



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL CASE NO.497 OF 1987**

**KENYA COMMERCIAL BANK LTD.....PLAINTIFF**

**=V E R S U S=**

**ROBERT MUREITHI GITHINJI.....DEFENDANT**

**J U D G M E N T**

This is one of the oldest cases on record! The entire evidence in chief was recorded by my brother Wambilyangah, J., before he was transferred in 1996. Cross-examination of the Defendant was recorded by my sister, Ang'awa, J., before she too was transferred. Long after that I recorded the submissions of counsel and it now falls on me to consider all the evidence and deliver the Judgment. I will do the best I can considering that some of the recorded evidence particularly the cross-examination of the Defendant is not easily decipherable.

The matter involves a sum of Kshs.228,542.30 allegedly owed by the Defendant to the Bank (the Bank) as at 30.7.1987 on account of outstanding loan /overdraft facilities with interest thereon. The Defendant denies owing even a single cent to the Bank and asserts that the debt is illusory. The Bank had employed a thief for a Manager and he misled them. Only three issues were framed for determination:

*“1. Was (sic) the overdraft facilities and/or loan facilities or advances in the Defendants’ Acc ount at the close of the business on the 30 th July 1987, referred to in paragraph 4 of the Plaint in the sum of shs.228,542.30?*

*2. Is the Plaintiff entitled to the recovery of the amount due from the Defendant as pleaded in paragraph 5 of the Plaint?*

*3. Costs and intrest.”*

The Bank through its three witnesses who included the alleged thief one Philip Njenga Gikebe (Gikebe) had a straightforward story to tell. The Defendant was its customer at two of its Branches in Mombasa and Malindi. He became a customer in Malindi where a computerised Current Account No.253.686.586 was opened for him in April 1979. The Accountant at the time who later became the Branch Manager was Gikebe. He testified that they were friends and he (Gikebe) would allow the Defendant to overdraw on his Current Account without security as he had the powers to do so as a Branch Manager.

In September 1980, the Defendant applied for a term loan of shs.30,000/- payable by monthly instalments of shs.1,200/- for three years. He offered as security his two parcels of land: Kilifi/Jimba/42 (Plot 42) and Kilifi/Mbaraka/310 (Plot 310). He wanted to increase stock in his business. For that purpose a Loan Account No.253912497 was opened and was credited with that amount while the Current A/c was debited. When the Defendant needed further loan of shs.10,000/- in February 1981, the sum then

outstanding on the Loan A/c shs.26,328.25 was cleared and the Loan A/c debited with the sum of shs.36,328.25. The same securities remained with the Bank.

The Defendant had also applied for a third loan of shs.40,000/- from the Mombasa Town Branch on the security of LR Kilifi/Jimba/197 (Plot 197). That was on 30.10.1980, for the purpose of farm development.

It is the Bank's case that the Mombasa Town Branch loan was subsequently debited to the Malindi Loan A/c in December 1992 and the Defendant continued to service the loans until July 1984 when he stopped making further payments although there was still an outstanding sum of shs.27,494/-.

Demand was made for payment on 14.9.1984. As at the time of filing suit in July 1987 the amount together with interest accrued was shs.41,243.65. Demand was also made for overdrawn amounts on the Current Account as at September 1984 amounting to shs.130,866.1. The Defendant was still operating the Account and he wrote back to acknowledge the indebtedness on 26.9.1984. He sought rescheduling of the debt and time to pay by end of December 1984. He reminded the Bank about the securities held. After making a few instalments payments on the debt, however, he stopped further payments and so the amount escalated to shs.187,298.65 by the time the Bank came to Court in July 1987. The total thus came to shs.228,542.30. All these facts were supported by exhibits produced as 1 – 11 including Bank Statements on both Accounts which statements were also in possession of the Defendant and have never been questioned. The first issue is therefore proved.

The Defendant on his part admitted that he obtained the three loans as stated by the Bank and gave the securities referred to. But he contends that he repaid all the loans. Firstly the loan for shs.30,000/- and a further shs.10,000/- which was secured by Plots 42 and 310; payable by monthly instalments of shs.1,200/-. He repaid the whole loan by March 1982 and his two Titles were discharged. He produced the Discharges of Charge dated 10.5.1982 but executed in March 1982.

Secondly, the loan for shs.40,000/- given through the Mombasa Town Branch was repaid by September 1993 but he told the Bank to keep the securities safely at Malindi Branch for his collection at a time of his choice. He contended that the loan was never consolidated with the Malindi Branch loans as it was given under Loan A/c No.211880516. The one sheet of the Account exhibited shows there was a debit balance of shs.8,091.80 as at 8.8.1983 but on 3.9.83 there was a transfer of similar amount from Current Account and that Account was "closed".

