

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 3767 OF 1993

SAVINGS & LOAN KENYA LTD.....PLAINTIFF

VERSUS

PETER MASILU KATU.....DEFENDANT

J U D G M E N T

The Plaintiff sues the Defendant for a sum of shs.327,903=20 with interest thereon at 24% from the 13.7.93 being the balance due and owing in respect of monies lent to the Defendant under a loan Agreement in 1986. The Defence is that the Plaintiff only advanced a sum of Shs.70,000/- to the Defendant and not Shs.145,000=00 as alleged by the Plaintiff. The difference is because the Defendant does not admit receiving a sum of Shs.75,000. Produced in evidence as Exhibit 4 is a note from the Defendant asking for the release of 75,000/-. Endorsed on the note is a receipt for cheque NO. 062449 and an acknowledgment of receipt signed by the Defendant. The Plaintiff produced its Bank Statement showing that this sum was duly paid and debited to its account. I accept that the Defendant received this sum of Shs.145,000/-.

The basis of the loan and the nature of it was contained in Exhibit 2 of the Letter of Offer. The loan was for Shs.300,000/- to enable the Defendant to construct a house at Athi River on L.R. No. 337/133. Although the letter of offer does not say so the loan was to be disbursed in installments relative to the state of the house as it was being built. Exhibit 4 referred to above was the Defendant's own calculation of what amount he was due having regard to the work which had been done to the house. The Plaintiff dispatched its Surveyor Ebony Estates Limited to value the work done. The letters of 22 May 1986 and 9 December 1986 state the percentage of the work which had been done leading to the first two installments of Shs.40,000/- and 30,000/- respectively. This is borne out by the payments of these sums debited to the account relating to the Defendant in the Plaintiff's books see Exhibit 7. The sum of Shs.75,000 the third installment is debited to the Defendant's account on the 6 April, 1988.

The defendant is of the view that by debiting certain sums to his account for example auctioneers charges and fire premium he is in effect repaying these amounts to his account. This is of course a fallacy as there are sums properly payable by the Defendant which the Plaintiff has paid on his behalf.

The defendant complains that the Plaintiff breached the Loan Agreement by failing to advance the whole sum of Shs.300,000/-. I accept that the arrangement for the loan was that it was to be paid by installments linked to the building progress of the house and it was not intended as a one off loan. If it was why didn't the Defendant demand it to be given to him immediately. I accept the evidence of P.W. 2 as correct on all material matters.

No restraining order was produced by the Defendant to substantiate his contention that the sale of his property by the Plaintiff had been restrained and it appears therefore that the Plaintiff acted within its rights in selling the suit premises.

The Defendant avers that the Plaintiff is not entitled to interest as it breached the loan agreement. I see no evidence of any breach by the Plaintiff. Had the Defendant finished his property and applied for installments payments they would have been paid. As it is the progress of the house was so delayed that the interest and the charges eroded the amount due to the Defendant as can be seen from the Defendant's Bank Statement. Thus by 30 April, 1991 the debit balance on the account was Shs.298,894.70. Thereafter apart from amounts received from the sale of the property the Defendant made no repayments at all.

The charge Exhibit 3 clause 1(a) provided for a minimum interest of 16%p.a. and allowed the plaintiff to vary the same. The Plaintiff claims for the sum of Shs.327,903.00 plus interest at 24%. Exercising my discretion I award the sum claimed with interest thereon at 16% p.a. from the 13.7.93. The plaintiff having proved that the sum claimed is due the Defendant will pay the Plaintiff's costs.

Dated and delivered at Nairobi this 12th day of April, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE.