



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1718 OF 1998

PRUDENTIAL BANK LTD.....PLAINTIFF

VERSUS

JASSI HOLDINGS LTD.....1ST DEFENDANT

OBADIAH KARIUKI KAMAU.....2ND DEFENDANT

ALICE WANJIKU KARIUKI.....3RD DEFENDANT

JUDGMENT

The plaintiff in this case called one witness and the defendant also called one witness.

Plaintiff's witness was Benjamin Barngetuny Bwabe who is an Assistant Liquidation Agent in the Deposit Protection Fund Department of Central Bank of Kenya. He knew the defendants as customers of Prudential Bank when the Bank was operational. The records, according to this witness show that on 6th October 1995 the defendants applied for an overdraft with the Prudential Bank with a limit of Kshs 1.5 million. Interest was to be 30% but the Bank reserved the right to change interest which was to accrue on daily basis. He produced letter of offer Exh. 1 which was a letter addressed to the Directors of Jassi Holdings Ltd – First defendant. Security for the same overdraft was LR No Nairobi/Block 111/8441. Second condition for the loan was Directors' guarantees of Kshs 1,500,000 each and thirdly the Board Resolution to operate Banking facilities and there was also a requirement of personal guarantee of Obadiah Kariuki Kamau, the second defendant. The third defendant is a director of the First defendant. All these conditions were fulfilled and the money was advanced to the first defendant herein. According to the account statement, the money was withdrawn and utilised. The account was not properly serviced and it continued attracting interest until it was overdrawn. Payment was demanded but the same payments as were made could not settle the debt. The plaintiff then sold the security – i.e. LR No NAIROBI/ BLOCK 111/841 There was still some balance outstanding even after the sale of the same security. Second and third defendants pledged a motor vehicle. The vehicle was eventually sold. After that a letter was written on the First defendant's letter head and signed by the third defendant stating that they had made firm arrangements to clear off the arrears by 30th May 1997 and seeking more time until payment in full. That letter is Exh 3. The security was realised in October 1997 but the balance has not been paid and that is what is being claimed.

In cross examination he said the amount that was actually debited against the defendant's (first defendant's) account was Kshs 1,298,116/- but one had to consider stamp duty, mobilization fee, and advocates charges which were deducted. The guarantee signed by the Third defendant does not contain the name of the Principal debtor but the Principal debtor in respect of which the guarantee was signed was the first defendant – Jassi Holdings and she also signed the letter of offer. The value of the security was Kshs 1,500,000/-. By the time demand letter was written to the defendant on 30th April 1997, the amount

owed was Kshs 1,700,000/-. The third defendant wrote to the bank and forwarded Kshs 300,000 which the bank received. The house was sold in 1998 and funds reached the bank in November 1998. He stated that the Bank (plaintiff) did not refuse the third defendant to get a buyer. She got a buyer Lucy Muthoni but the same Lucy Muthoni delayed in finalising the sale. The witness was shown mfi D1 and mfi D2 but as these were eventually not produced despite Defence counsel's undertaking, I will not attach any importance to the evidence touching them. He agreed the house was sold for 1,600,000 in August 1998. At that time total amount owed was Kshs 2,300,000. There was a chattels mortgage on the vehicle which was sold at Kshs 110,000 but the account was credited with Ks.hs 79,000/- after auctioneers fee of Kshs 31,000/- was deducted. Other properties were offered by the defendants but these could not be charged as there was no consent obtained from Land Board to charge the same. The titles to the same properties are not with the plaintiff. In October 1998, the outstanding amount was Kshs 2,500,000/-. The vehicle was repossessed on 28.5.1998 and was sold on 28.5.1999. Delays in finalising sale of the land was by the City Council and not the plaintiff.

In re-examination, this witness stated that the First and 2nd defendants defaulted in repaying the money. There was no agreement to the effect that the defendants would look for a buyer of the security. The other securities offered by the 3rd defendant were not sold because they were agricultural land which could not be charged or sold without the consent of the Land Board of the area. The consent was to be obtained by the borrower and lastly he said the amount due is Kshs 1.9 million.

The second defendant did not appear in court and did not give evidence in his case. It is also apparent that the third defendant gave evidence but she did not give evidence on behalf of the first defendant. She only defended herself. I will consider the effect of the fact that the first two defendants did not offer any evidence in this case later.

The third defendant Alice Wanjiku Kariuki stated in her Defence that she is a Director of the first defendant. They got overdraft facilities from the plaintiff which they operated from October 1995 to 1997. It was a revolving fund. They gave a security of a house she owned and which was valued at Kshs 1.5 million. That was the initial security given for the facilities but in April 1997, the plaintiff wrote saying it was not happy with the Account. The plaintiff wanted to realise the security. She agreed with the plaintiff and authorised them to sell the security and she undertook to give further security for the difference. At that time the amount outstanding was Kshs 1,700,000/-. She agreed that the house be sold at Kshs 1,600,000/- as a lot of improvements had been done to it. She also gave the plaintiff log book for her car KYN 075 and she also gave the two titles of urban properties which did not require any consent. The car was given to the plaintiff to hold but the pieces of land could be sold. She then left for United States of America. All these were left with the plaintiff's advocates, Munene & Company, advocates.

When she came back, she found the house was not sold and in May 1997 she got hold of Wainaina Real Estate and got a buyer from Central Bank who was prepared to buy the property and sale agreement was prepared. The intended buyer was Lucy Matheri – who was an employee of Central Bank. The amount agreed with Lucy was Kshs 1.6 million. The agreement was dated 23.5.1997. Central Bank gave undertaking but as the plaintiff did not accept the same undertaking Central Bank withdrew the offer. (That agreement document was however withdrawn and was not produced as exhibit by the third defendant after plaintiff's counsel objected). Thereafter in 1998, the third defendant got another buyer Mercy Wokabi who also agreed to buy the property. She produced Exh. D1 as sale agreement between herself and Mercy Wokabi. The Bank did not accept that deal and it also went through. She got a letter acknowledging delay and granting 20% cut off for the plaintiff. She produced it as Exh. D2. Mercy was willing to pay Kshs 1.8 million for the property. She paid Kshs 300,000 and gave the plaintiff car log book. The plaintiff sold the vehicle for Kshs 110,000/- but credited the account with Kshs 79,000/- but at the same time they debited the account with Kshs 60,000 as the legal fees which in effect meant that only Kshs 19,000 was then credited to the account. Exh. D3 was the relevant letter for that transaction. She then gave the plaintiff two title deeds No. 7/ICHAGAKI/1978 and No. 7/ ICHAGAKI/1979 owned by herself to sell. According to herself the same properties were charged as she signed the charge documents relating to them; further there is a letter she produced as Exh.D4 showing that the properties were to be charged. The titles are still with the plaintiff. The two were worth half a million. She maintained she had paid in total Kshs 2.1 million. They still held the securities despite this payment. The house was

eventually sold in 1999 when it did fetch Kshs 1.6 million.

In cross examination she agreed that she signed the letter of offer herself and said that she tried to sell the property but she also conceded that she could not sell what was not hers. She was not certain as to what she owed the bank by April 1999. She has not made any payment to the plaintiff since April 1999 as by April 1999 she had made payment of Kshs 2,100,000. By April 1999 she conceded that the amount outstanding was Kshs 1,254,014/-. The car was sold for Kshs 110,000/- which was not proper as there was a valuation on it of Kshs 300,000 but she had no valuation report. She was told the vehicle was sold to the highest bidder. The two other pieces of land did not require Land Board's consent as they were town properties. She denied having been reluctant to seek consent on the Land Board. She referred to letter dated 10.6.1999 and said it is true the cut off was given but she did not provide a proposal. She stated lastly in cross examination that Bank disposed of the security it did charge but the balance accumulated because of the delay in effecting the sale.

