



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1399 OF 1995

NDUNGU NJAU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

J U D G M E N T

The Plaintiff brings this action against the Defendant which is its Banker for orders that a permanent injunction issue restraining the Defendant from selling the Plaintiff's property (the suit premises), that the Plaintiff is not under any obligation to pay sums allegedly paid to Kangethe & company and that the Defendant release to the Plaintiff his title deed of the suit premises.

In the body of his plaint the Plaintiff claims in paragraph 9 that he has fully paid all amounts due to the Defendant with interest. He does not however seek an order that he has so repaid the sums due.

The Plaintiff denies having received or had been given a statutory notice under Section 75 of the Registered Land Act. He also challenges the auctioneers charges charged into his account as being unconscionable and unjustifiable and allege legal charges paid to Kangethe & company are as a result of collusion and evidence of a kickback between Kangethe & Company and the Bank Manager as it is inconceivable that Shs.232,425/20 could have been incurred as legal fees to recover Shs.109,360=25.

This case is long in the tooth as it has had a number of interlocutory matters brought in it one of which culminated in an appeal to the Court of Appeal. In those applications a number of the matters now for adjudication were canvassed.

The Defendant has filed a Defence and counterclaim to the plaint. The Defence consists mostly of a series of denials and makes no positive averments save that it avers that the sum of Shs.300,000 which the Plaintiff claimed was to be sent to him was in fact the overdraft amount to his account. The Defendant counterclaims for Shs.332,442 as at 5.6.1995 together with interest thereon at 30%p.a.

No defence to the counterclaim was filed and the question of what if anything is due to the Defendant is a matter for formal proof. However the issue is as large as it is the duty of this court to determine what if anything is due from the Plaintiff to the Defendant or if the Plaintiff is correct that everything has been repaid in which event he is entitled to the relief sought by him.

The Plaintiff gave evidence that he signed a letter of offer dated the 23.9.91. This letter referred to a letter from the Plaintiff in which he applied for Banking Facilities. The Defendant had agreed to these facilities and set out the terms in the letter.

The overdraft was stated to be shs.50,000/- repayable on demand in respect of which the Defendant already held by way of security a written guarantee and charge over the suit premises for Shs.300,000/-. The Letter provided for interest at 20% p.a. with monthly rests calculated on daily balances and reserved to the Bank the right to change the rate of interest on notice. It was further provided that in the event of a conflict between anything in the charge or letter the provisions of the charge would prevail. This I find is the meaning and intention of a paragraph in the letter headed "Charge/Mortgage Term".

The Plaintiff admitted executing the charge and claimed that he was advanced Shs.109,000/-. He gave evidence of various payments and stated he did not owe the Defendant any money.

In cross-examination the Plaintiff admitted the loan was given in 1991 and the first repayment was made in 1994 on the 23.11.93 (In chief he had said 26.1.94) it appears to be a mistake as appears from the account page 1 where a sum of shs.31,558=50 was credited on the 31.3.94. He said he understood the contents of the charge and was shown the Letter constituting the statutory notice dated the 30.7.93 which he did not deny.

In chief the Plaintiff said that the Defendant wanted to sell his land (the suit premises) and had paid the advocate a lot of money. In cross-examination he said "The charges to the Advocate were properly debited" which appeared to run counter to his averments in the plaint as I pointed out at the time.

The Plaintiff gave no evidence of the collusive arrangement between the advocates and the Bank Manager. He said in cross-examination that no notice of change in the interest rates was given.

The Plaintiff was asked about the letter of the 17.9.94 he had written to the Defendant in which he asked for further indulgence in respect of the money due to you (the Defendant) which he promised to clear on or before the 31.10.94 in respect of which he had deposited a sum of Shs.50,000/- and gave a cheque for Shs.100,000/-. In the letter he admitted the amount due as 186,350.90. The Plaintiff said he had written the letter by mistake but did not explain the nature of the mistake. He also agreed that the cheque for Shs.100,000/- was dishonoured on presentation. In reply to the Plaintiff's evidence a Mr. Rigore was called by the Defendant who was the bank manager who dealt with the Plaintiff account at Narok.

