



National Bank of Kenya Limited v Nuru Chemists Limited & another (Civil Appeal 695 of 2019) [2024] KEHC 8070 (KLR) (Civ) (5 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 695 OF 2019

DAS MAJANJA, J

JULY 5, 2024

BETWEEN

NATIONAL BANK OF KENYA LIMITED APPELLANT

AND

NURU CHEMISTS LIMITED 1ST RESPONDENT

JAMES ISABOKE 2ND RESPONDENT

(Being an appeal from the Judgement and Decree of Hon. P.N. Gesora CM dated 27.11.2019 at the Magistrates Court at Nairobi, Milimani in Civil Case No.271 of 2019)

JUDGMENT

Introduction and Background

1. The Appellant (“the Bank”) is dissatisfied with the decision of the Subordinate Court dated 27.11.2019 where its suit was dismissed and now appeals to the court. In its suit, the Bank had claimed that sometime in 1996, it took over all debts, liabilities, obligations and duties of Standard Chartered Bank Kenya Limited, Kisii Branch (Standard Chartered). That by an agreement dated 16.08.1993, the 1st Respondent applied for and was granted a loan of Kshs. 2,000,000.00 by Standard Chartered attracting interest at the rate of 37% per annum. The loan was to be repaid on demand at any time at Standard Chartered’s discretion. The Bank further claimed that by an instrument of guarantee and indemnity dated 16.06.1993 (“the guarantee”), the 2nd Respondent guaranteed the 1st Respondent’s indebtedness to Standard Chartered upto the sum of Kshs. 3,500,000.00. It was the Bank’s further claim that 1st Respondent maintained and operated a current account and loan account with it. The Bank claimed Kshs. 5,937,231.70 due as at 31.05.2001 in respect of the loan and overdraft facilities provided to the 1st Respondent together with interest at 26% and Kshs. 3,500,000.00 from the 2nd Respondent payable under the guarantee.



2. In their defence, the Respondents denied the averments of the Bank. They specifically denied ever operating a current and loan account with the Bank or having any knowledge that the Bank had taken over the debts, liabilities, obligations and duties of Standard Chartered. Whereas they agreed taking up the loan with Standard Chartered, they averred that the said facility was repaid in full by the 1st Respondent through the facility obtained by Barclays Bank of Kenya (Barclays Bank). On the guarantee, the Respondents stated that it ought not to have been altered or in any other way varied without their full consent or knowledge. The Respondents further averred that the Bank fraudulently colluded with Standard Chartered to have the executed transfer of charge transferred to the Bank without their knowledge, consent and/or authorization.
3. In reply to the defence, the Bank reiterated its position and stated that there was a contractual relationship between the Respondents and Standard Chartered and upon the Bank taking over the debts, liabilities, duties and responsibilities of Standard Chartered, the Respondents became legally liable to pay the Bank for any outstanding debts owed to Standard Chartered. The Bank averred that the Respondents, having acknowledged the debt, were estopped from denying that the Bank took over the same from Standard Chartered. The Bank denied that the loan was fully repaid as the Respondents had not adduced any evidence to that effect. It further denied altering the guarantee and that there was no transfer of charge but an assignment to Bank as stipulated in the charge itself.
4. When the matter was set down for hearing, the Bank called its Remedial Analyst, Nancy Naswa (PW 1) while the 2nd Respondent (DW 1) testified on behalf of the Respondents. In its judgment, the Subordinate Court held that in as much as the 1st Respondent took out a loan with Standard Chartered and that its operations were taken over by the Bank, PW 1 admitted that the 1st Respondent did not appear in the list of debtors transferred to the Bank from Standard Chartered. That this lent credence to the testimony of DW 1 that he paid a total of Kshs. 2.1 million to Standard Chartered vide cheques dated 13.07.1995.
5. The Subordinate Court held that there were serious discrepancies in the manner in which the account was taken over from Standard Chartered as the Respondents did not seem to be in the know. That the failure by the Bank to call for and adduce evidence from Standard Chartered created a gap in the Bank's case and there was no flow created to prove its case as required by law. It further held that the Bank sent auctioneers to the 1st Respondent's premises and this informed why the 2nd Respondent wrote letters promising to pay the sums claimed by the Bank. That the procedure adopted in transferring the property did not meet the threshold set out in law and that this ought not to have been done when the 1st Respondent was not appearing in the list of debtors taken over by the Bank from Standard Chartered.
6. Ultimately, the Subordinate Court found that the Bank had not proved its case and dismissed it thus precipitating this appeal. It is anchored in the memorandum of appeal dated 29.03.2020 (erroneously dated 29.03.2019) and has been canvassed by both parties by way of written submissions. Since the submissions restate the parties' positions I have already highlighted above, I will only make relevant references rather than summarize the same in my analysis and determination below.

Analysis and Determination

7. The Bank is aggrieved with the Subordinate Court's appreciation of the evidence and overall findings and thus urges the court to find otherwise and set aside the subordinate court's decision. In resolving this appeal, this court is guided by the principle that it is this court's duty to analyze and re-assess the evidence on record and reach its own conclusions in the matter (see *Selle v Associated Motor Boat Co.* [1968] EA 123, *Jabane v Olenja* [1986] KLR 661, 664).



8. As stated, the Bank's case was for the recovery of Kshs. 5,937,231.70 together with interest at 26% from 31.05.2001 from the 1st Respondent and Kshs. 3,500,000.00 from the 2nd Respondent. These, the Bank claimed, were in respect of a loan taken by the 1st Respondent and guaranteed by the 2nd Respondent from Standard Chartered. The Bank also claimed that it had taken over all debts and liabilities of Standard Chartered in 1996. The Respondents did not dispute the taking of the loan from Standard Chartered and the Bank taking over all debts, liabilities and obligations from Standard Chartered. What was in dispute was whether this loan was fully repaid by the Respondents. I am in agreement with both parties' submissions that proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in section 107 (1) and (2) of the Evidence Act (Chapter 80 of the Laws of Kenya) which provides that "whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist" and that "When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person". The Court of Appeal in *James Muniu Mucheru v National Bank Of Kenya Ltd* [2019] eKLR simply put it that 'Courts will make a finding based on which party's version of the story is more believable.'
9. The Bank claimed that the Respondents were still indebted to Standard Chartered by the time it took over Standard Chartered's debts, liabilities and obligations. To prove this, the Bank produced various correspondences between the parties dated 09.05.1996, 18.11.1996, 19.04.1997 and 26.04.1999; statements of account dated 10.07.2007, 31.12.2001, 21.02.2002 and 22.09.1995. On their part, the Respondents stated that they had cleared and paid the loan in full with Standard Chartered and that its letters to the Bank on repaying the same were made under duress as the Bank had sent auctioneers to the 1st Respondent's premises. In any event, the Respondents stated that the facility with the Bank had been taken over and repaid by Barclays Bank. The Respondents produced the Bank's letter of offer/approval for restructure of the loan dated 12.05.1999, the 1st Respondent's loan agreement with Barclays Bank dated 19.07.1996, bank statements from Standard Chartered and the Bank, chequebook counterfoils and a letter addressed by the Respondents advocates to the Bank dated 07.01.2000.
10. I have gone through the aforementioned documents while paying attention to the dates of the same as these dates play a crucial factor in determining the Respondents' indebtedness. In the 1st Respondent's letters to the Bank dated 09.05.1996 and 26.04.1999, the 1st Respondent expressly admits indebtedness and seeks the indulgence of the Bank to be able to repay the same in varied installments. While the 2nd Respondent testified that he wrote the letter of 1999 under duress as auctioneers were at the 1st Respondent's doorstep, he did not deny and actually admitted that he was still indebted to the Bank as he asked the Bank to restructure the loan. This is confirmed by the Bank's offer letter dated 12.05.1999 which was produced by the Respondents where it is indicated that their outstanding loan as at that date was Kshs. 3,450,256.75 and that the Bank had agreed to restructure the existing facility.
11. Again, whereas the Respondents stated that this loan was taken over and repaid by Barclays Bank, the loan approval documents indicate that the same was done in 1996 meaning that even if Barclays Bank repaid the loan at that time, the Respondents still remained indebted 3 years later. Further, the Respondents produced bank statements from Standard Chartered and Barclays Bank for the years 1995 and 1996 which do not explain or upstage the Respondents' indebtedness as of 1999. It also renders the Respondents' argument that they were not listed as debtors in the list of debtors exchanged between Standard Chartered and the Bank moot. It further does not explain the bank statements produced by the Bank for the years 2001, 2002 and 2007 which indicate that the 1st Respondent's loan account had debit balances.



12. Section 176 of the *Evidence Act* creates a presumption in favour of the Bank on the terms that “A copy of any entry in a banker’s book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded.” These statements of account were produced without objection, meaning the court ought to admit it as a true and accurate entry unless demonstrated otherwise. The Respondents did not demonstrate any false entry in the statements or rebut the same with an updated statement of account that indicates otherwise. I therefore agree with the Bank that in the absence of contrary evidence, it follows that the Bank had proved to the satisfactory evidentiary standard that the Respondents were indebted to it. The Respondents did not adduce any evidence indicating that they had cleared the loan with the Bank at least as per the latest statement of account of the Bank dated 10.07.2007.
13. From the totality of evidence, I hold that the Subordinate Court was in error when it found that the Bank had not proved its case against the Respondents.

Disposition

14. The Appellant’s appeal succeeds on terms that the decision of the Subordinate Court dated 27.11.2019 is set aside. I note that as per the statement of account dated 10.07.2007, the 1st Respondent is indebted to the Bank in the sum of Kshs. 4,560,281.90 which is lower than the Kshs. 5,937,231.70 pleaded by the Appellant in its plaint as at 31.05.2001.
15. I therefore enter judgment for the Appellant against the Respondents for Kshs. 4,560,281.90 and that the interest be applied at a rate of 22% as per the letter of offer dated 12.05.1999 from the date of filing suit until payment in full. Since the guarantee was not disputed, judgment is entered against the 2nd Respondent for Kshs. 3,500,000.00.
16. The Appellant is awarded costs of the suit in the Subordinate Court. The Respondents shall pay costs of this appeal assessed at Kshs. 70,000.00.

DATED and DELIVERED at NAIROBI this 5th day of JULY 2024.

D. S. MAJANJA

JUDGE

