Diamond Trust Bank Limited v Mrima Filling Station Limited & another (Civil Appeal 190 of 2022) [2024] KEHC 16907 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 16907 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 190 OF 2022

F WANGARI, J

FEBRUARY 16, 2024

BETWEEN

DIAMOND TRUST BANK LIMITED .... APPELLANT

AND

MRIMA FILLING STATION LIMITED .... 1ST RESPONDENT

HISHAM ABDULLAH MWIDAU .... 2ND RESPONDENT

(Appeal arises from the Judgement and Decree of Trial Court delivered on 21st October 2022 by Hon. G. Kiage, Senior Resident Magistrate in Mombasa CMCC No. 796 of 2012)

JUDGMENT

1. This Appeal arises from the Judgement and Decree of Trial Court delivered on 21st October 2022 by Hon. G. Kiage, Senior Resident Magistrate in Mombasa CMCC No. 796 of 2012. The Trial Court dismissed the Appellant's suit for want of prove on a balance of probabilities.
2. The Appellant being aggrieved by the dismissal filed this Appeal and preferred the following grounds in the Memorandum of Appeal;
    a. The Trial Court erred in law and fact in dismissing the Plaintiff's suit on account of failure to produce crucial payment documents.
    b. The Trial Court erred in law and fact in failing to find that the 1st Respondent was indented to the Appellant.
    c. The Trial Court erred in law and fact in failing to find that the statement of account produced in Court was not controverted.
    d. The Trial Court erred in law and fact in failing to find that the 2nd Respondent was liable having executed the overdraft's personal guarantee.

e. The Trial Court erred in law and fact in disregarding the issues by the parties.

f. The Trial Court erred in law and fact in failing to award interest in the overdraft facility.

g. The Trial Court erred in law and fact in applying the burden beyond reasonable doubt that was not applicable.

Pleadings

3. The Appellant filed the suit vide the Plaint dated 23rd March 2012. It was pleaded that the 1st Respondent was a customer of the Appellant by virtue of operating an Account with the Appellant.

4. Further, that on 15th February 2010, the Appellant offered the 1st Respondent an overdraft facility for Kshs. 1,500,000/= which was at the request of the 1st Respondent enhanced to Kshs, 5,000,000/= on 14th April 2010.

5. The Respondents defaulted in the refund in breach of the terms of the overdraft. Consequently, the Appellant liquidated the account on 30th September 2010 and credited the proceeds in the 1st Respondent's account leaving a balance of Kshs. 887,171.07. The Appellant's claim was for the amount of plus interest at the rate of 34% per annum from 15th October 2010.

The Respondents case

6. The Respondents entered appearance and filed Defence dated 15th May 2012 denying the averments in the Plaint. They pleaded that they were not in breach of the facility. That the limit was Kshs 2,050,000/= and the Appellant had agreed to them exceeding the limit.

7. Further, they stated that the facility date had not expired and they were entitled to draw monies.

Evidence

8. During testimony, the Appellant's witness relied on the witness statement and documents filed in Court on 23rd September 2016 and testified in support of the Plaintiff's case.

9. On cross examination, it was his testimony that the interest was 10% and increased to 24%. That there was communication in the local dailies on the increment of interest rates. Interest later increased to 34%.

10. The 2nd Respondent also testified in court and relied on his witness statement and bundle of documents dated 15th May 2012. It was stated that the facility was to expire on 30th April 2011 and had a drawable limit of Kshs. 2,050,000/= being the secured value.

11. On cross examination, it was the Respondents' case that the Appellant sought an overdraft of Kshs. 1,500,000/- which they applied and was increased to Kshs. 5,000,000/-. He further stated that that the terms of the 1st offer letter were similar to the 2nd offer letter. In re-examination, he stated that there was no personal guarantee to secure the overdraft facility.

The Appellant's Submissions

12. The Appellant filed submissions dated 23rd October 2023. It was the submission of the Appellant that the Trial Court erred in failing to find that the Respondents were indebted to the Appellant.

13. Counsel referred to the various clauses in the two Letters of Offer and the Guarantee and relied among others on the case of National Bank of Kenya v Pipeplastic Samkolit (2001) eKLR to advance the

argument that in dismissing the suit, the Trial Court formed a contract contrary to the intention of the parties when a court of law will not normally intervene in the parties' freedom of contract.