He referred to a letter of the 28.11.1991. This letter referred to the overdraft of 50,000/- which had been given to the plaintiff, but that he had not accepted the offer. He was given up to the 31.12.91 to clear his debt and informed that the debt attracted interest at 20% plus a 1% penalty on the monthly balance. The amount due at that time was Shs.119,587.20. The Plaintiff replied on the 6.5.1992 and promised Shs.60,000/- would be deposited by the end of May 1992 and the balance before August, 1992. On the 18.6.1992 noting with disappointment that the sum of Shs.60,000/- had not then deposited the Defendant gave the Plaintiff until the 10.7.1992 to reduce his balance to the 50,000/- limit authorised. At that time Shs.140,481.50 was the debit balance.

On the 24.5.1993 the Defendant again wrote to the Plaintiff informing him that his account was still deteriorating, the debit balance being Shs.182,300.10/-, which attracted interest of 24% and a default penalty of 2% per month. He was given until the 31.5.1993 to pay. On the 30.7.93 Kangethe & Co. for the Defendant wrote demanding Shs.189,786.10 and giving three months statutory notice that if the sum was not paid auctioneers would be instructed to sell the suit premises. The Plaintiff then paid a sum of Shs.98,000/- and the Defendant informed the Advocates to hold legal action as acceptable repayment arrangements had been made.

On the 18.7.99 the advocates were informed that the Plaintiff had made no efforts and they were instructed to proceed further. In cross-examination Mr. Rigore pointed out the debits in the account relating to Advocates and Auctioneers charges which were as follows:-

Page 42 - Shs.28, 930.00

Page 44- 27,910.30

Page 45- 33,060.00

Page 46- 32,765.00

Page 47- 41,500.00

Page 49- 20,812.00

He said the auctioneer was instructed every time the Plaintiff defaulted. The debit notes showing these charges were sent to the Plaintiff who never made a complaint against them.

He said the interest rate applied, varied, and was at 28% and 30%. The debit charges exhausted the facility and interest was applied.

From the evidence it seems clear that the plaintiff having been given an overdraft limit of shs.50,000.00 failed to service his account in a proper manner and as a result interest accrued together with penalties. The charge provides on page 2 that the rate of interest, which changed, could be in the Bank's discretion, was 17% on the loan PROVIDED ALWAYS that the bank shall not be required to advise the Borrower prior to any change in the rate of interest payable.

In any event the letters sent to the plaintiff stated the rate of interest charged as well as informing him of the penalty rate incurred. I find however that the Defendant was entitled to vary the interest rate without notice to the Plaintiff.

With regard to the advocates and auctioneers charges, the charge provides on page 2 that "in respect of expenses incurred in relation to this security together with commission and other usual charges law and other costs charges and expenses"

These are chargeable property by the Defendant to the Plaintiff's account. The Plaintiff claims that with regard to the auctioneer charges these are unconscionable and unjustifiable. However the Plaintiff brought no evidence to show that this was the case. The Plaintiff could have administered interrogatories before the hearing to discover the amount of the charges and then brought evidence to show whether or not they were reasonable. This also applied to the advocates charges.

With regard to the allegation of collusion between the Advocates Kangethe & Co. and the Defendants Bank Manager the Plaintiff gave no evidence to support this allegation nor was it put to Mr. Rigore. I find that no such collusion existed.

I am satisfied that in the absence of evidence to the contrary the charges debited to the Plaintiff account were properly charged and that had the plaintiff so chosen he could have challenged these charges when the same were notified to him. I find that the statutory notice is valid and was properly served.

I further find that the accounts put in evidence reflect the true position as to the indebtedness of the Plaintiff to the Defendant and that as at the 5 June 1995 the debit balance was Shs.332,442=00. In the result I dismiss the plaintiff's claim with costs to the Defendant and award the Defendant Shs.332,442=00 with interest thereon at court rates from date of the filing of the plaint as well as costs thereon.

Dated and delivered at Nairobi this 27th day of September, 2001.

PHILIP J. RANSLEY

COMMISSIONER OF ASSIZE