In re-examination she said she had no agreement with the plaintiff to sell the property. She agreed with them to sell the property immediately but she went away for one month but on her return she found they had not sold the property. The plaintiff did not ask her for consent as she had indicated to them that they needed no consent.

The above were the facts of this case as can be gathered from the evidence of the only two witnesses who gave evidence. The first and 2nd defendant did not give evidence and although the third witness gave evidence and is a Director, she did not state in so many words that she was covering the position of the first and second defendant. If however, I have a doubt in my mind as to whether the third witness evidence as the director covered the first defendant, such doubt is clearly not there when it comes to the second defendant who is not a Corporate body and who was sued in his individual capacity. He (2nd defendant) did not appear in court and did not give evidence in Defence of the case against him. I will first consider the case against him. Paragraph 5 of the Plaint is talking of an agreement between plaintiff and first defendant contained in the letter dated 6.10.1995. At paragraph 5 (d) of the same Plaint it is stated that the loan advancement to first defendant was to be secured by personal guarantees of the 2nd and 3rd defendant. Paragraph 6 of the Plaint states as follows:

“6. By legal charge made on 19th October 1995 the 2nd defendant charged property L.R. No. NAIROBI/ BLOCK/111/841 to the plaintiff by way of legal charge with repayment to the plaintiff of a sum of Kshs 1,500,000.00 together with interests, costs and expenses in relation thereto and all monies due and owing from time to time by the defendant to the plaintiff”.

Paragraph 7 of the plaint says that the 1st defendant, 2nd defendant and third defendant by separate contracts in writing did guarantee the payments advanced to the first defendant. As far as I can see these were the only allegations in the Plaint made against the Second defendant. In a joint statement of Defence the 2nd defendant states as follows in response to these allegations. At paragraphs 6, 7 and 8 he says:

“The 2nd and 3rd defendants deny paragraph 5(d) of the Plaint and state that they did not execute any personal guarantee to secure the aforesaid loan advancement and shall put the plaintiff to strict proof thereof.

7. The 2nd defendant denies paragraph 6 of the Plaint and shall put the plaintiff to strict proof thereof”.

8. The defendants deny paragraph 7 of the Plaint and state that they did not sign any separate contract guaranteeing the due payment of Kshs 1,500,000/- and shall put the plaintiff to strict proof thereof”.

Has the plaintiff proved the allegations it made against the 2nd defendant in the Plaint? I do not think so.

First, the plaintiff has not throughout the entire hearing produced what it calls legal charge made on 19.10.1995 to show that it was the Second defendant who charged property LR No NAIROBI/BLOCK

111/841 to the plaintiff. Secondly if the evidence before me is anything to go by then it is clear to me that the property LR No NAIROBI/BLOCK/111/ 841 belongs to the third defendant. She says in her evidence throughout that it was her own house and there is no evidence before me to suggest that the 2nd defendant owned it or was partly owning it. All the evidence I have then is that it was belonging to third defendant (see Defence Exh D1 Agreement for Sale between Alice Wanjiku Gakere and to Mercy Muringi Wokabi). One is bound to wonder how a person could charge to another a property that does not belong to him. The other allegation concerning the 2nd defendant to this matter is that he did agree to guarantee the loan to first defendant. It is clear that the letter of offer was accepted by both the third defendant and the Second defendant and they signed it on 16.10.95. That letter of offer says at paragraph (i) – (iv) that the overdraft was to be secured *inter alia* by personal guarantee by Obadia Kariuki Kamau supported by the securities held with the plaintiff. However, in the evidence before me, no proper documents of guarantee was produced to show that 2nd defendant did sign any proper guarantee. Document marked mfi 2 was not produced and could not be produced as it was a copy and did not show the person to whom the overdraft was granted and was not in any case registered.

