was no provision of 40% p.a. interest rate agreed between the 1<sup>st</sup> Plaintiff and the Defendant. I agree with the 1<sup>st</sup> Plaintiff that the 1<sup>st</sup> Plaintiff and the Defendant negotiated the total interest payable for the duration of the Hire Purchase Agreements.

The 1<sup>st</sup> Defendant's statements of account produced in respect of the two accounts reveal that the 1<sup>st</sup> Plaintiff has paid both principal sums together with agreed interest. In respect of A/C 256, the 1<sup>st</sup> Plaintiff appears to have paid about Kshs 2,913,076/=. There appears to be an overpayment of about Kshs 134,500/=. And in respect of A/C 456, the 1<sup>st</sup> Plaintiff appears to have paid about Kshs 858,620/= which would suggest an overpayment of Kshs 25,490/=.

The third financial facility extended to the 1<sup>st</sup> Plaintiff by the Defendant was A/C 637: the Bill Discounting facility. This facility was governed by the Defendants letter dated 2<sup>nd</sup> October, 1996 addressed to the 1<sup>st</sup> Plaintiff. This letter contained the terms of the Bill Discounting facility and the 1<sup>st</sup> Plaintiff accepted the said terms by signing the duplicate of the letter. This facility was in respect of bill discounting of Kshs 600,000/=. The facility was granted at an interest rate of 32% p.a. for the number of days duration of the Promissory Note/Bill presented, chargeable on discount basis in advance. There was also provision of interest on arrears at the rate of 48% p.a. calculated on reducing balance basis. The 1<sup>st</sup> Plaintiff appears to have defaulted in honouring this account and the Defendant instituted HCCC No.1765 of 1997 against the 1<sup>st</sup> Plaintiff for Kshs 611836/= plus interest at the rate of 48% per annum from 28<sup>th</sup> April 1997 until payment in full. The 1<sup>st</sup> Plaintiff has agreed that this suit is pending before this Court and the Defendant was not entitled to consolidate the account involved i.e. A/C 637 with the Hire Purchase accounts. The Defendant has breathed no word about that suit and the consequences thereof. The purported consolidation was effected on 8<sup>th</sup> October, 1998 without withdrawing the said HCCC No.1765 of 1997.

In my view the Defendant in electing to institute HCCC No. 1765 of 1997 in respect of sums allegedly owed to it by the 1<sup>st</sup> Plaintiff opted to treat the three financial facilities separately. The Defendant could not have purported to consolidate the Bill Discounting facility with the Hire Purchase accounts without discontinuing HCCC No.1765 of 1997. If the Defendant were to succeed in both the earlier case and in this suit the result would be two decrees in respect of the same claim. The 1<sup>st</sup> Plaintiff would suffer double jeopardy and the Defendant would be unjustly enriched. No Court of justice will endorse such a consequence.

I hold therefore that in the special circumstances of this case the Defendant was not entitled to consolidate the bill Discounting facility with the two Hire Purchase accounts.

The statements of accounts produced by the Defendant show that the Defendant loaded the Bill Discounting account with a sum of Kshs 59,750/= described as Court filing charges. This was on 27<sup>th</sup> June 1997. The Defendant continued to charge interest on this sum upto the time of filing this suit. Indeed it is an aspect of the Defendants' Counterclaim against the Plaintiffs. In my view this further confirms the Plaintiffs' complaints against the accounts produced by the Defendant.

In summary, I have found as follows:-

1. The 1<sup>st</sup> Plaintiff has overpaid the Defendant in the sum of Kshs 159,990/= in respect of the Hire Purchase A/C Nos. 256 and 456 and I enter judgment for the 1<sup>st</sup> Plaintiff as against the Defendant in this sum.
2. The said sum of 159,990/= will attract interest at Court rates from the date of filing suit until

payment in full.

3. An injunction will issue restraining the Defendant, its agents and/or servants from interfering and/or repossessing goods at the 1<sup>st</sup> Plaintiff's business premises.

4. The 1<sup>st</sup> Plaintiff indeed none of the Plaintiffs proved that they were entitled to general damages. The claim for damages for loss of business/profit is therefore dismissed.

5. The 1<sup>st</sup> Plaintiff shall have the costs of this suit.

6. The Defendant's Counterclaim is dismissed with costs as against all the Plaintiffs.

DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2004.

F. AZANGALALA

**AG. JUDGE**

Read in the presence of:-