



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT CIVIL APPEAL NO. 462 OF 1998

CREDIT BANK LTD Formerly CREDIT (K) LTD PLAINTIFF

VERSUS

GALAX PRINTER LTD & OTHERS DEFENDANTS

J U D G E M E N T

On 3rd July, 1990 the plaintiff filed a suit against the defendants jointly and severally for a sum of Kshs.95,141.20 being the unpaid balance of overdraft facilities offered to the former by the latter in or about October, 1988.

The 1st defendant was the actual borrower while the 2nd and third defendants were guarantors to the loan.

Though the defendant filed a defence, when the case was called for hearing either 14th or 15th October, 1998 only the plaintiff appeared and testified through one Joseph Bobby Kilimo.

According to the evidence adduced, the plaintiff had offered to the first defendant the facilities of up to Kshs. 1million repayment of which was guaranteed by the 2nd and 3rd defendants.

That up to the date of filing suit as above the unpaid balance stood at Kshs.95,141.20.

This amount attracted interest at the rate of 19% per annum and that by the time the case was being heard or a day before (14.10.98), the outstanding balance was Kshs.882,350/20 which the plaintiff claimed from the defendants in the suit.

In court Kilimo produced various documentary evidence to confirm that the defendants had an outstanding amount giving rise to the filing of the suit, Kshs.95,141/20 and that due to the chargeable interest the figure had gone up to Kshs.886,350/90.

The defendants gave no evidence hence all the facts given in the plaint and the evidence given by Kilimo to support the plaint went unchallenged.

However, when the learned acting Senior Principal Magistrate wrote and delivered her judgement she appears to have laid emphasis on the amount debited for the defendant's account in respect to the charges paid to credit advisory services limited which she said was payable by the defendants without any evidence to support it. She further said in her said judgement that the plaintiff had not shown how much the said Credit Advisory Services had charged.

But this was not really much of an issue here. If it was, then exhibit 6 showed that on 23rd June, 1989

the plaintiff had debited a sum of Kshs.60,711/45 to the defendants account and that on 4.12.89 part of this money – (Kshs.35,411/=) was refunded, leaving Kshs.25,300/45 to be disputed for lack of evidence as she put it.

Otherwise, the said Magistrate agreed in the rest of the judgement that the defendants had been advanced the loan for which they had given corporate and directors' guarantees.

That at the time of default in the repayment on 31.10.90, the outstanding balance was Kshs.95,141/20 which accumulated, due to interest, to over Kshs.800,000/=.

If this be the case and that the defendants did not appear in court at the hearing of the case to counter the plaintiff's evidence, on what basis could she dismiss the entire plaintiff's claim of Kshs.95,141/20 plus interest at court rates from the date of default till payment in full?

The lower court acknowledged that there existed banks interest which had raised the figure from Kshs.95,141/20 to over Kshs.800,000/= and no evidence was adduced by the defence to contest this interest.

To my mind the Magistrate erred in dismissing the entire suit when there was ample evidence of the defendants indebtedness to the plaintiff.

A part from the sum of Kshs.25,300/45 which I find was not proved to have been paid to Credit Advisory Services Limited, the remaining part of the plaintiff's claim was proved on a balance of probabilities as no evidence was adduced by the defence to contest it.

Consequently I allow this appeal to the extent I have stated with costs of this appeal and of the case below.

Delivered and dated this 30th day of January, 2002.

D.K.S AGANYANYA

JUDGE