14. It was submitted that the statement of account produced in court was evidence that the Respondents were indebted to the Appellant. The Appellant relied on Section 179 of the *Evidence Act* to the effect that a copy of any entry in a banker's book is prima facie evidence of such entry and the transactions as recorded.

15. The Appellant also submitted that there was no requirement on the part of the bank to notify the customer in advance of the change of interest rates. Reliance was placed on the case of John Kinyanjui Kanya v Barclays Bank Ltd & Another (2010) e KLR.

16. Further, it was submitted that as the guarantee was signed, the Respondents had the obligation to honor it and relied inter alia on the case of Kenya Planters Cooperative Union v Stephen Nyaga Kimani & Another (2005) eKLR. In this regard, it was urged that the Respondents having executed the guarantee and indemnity would not escape liability and the Trial Court erred in letting them off the hook by finding that the Appellant had not proved the case on the required standard.

17. This court was urged to allow the Appeal.

Respondents' Submissions

18. It was the submission by counsel that the Trial Court correctly found that the Appellant had not proved the case against the Respondent.

19. It was the submission of the Respondents that even though the amount per the 2nd overdraft offer was Kshs. 5,000,000/=, the Appellant capped it to a limit of Kshs. 2,050,000/- thus unilaterally varying the contract in breach of contract. Reliance was placed on the case of Surya Holdings Limited & 4 Others v ICICI Bank Ltd & Another (2015) eKLR.

20. Counsel also submitted that the Appellant as such had not proved the case on the required standard, that is, preponderance of probabilities.

21. It was also submitted that the discretion of the Appellant in charging interest was not completely unfettered and it was in error to charge higher or increased interest rates without prior information to the Respondents. Reliance was placed inter alia on the cases of Pius Kimaiyo Langat v Cooperative Bank of Kenya (2017) eKLR.

Analysis

22. This Court has considered the pleadings, evidence, submissions and authorities relied on by the parties in support and opposition to the Appeal. The issue that fall for this Court's determination is whether the Trial Court erred in law and fact in dismissing the Appellant's case.

23. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

24. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the Court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the

principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. I note that in the Lower Court, the Appellant sought a liquidated amount of Kshs. 887,171.07. This is a claim on special damages. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates.

26. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 stated that:

> " ... Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded."

27. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved. This court's task thus entails whether the Trial Court failed to award special damages that were pleaded and proved.

28. In Joseph Kipkorir Rono vs. Kenya Breweries Limited & Another Kericho HCCA No. 45 of 2003, Kimaru, J held that:

> " In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...

29. Proceeding along this line, it is the Appellant who had the duty to prove that Kshs. 887,171.07/- as claimed was indeed owing. Similarly, as there is an allegation of breach of contract, it was the duty of the Appellant to prove breach of contract. The dispute thus revolves around breach of contract. It is clear that a valid contract has, in law, terms binding the parties thereto and which they are under duty and obligation to perform. Proof of performance or breach of contract is a matter civil law subject to a balance of probabilities.

30. This position was well summarized by Njugi, J as she then was in Taidy's Restraurant v Gerfas Otieno Sammy t/a Nyanco Investment Contractors [2019] eKLR where she reflected the proper standard of performance of contracts as follows:

> The plaintiff in a civil suit is required to prove his or her case on a balance of probability- see Kirugi & Anor. -vs- Kabiya & 3 others [1987] KLR 347. In the present matter, I am satisfied that the trial court properly reached the conclusion that the appellant had entered into a contract for the construction of a car park for the appellant, that the respondent had performed his part of the contract but the appellant had failed to pay the contractual sum, and it properly entered judgment for the respondent.

31. In the instant case, the existence and validity of contract by way of the executed letters of offer is not a disputed matter and this court proceeds on the basis of the existence of a valid contract between the parties.

32. On the perusal of the record, I note, like did the Trial Court that indeed there were two letters of offer. The initial one was dated 15th February 2010 and was an overdraft amount limit of Kshs. 1,500,000/=. The second letter of offer was dated 14th April 2010 and enhanced the facility from Kshs. 1,500,000/= to Kshs. 5,000,000/-. It was stated to expire on 30th April 2011 and was renewable at the Appellant's discretion on May 1, 2011.

33. On its analysis, the Trial Court found that the Appellant failed to prove that the Respondents had breached the terms of the overdraft. In my reevaluation, I understand the Appellant's case to be that the cheques amounting to Kshs. 577,200/- were honoured and the amount drawn due to the overdraft. The Respondent did not dispute that the cheques were overdrawn. In the witness statement by the 2nd Respondent, it is the Respondents' case that it is the Appellant who rushed into realization the amount before the overdraft facility expiry period of 30th April 2011.

34. This leads to the question as to what the overdraft facility provided as to the breach and the repercussion of breach. I note under clause 3 of both letters of offer that on repayment, it was provided as follows:

> Notwithstanding any other provision of this letter, the above facility is repayable on demand being made; you shall immediately repay the outstanding amount together with all accrued interest and other sums due to DTB in respect of the facility.

35. Therefore, like the Trial Court, this Court has to establish whether there was any default and the consequential demand to pay. Per the offer letter, demand would precede payment. The facility was payable on demand.

36. On this, the Trial Court established that no demand was made as to entitle the Appellant to proceed in the manner that they did. That the Appellant moved to realize the security before issuing the demand. I note that the demand was issued on 30th October 2010. Prior to this on 16th August 2010 and 30th August 2010, the Appellant issued letters notifying the Respondents of their indebtedness and demanding that a sum of Kshs. 900,000/- be paid within 7 days. The amount of Kshs. 900,000/- arose from the claim on the overdrawn cheques for Kshs. 577,200/- plus interest at the stated rate of 25.5%.

37. It was pleaded by the Appellant that the amount was realized on 30th September 2010 leaving out a balance of Kshs. 887,171.07/=. The Respondent's position as earlier stated however, is that they could not settle the overdraft facility because the due date had not materialized.

38. There was no dispute that the account was indeed overdrawn. As was held in National Bank of Kenya v Barrack Deya Okul [2006] eKLR in Kenya Commercial Finance Company Ltd Vs Ngeny & Another [2002] 1KLR 106 at Pg.127 it was held as follows:-

> " it is well established as a matter of banking law and practice that where a customer opens a current account with no express agreement with the bank and the customer draws a cheque on the account which causes the account to go into overdraft, the customer has by necessary implication requested the bank to grant an overdraft of the necessary amount on its usual terms as to interest and other charges and in deciding to honour the cheque, the bank has by implication accepted the offer.

39. In my view, the Appellant did not particularize how it arrived at the claimed amount of Kshs. 887,171.07. It was also not demonstrated the details of the default on the part of the Respondent including months when default was recorded and the effect on the fixed deposit and security amounts. as was held in the case of IDB Capital Limited (Formerly Industrial Development Bank Limited V Sarkish Flora Limited [2008] eKLR.

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It is my view then that the Plaintiff deserves to recover the amount shown to have been drawn by the Defendant for which the funds in the Defendant's accounts could not meet. The Plaintiff is entitled to recover the said sum as a debt. That means it will not be entitled to claim interest as per the Overdraft Agreement between it and the Defendant.

40. I now turn to establish the effect of the statement of account produced in court. The Trial Court found that the statement of account did not contain any transactions by the Respondents in the course of the facility period. I note the Statement of account was produced in the Plaintiff's Further Bundle of Documents dated 22nd September 2015. It is for the period between 1st April 2011 and 14th January 2013.

41. Being that it would only highlight entries in respect of the parties for the month of April 2011 before expiry of the facility on 30th April 2011, I agree with the Trial Court that the same was of little value to this case. It cannot be expected that much transactions would exist owing to the fall out between the parties from as early as the mid of 2010. Under Sections 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya, the person who alleges is under a duty to prove all allegations as contained in their claim against the Defendant, on a balance of probabilities

42. In the case of Pius Kimaiyo Langat v the Kenya Commercial Bank of Kenya Ltd [2017] e KLR the Court of Appeal restated its decision in William Muthee Muthami v Bank of Baroda [2014] eKLR to the effect that:

> " In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the in breach."

43. The Court proceeded to state:

> " Lord Clarke, in RTS Flexible Systems Ltd v Molkerei ??Aloi Muller GM BH [2010] I WLR 753 at [45], [2010] UK SC 14 put it this way:
>
> "The general principles are not in doubt. Whether there was binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

44. Furthermore, the elements of a contract are set out in Halsbury's Laws of England 4th (ed.) Re-Issue Vol. 9(1) paragraph 603 at page 340 as follows:

> " To constitute a valid contract (1) there must be two or more separate and definite parties to the contract; (2) those parties must be in agreement, that is, there must be consensus on specific matters (often referred to in the older authorities as 'consensus ad idem'); (3) those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises; (4) the promises of each party must be supported by consideration or by some other factor which the law considers sufficient. Generally speaking, the law does not enforce a bare promise."

