

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.324 OF 1998

TRANS-NATIONAL BANK LIMITED.....PLAINTIFF

=V e r s u s=

SALIM AGIL SAID.....FIRST DEFENDANT

SALAME MOHSIN SAID.....SECOND DEFENDANT

R U L I N G

The Plaintiff (hereinafter the Bank) seeks summary judgment against the two Defendants for a sum of shs.2,379,362.35 as claimed in the Plaintiff. O.35 r.1 of the Civil Procedure Rules is invoked in the Notice of Motion dated 10.8.2000.

In the Plaintiff filed on 9.9.98 the money is claimed on account of-

“balance of moneys payable by the Defendants to the Plaintiff for moneys lent by the Plaintiff to the Defendant as Bankers at the Defendants’ request at Mombasa due as at 31.5.1998 with interest at 36% p.a. from 1.6. 1998 being the agreed and/or the market rate to be paid upon moneys due from the Defendant to the Plaintiff”.

In the Affidavit in support of the application however, there is no loan agreement referred to or exhibited between the Bank and the Defendants. What is exhibited is an Account Opening Standard Form from the Bank. It has the Title “Current Account (Sole Proprietor)” although it is signed by the two Defendants. It was signed in Mombasa on 01.03.93 for the opening of a Current Account and a deposit of shs.5,000/- was made. It is not clear in the Form who was going to operate the Account as it only shows “any of the survivors or survivor”, but there is a handwritten endorsement, “Either to sign”. There is also a clause providing that the Account holders have “read and understood the General Terms and Conditions in connection with the business dealing with the Bank”. A Standard Form of those General Terms is also exhibited but it is not executed by the Defendants although there is provision for their signatures. Finally, the Account Number given for that Account was 001-0201552-000.

There are no Statements of Account exhibited to show the state of the Account from 1.3.93 to 31.3.1996. The Statements exhibited in respect of that Current Account run from 30.4.1996 to 28.2.1997. A close examination of those Statements however, shows that the Account has been in credit throughout and there is no debit made for any loan advance or overdraft. The credit balance as at 31.1.97 was 1,538,415.55.

Then a strange thing happens after 28th February, 1999. A totally new Account in the names of both Defendants is exhibited. It is A/C No. 109 0015520001. It opens with a huge debit balance of shs.1,584,208.40 and appears to be a dormant Account since only debit entries for Ledger Fees and interest is charged thereafter. The two sheets exhibited for that Account have no dates and therefore the years covered are a mystery. Up to 30th April of an unknown year, the debit balance was shs.2,379,362.35. This suit was filed on 9.9.1998 seeking judgment for that amount which is said to have been due as at 31.5.1998.

Learned counsel for the Bank Mr. Gor did not refer to or explain these matters. Instead he relied on the standard form on General Terms and Conditions and submitted that the two Defendants opened a “Joint Account” and “Partnership Account” and therefore there was joint and several liability. By signing the Account Opening Form the two Defendants authorised the Bank to make advances with or without

security by way of overdraft, loan or any other manner. There were no queries raised on the Statements forwarded to the Defendants and there cannot therefore be any dispute on them. He conceded that the Account was being run by the First Defendant only but submitted that the Bank was given authority by both Account holders for either one of them to operate it.

The First Defendant has said nothing about this suit or the application. There is no Affidavit of service or other indication on record that he was served with summons to enter appearance or with this application.

But the 2nd Defendant entered appearance and filed defence. She has also filed a Replying Affidavit. In both she concedes that she opened a joint Current Account with the 1st Defendant but contends that there was no authority from her to convert it to a loan or overdraft Account. If any loan or overdraft was advanced by the Bank to the 1st Defendant then it was without her knowledge or authority. She is a stranger to the claims made since it was the 1st Defendant who operated the Account throughout. She was also a stranger to the unconscionable interest rates charged on the amounts demanded as no interest rates were negotiated or agreed when the Current Account was opened. Through learned counsel Mr. Okongo she submitted that there were serious triable issues in this matter and the Bank is not therefore entitled to summary judgment.

I respectfully agree with Mr. Okongo. As pointed out above, it remains a mystery how the Joint Current Account which the Bank relies on for its claim, acquired a different identity and a debit balance when it has always been in credit. There is no implied authority under the General Terms and Conditions for the Bank to advance loans or overdrafts on Joint Current Accounts. It is arguable, but it would appear they may do so in a "Partnership Account" but the Account in issue here was not a Partnership Account. Indeed it has the Title "Sole Proprietor" although it was admittedly a Joint Current Account. It had to be maintained at a minimum credit balance of shs.5000/- which appears to have been the case. It seems to me that the Bank has not disclosed all the facts relevant to the claims made in this matter and I have no basis therefore for finding that the debt is justly and truly due. There are more than one bona fide triable issues. The application fails and is dismissed with costs to the 2nd Defendant/Respondent.

Dated this 20th day of March 2001.

P.N. WAKI

J U D G E