The Defendant denied authorship of the letter dated 26.9.1984 (Exhibit 7) purporting to admit the indebtedness offering repayment. He said it was a forgery and was in line with the criminal activities of Gikebe who was the Malindi Branch Manager at the time. Gikebe was charged in 1984 for Stealing by Servant from a specified Bank Account in the same Bank and was convicted for the offence. The Defendant further pointed out unauthorised debits and credits received on his Statements by Gikebe to show that Gikebe was not beyond stealing and falsifying entries in his Account. Indeed he exhibited a paying-in-slip for shs.43,000/- which he testified he had given to Gikebe for Banking but was nowhere reflected in the Bank Statements exhibited.

Gikebe of course, although he conceded his conviction, denied that he stole anything from the Defendant. On the contrary he explained that he made the unauthorised entries in order to assist the Defendant who was his friend. The idea was to keep away the information on excessive overdrafts from his head office and the Defendant never lost any money. Instead he gained because he was not charged interest on the overdrawn amounts. He denied ever receiving shs.43,000/- from the Defendant and challenged the authenticity of the paying-in-slip which had no signature of the depositor or Chashier's Stamp.

It seems to me in assessing the evidence on the first issue that much of it depends on the credibility of the Defendant and the witness Gikebe. It is unfortunate that the Bank had for its Accountant and Branch Manager an indisciplined and reckless officer who had thrown all Banking procedures and ethics through the window. He is a convicted felon to boot. But he offered to testify in this matter after paying his debt to society and with nothing to gain from the Bank as he had already been dismissed. He owned up to what

he did in respect of the Defendant's Accounts and gave his reasons for so doing. Whatever reasons the Defendant may have for inviting me to ignore that witness's evidence for being tainted, or total falsity, I do not feel persuaded that the Defendant himself was an innocent by-stander when he received unauthorised overdrafts, and soft loans. I do not see how for about 10 months Gikebe would fiddle about with the Defendant's Account without the Defendant raising any queries about it. It is conceded that he was receiving his Bank Statements regularly. I do not see how debits for term loans would be made on the Accounts without the Defendant's prior knowledge or subsequent protest or enquiry. I do not see why it took so long for the Defendant to enquire about an amount of shs.43,000/- uncredited to his Account. I do not see why it becomes difficult for a person who asserts that he had made full payment of a loan to withhold full particulars of such payment and only produce one sheet of paper of dubious source. I mention these few matters to underscore my assessment that when it comes to credibility, I do not place the two witnesses far apart.

There is evidence which is admitted that three loans were advanced by the Bank to the Defendant. I believe that the loan from the Town Office was consolidated with the Malindi loans and was not settled separately by the Defendant. That would partly explain why the security documents were retained by the Malindi Branch. It may well be that the two securities were discharged when full payment of the earlier loans was made in full. I notice in the Statements produced that there was a lump-sum payment of shs.26,950.75 loan repayment on 9.3.1982 which is the time the two securities were discharged. That amount is not reflected anywhere in the Loan A/c documents exhibited.

I do not believe there was full payment of all the Loan Accounts as contended. The Defendant made no response to the letter dated 14.9.84 in respect of the sum outstanding. He had difficulties with his Current Account which was the source of the Bankers order for servicing the Loan Account.

No good reasons were advanced by the Defendant for disowning his letter dated 26.9.84 (Exhibit 7). There were three witnesses from the Bank who were familiar with his signature and readily identified it. The best he could have done was to call rebuttal evidence instead of simply denying the signature was his. There is evidence that he made instalment payments pursuant to that letter before ceasing to service the Current A/c altogether. The amounts accrued due to the neglect of the Account were legitimate.

It is conceded however, without accepting the validity of the claim, that the sum of shs.43,000/- claimed to have been paid in by the Defendant but unaccounted for may be discounted from the principal sum. I find for the Defendant on that sum accordingly.

In answer to issue No.1 therefore I find that the Statements of Account submitted in evidence reflect the correct amount outstanding as at 30.7.1987 as shs.228,542.30. That amount includes interest at the agreed Bank rates.

On issue No.2, I find that the Plaintiff is not entitled to recover that amount from the Defendant and only part thereof is recoverable. From that sum shall be deducted a sum of shs.43,000/- with interest thereon at the Bank rates then prevailing from 12.7.1984 upto 30.7.1987. There shall also be deducted a sum of shs.26,950.75 with interest thereon from 9.3.1982 upto 30.7.1987. The balance of the principal sum shall be payable with interest at the court rates then prevailing from the time of filing suit together with costs on the lower scale since the matter may well have been handled before the Chief Magistrate's Court.

Dated this 24th day of January, 2001.

**P.N. WAKI**

**J U D G E**

24.01.01

Coram: Waki, J.

Okongo – for Plaintiff

Mwangi – for Defendant

Court Clerk – Mrs. Muthoka

Judgment read, dated and signed in Chambers.

P.N. Waki, J.