45. Therefore, as the Appellant Pleaded and claimed a specific amount of Kshs. 887,171.07, it was upon the Appellant to prove how this amount accrued. The amount claimed as per the demand letters produced in court appear to have been based on the default arising from the two cheques and this was Kshs. 577,200/- with interest.

46. Unfortunately, the statement of account did not show how the amount of Kshs 887,171.07 was arrived at. It did not equally cover the period under which the two cheques were drawn. The court was left in conjecture. It was bluntly pleaded to have arisen when the Appellant liquidated the security of Kshs. 1,500,000/- on 30th September 2010 and credited the proceeds in the 1st Respondents account leaving an outstanding balance of Kshs. 887,171.07

47. The role of the Court in fact finding in adversarial system is severely limited to what parties bring before the court. Indeed, Order 2 Rule 4 (1) provides as follows on issues of payment or satisfaction:

> " 4. Matters which must be specifically pleaded
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> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
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> (a) which he alleges makes any claim or defence of the opposite party not maintainable; (b) which, if not specifically pleaded, might take the opposite party by surprise; or
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> (c) which raises issues of fact not arising out of the preceding pleading.

48. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows;

> "
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> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position

was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……
>
> …In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

49. It follows that pleadings must be specific as to the claim sought. A party cannot purport to throw unseemly information by way of pleadings and expect the court to read between the lines as to the intended meaning. As courts interpret the law, parties must do what it takes to set factual situations that bespeak the law. Proper factual interpretation flows from concise pleadings that clearly set out the intention of the parties.

50. The court cannot be reduced into filling gaps in imprecise pleadings for if this were to happen, the court would then be descending in the arena of the parties' conflict. This is unacceptable. It is not the spirit of the aforestated Order 2 Rule 4 of the Civil Procedure Rules.

51. The Appellant's advocate made attempt to submit that the statement of account would show that the 1st Respondent's account was overdrawn. I am unable to decipher how it would be thought that the statement of account was conclusive evidence that the Respondents were indebted to the Appellant for Kshs. 1,785,743.18 as at 14th January 2013.

52. It was pertinent upon the Appellant to prove the breach of contract during the existence of the enhanced overdraft facility which was valid up to 30th April 2010. To the extent that the statement of account covered the bulk of the period outside the overdraft facility time, the same cannot be said to be evidence of the dealings within the facility period.

53. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……'

54. Therefore, the Court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court,

in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as follows;

> "In Belgore Versus Ahmed(2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
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> "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent"

55. I hold that it was a clear term of the contract that the Appellant would demand and the Respondents would be immediately obligated to meet the demand, at any time, during the subsistence of the overdraft facility period. However, the Appellant had to prove the extend of default. I understand the Appellant to state that two cheques amounting to Kshs. 577,200/= were overdrawn and paid. The Respondents do not dispute.

56. The Appellant however did not prove how the amount of Kshs. 887,171,07 claimed as outstanding arose. It was said that the amount arise after the Appellant liquidated the security in paragraph 6(e) of the Plaint. Paragraph *6*(e) made reference to the lien over fixed deposits aggregating Kshs. 1,500,000/=. Clearly, it appears the Appellant based on the offer letter dated 15th February 2010 when there was a subsequent offer letter dated 14th April 2010 that had enhanced the former offer letter to Kshs. 5,000,000/.

57. As the Court finds that the Appellant failed to prove its case on a balance of probabilities, I will not delve into the issues raised on the application and variation of bank interest rates. I let it to rest.

58. I have said enough to show that this Appeal fails. The Trial Court was correct in its finding that the Appellant did not prove its case to the required standard on a balance of probabilities.

Determination

59. In the upshot, I make the following Orders:

    i. The Appeal is devoid of merit and is dismissed.

    ii. The Respondents shall have the costs of the Appeal.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 16TH DAY OF FEBRUARY, 2024

……………………………

F. WANGARI

JUDGE

In the presence of;

Kavata Advocate h/b for Kisinga Advocate for the Appellant

Mrs Kibe Advocate for the Respondent

Salwa, Court Assistant