This then means that even though 2nd defendant did not give evidence in his case having filed defence, there is however no proof of his liability which has been adduced and I cannot hold him liable. The case as against him is dismissed, but as he did not appear in court to defend himself no costs will be awarded in his favour.

The third defendant is a director of the first defendant. She gave evidence and I will take it that her evidence covers the first defendant as well although she did not make this clear. However in my mind, I do feel that whether First defendant gave evidence directly or not the legal aspects in issue here can be considered on the evidence before me already, for the plaintiff still has a duty just as it would have had in formal proof to prove the case against each defendant within the standards of probability before it can expect judgment against any or all defendants.

The plaintiff has brought the first defendant and third defendant to the court. It is claiming the balance of the amount allegedly due to it after it has sold the security given to it and yet another property which according to evidence before me was not even a security namely a motor vehicle registration No KYN 075. The legality of the claim has been challenged and I do agree that the court has a duty to consider whether claim is based on a properly proved case. The starting point is the letter of offer and next will be the guarantee documents.

The plaintiff offered the facilities *vide* a letter of offer dated 6th October 1995 addressed to the defendants. The security required was as follows:

“(i) SECURITY As security, we require to take the following:-

(i) A first legal charge over property L.R. No. Nairobi/ Block/111/841, Nairobi for Kshs 1,500,000. The charge to be prepared for execution and registration by our advocates.

(ii) Directors Guarantee for Kshs 1,500,000/- each.

(iii) Board Resolution to operate banking facilities with us and borrow.

(iv) Personal guarantee by Mr. Obadiah Kariuki Kamau supported by the securities held with us”.

Although it was not proved before me that a charge existed, it seems that one existed and that was why the property charged was sold. There is nothing adduced to prove that the third defendant did execute any guarantee for Kshs 1,500,000/- or at least none has been exhibited as is required by law. The defendant in cross-examination did seek to be shown Board Resolution to operate a Banking facility with plaintiff but none was availed and there is none produced as exhibit. I have already dealt with the question of guarantee by Second defendant. Further, I have perused the same letter of offer and I do not see any evidence that acceptance was made over the seal of the First defendant which is a limited liability company. It seems to me without saying more that the requirements as to security were not fully complied

with. The plaintiff is relying on the same letter of offer in claiming the balance, it must show that it did comply with the requirements of the same letter of offer and that all the procedures for granting the same overdraft were complied with. The first defendant cannot be held liable for the loan secured through a document that it did not in law execute. The law required it to execute the acceptance of the letter of offer by affixing its seal witnessed by its directors who also signed the same document. There is no evidence that this was done. The law required it to accept the overdraft or the loan by its Board of Directors passing a resolution to that effect. Nothing has been adduced in evidence to show that this was done despite cross examination on the same. Under those circumstances I cannot hold the first defendant liable either. I do dismiss the case against it.

The third defendant, it would appear was the one running the day to day business of the First defendant Company. What I have said about the first defendant do also apply to it. As far as she is concerned, no guarantee allegedly executed by her was availed to the court (if she did execute one). Further as concerns her, I do feel the plaintiff was outrageously unfair. She was in my humble opinion honest in her evidence. She was extremely co-operative with the plaintiff in an attempt to clear this alleged overdraft but clearly her efforts were frustrated at every stage. One may ask, after she had authorised the plaintiff to sell the property way back in April 1997, what stopped the plaintiff from selling the same then when the loan balance was only Kshs 1,700,000 against a property valued at Kshs 1,600,000/-? If the plaintiff had moved quickly, only Kshs 100,000 odd would have remained which her motor vehicle would have wiped out (again if it was also sold in time). The plaintiff's witness blames the City Council for the delay yet not even a single attempt was made to adduce any evidence to show the involvement of the City Council. It seems clear to me that the delay was possibly to enable the plaintiff earn more interest on the loan. That is not only cruel, it is unethical and unprofessional. I am on my part not ready to condone such a clear attempt by a financial institution to frustrate a customer.

The third defendant allowed the plaintiff to sell the property way back in April 1997. When the plaintiff could not sell it for no proper reasons she offered to sell it to a person at Central Bank, the plaintiff did not give consent for that to happen; she then in 1998 attempted to sell it to another person, the plaintiff did not approve of that and eventually the plaintiff sold it late in 1998 close to two years later. Surely how much interest was earned during that time and was it morally proper to ask the 3rd defendant to pay that interest? I do feel it was not proper. However as if that is not enough, the 3rd defendant gives her car to the plaintiff to sell to defray any balance. That car is sold one year later – obviously after it had depreciated seriously in value and it is sold for Kshs 110,000, of which only Kshs 79,120/- is credited to the defendant but against another debit of Kshs 60,700 described as lawyer's fee. One may ask what was the first deduction that reduced the amount from Kshs 110,000 to Kshs 79,200 for? PW1 says it was lawyer's fee yet the letter Exh.D2 dated 10th June 1999 from plaintiff to 1st defendant also says Kshs 60,700 was the lawyer's fee and it was a debit against Kshs 79,120. It is clear that all that a whole vehicle fetched to the credit of the 3rd defendant was Kshs 18,420/-. This was again cruel. Lastly, the plaintiff clearly received title deeds to two properties given to it by the 3rd defendant. The letter dated 29th July 1999 is from plaintiff to its advocates Munene & Co, Advocates and is clear on this. The properties were to be charged for Kshs 250,000/- each. These were properties LOC 7/ICHAGAKI/1978 and 1979. None knows what happened about them. plaintiff in the letter I have referred to herein Exh.D4, did ask its Advocates to charge the properties. The plaintiff clearly had the documents at that time (29.7.1998) for they enclosed the same to their said Advocate. It now says the properties were not charged because no consent was obtained and that the 3rd defendant frustrated attempts to obtain consents. It has not again adduced any evidence showing that they even wrote to the 3rd defendant or even to the Land Control Board on the question of consent. The 3rd defendant states that the pieces of land are in a township area and no consent is required. Whatever happened, one question is glaring, if the documents were not charged then why hold on to the documents of title? Why not return them to the 3rd defendant. There is no evidence that they have been returned to third defendant since the plaintiff handed them out to its agent namely its advocates. Thus the plaintiff is now seeking this claim here from the defendants while still holding the documents of title to these properties as well.

I need not say any more. I do not approve of the plaintiff's actions in this entire transaction which seem to me to be an attempt to get everything from a "willing Debtor" notwithstanding the non-ethical approach. I say non-ethical approach because apart from what I have said here, it would appear to me that the plaintiff

was even selling motor vehicle belonging to 3rd defendant without any proof of chattels mortgage on the same vehicle – at least none has been shown to the court.

In conclusion, from what I have stated, I am satisfied that the plaintiff has not proved that the proper legal procedures were put in place when this overdraft was obtained. I am also not satisfied that liabilities of the 3rd defendant based on guarantees (allegedly executed guarantees) which have not been produced is proved as required in law. Further I do find that if the plaintiff had taken prompt action in realising the securities offered by the 3rd defendant in time, there would be no amount outstanding as alleged. The amount allegedly outstanding is not genuine as it results from manipulations by the plaintiff to earn more interest on the amount at times when securities were availed for it to sell and realise its money. Third defendant did all humanly possible to repay this loan but the plaintiff frustrated her efforts. If all banks did what was done here, no borrower would pay his debts and hence the economy of the country would be adversely affected.

This suit is dismissed as against all defendants. Costs to the 1st and 3rd defendants.

Judgment accordingly.

Dated and delivered at Nairobi this 22nd day of January, 2002

J.W.ONYANGO OTIENO

JUDGE