



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO.1743 OF 1999**

**DAIMA BANK LIMITED.....PLAINTIFF**

**VERSUS**

**NICHOLAS MAUNDU.....1ST DEFENDANT**

**WILSON KYALO.....2ND DEFENDANT**

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

This judgment is being written pursuant to a consent order whereby it was agreed that judgement in this matter be written on the basis of the evidence recorded by the late Hewett J.

The plaintiff's claim against the defendants is for the sum of Shs.1,149,112.10 together with interest thereon at 4.1% per annum from 13.4.1999 till payment in full. The claim is alleged to be in respect of monies due and owing by the defendant to the plaintiff in respect of monies granted by way of advance and permission to overdraw the joint account of the defendants as well as the granting of other financial accommodation to them. Both defendants filed a joint defence to the suit in which the 1st defendant admitted having been advanced by the plaintiff the sum of Shs.800,000/= to purchase a second hand commercial motor vehicle but avers that he has made what he calls extensive and substantial repayments amounting to about Shs.560,000/=.

In addition to the above averments, the 1st defendant goes further to put forward other purported defences which in my view are irrelevant and do not answer the plaintiff's claim.

As for the 2nd defendant his defence is that he was not a party to the transaction between the plaintiff and the 2nd defendant and he has therefore been wrongly sued.

At the trial of this suit before the late Hewett J. each side called only one witness. The plaintiff's witness was its Credit Control Manager, Mr. Musimba (PW 1). His evidence established that on 3.8.1995 the 1st defendant was offered a loan in the sum of Shs.800,000/= to purchase the motor vehicle referred to above. The rate of interest specified in the offer was 32% per annum with a provision for increasing it by 4% in the event of default. The evidence further show that the 1st defendant accepted the loan and offered the motor vehicle financed by the loan namely KAD 408Y as security thereof and consequently signed blank transfer forms for the purpose of the perfecting the security. At the same time he surrendered the motor vehicle log book to the plaintiff.

After the loan became operational the 1st defendant experienced problems in the loan repayment.

After a demand notice had been served upon him as well as upon the 2nd defendant (as to whom I shall revert later in this judgment) the motor vehicle Registration No.KAD 408Y was repossessed by the defendant but was subsequently released back to the 1st defendant after he had pleaded with the plaintiff to do so under a letter dated 8.1.1997 (see Exh.2 Annexures). In the said letter the 1st defendant he promised to clear the outstanding balance of the loan. The 1st defendant did not however honour the promises he made and when the arrears continued to build up again the plaintiff instituted this suit to recover the entire debt.

In the course of his evidence Mr. Musimba explained, satisfactorily in my view, how interest has been charged on the account and in my view the 1st defendant's complaints regarding interest have no merit.

When he took the witness stand the 1st defendant did not say anything that would cast any doubt as to the legality of the action the plaintiff has instituted against him. He admitted the loan; he did not show that any charges made in the account were improper and in the end he admitted that he owed the plaintiff money his only plea to the court being he be allowed to repay the debt by monthly instalments of Shs.30,000/=. In short the 1st defendant has no answer to the plaintiff's claim and I accordingly find that he is liable to the plaintiff for the full amount claimed together with interest at 32% per annum from 13.4.1999 till payment in full.

With regard to the 2nd defendant the position is not all that clear. As stated above his defence is that he was not a party to the agreement between the plaintiff and the 1st defendant (who is his son) and therefore he has been wrongly joined in the suit.

The evidence tendered on behalf of the plaintiff by PW1 on this aspect of the matter is very brief. The relevant parts of that evidence are that the 2nd defendant approached the plaintiff with a view to assisting his son (the 1st defendant) to repay the loan. In that regard he undertook to pay Kshs.50,000/= (per month) and duly made four payments, that is to say Shs.26,000/= on 5.8.1997, Shs.10,000/= on 7.8.1997, Shs.40,000/= on 25.2.1998 and Shs.30,000/= on 15.3.1999. Besides the foregoing evidence, there is nothing else to connect the 2nd defendant with the loan though I note that in his submissions learned counsel for the plaintiff Mr. J. W. Wambua claim that the 2nd defendant gave a written undertaking by way of a letter dated 4.3.1997 to repay the outstanding loan by monthly instalments of Shs.50,000/= which said undertaking according to J. W. Wambua makes the 2nd defendant liable.

Two observations have to be made regarding that alleged undertaking:-

(a) The letter containing the undertaking does not appear to have been tendered in evidence and obviously without it I cannot say whether or not it renders the 2nd defendant liable to the plaintiff. Given that position I must therefore proceed on the footing that the letter and the undertaking do not exist the onus being placed on the plaintiff to prove its case (see Section 107 of the Evidence Act).

(b) It is also my considered opinion that an undertaking of the value referred to by the plaintiff's witness and learned counsel cannot on itself render the 2nd defendant liable to the plaintiff.

From the above reasons I do not think that any case has been made out, on a balance of probability, against the 2nd defendant and as against him the suit must fail.

In the event the suit against the 2nd defendant is dismissed with no order as to costs but judgment is entered in favour of the plaintiff against the 1st defendant for Shs.1,149,112.10 with interest thereon at 32% per annum from 13.4.1999 till payment in full. Then 1st defendant will bear the plaintiff's costs of the suit.

Dated at Nairobi this 2nd day of November, 2001.

**T. MBALUTO**

**JUDGE**