



REPUBLIC OF KENYA



**Kher & another v Gulf Africa Bank Limited & another (Civil Appeal 302 of 2014)
[2023] KEHC 20263 (KLR) (Commercial and Tax) (10 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20263 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL 302 OF 2014
JWW MONG'ARE, J
JULY 10, 2023**

BETWEEN

HASHIM MOHAMED KHER 1ST PLAINTIFF

AL HEELAM HOLDINGS LIMITED 2ND PLAINTIFF

AND

GULF AFRICA BANK LIMITED 1ST DEFENDANT

DATA RUSH SERVICES LIMITED 2ND DEFENDANT

JUDGMENT

1. By a plaint dated 14/1/2014 and amended on 4/9/2014 and further amended on 10/4/2017 the Plaintiff has moved to this Honourable court seeking the following reliefs;
 - a) A declaration that the profit rate of 21% and penalty levied by the Defendant since June 2013 to December 2013 are unlawful, null and void.
 - b) An Order of refund to the Plaintiffs on the excessive amount levied since June 2013 to December 2013 totaling to Ksh 3,929,452.50/-.
 - c) A Temporary Injunction to issue, restraining the Defendant, its servants, employees and/or agents from interfering and frustrating the business relationship between the Applicants and National Bank Limited.
 - d) An Order of refund of default damages irregularly levied on the Plaintiffs accounts when the titles were already lost Ksh 1,507,086.33/-.



- e) A mandatory injunction to compel the Defendant to release to the Plaintiffs title documents for L.R No.209/3687 and L.R No.7741/233 and in the alternative to procure provisional titles.
 - f) A mandatory injunction do issue compelling the defendant to reverse the charges of Ksh 390,000/- imposed upon the 1st Applicant's account number 011xxxxx held at Gulf African Bank Eastleigh Branch.
 - g) Loss and damages occasioned by the aborted sale of the property on L.R No.209/3687 due to the loss of the titles in the sum of Ksh 45, 090,175.49/- plus interest at commercial rates.
 - h) General damages for loss of the Plaintiff's titles.
 - i) Exemplary and punitive damages.
 - j) Interest on (b) (c) and (e) above the court rates.
 - k) Cost of the suit.
 - l) Any other relief that this Honourable Court may deem just to grant.”
2. The suit was opposed. The 1st Defendant filed a re-amended statement of defence and counterclaim dated 12/5/2017 against the 2nd Defendant. The 2nd Defendant/Courier filed an amended defence to the 1st Defendant's counterclaim dated 19/6/2019.

The Plaintiff's Case:

3. The Plaintiffs called two witnesses to testify on their behalf. PW1, the 1st Plaintiff, testified that they obtained credit facilities from the Defendant which were secured by land titles in respect to L.R No.209/3687, L.R No.7741/233 both in the name of the 1st Plaintiff and L.R No.36/1/11 in the name of the 2nd Plaintiff. The 1st Plaintiff averred that in the year 2010, he fully settled the loan facility secured by the title L.R No.209/3687 and that in the year 2013 he set out to sell the aforementioned property in order to offset and settle the remaining outstanding credit facilities with the Defendant who still held title documents to L.R No.7741/233 and L.R No.36/1/11 as security.
4. PW1 further averred that the Defendant unjustifiably failed to return to him the title documents for the property L.R No.209/3687 therefore he was unable to conclude a sale transaction and lost out on the profit; that in an attempt to transfer the remaining loan account with the Defendant to National Bank of Kenya Limited, the Defendant informed the 1st Plaintiff that it had lost the Plaintiff's title documents that were in its custody. PW1 further informed the court that he had several meetings with the Defendant's officers who assured him that the bank was not going to not levy profit and penalty charges on the outstanding facility as the loss of the titles happened while the same were in its custody. However contrary to its representation, the Defendant continued to levy profit and penalty charges at the rate of 21% despite the rate having been agreed at 18%.
5. It was the Plaintiff position that the Defendant owed it a duty of care to ensure that the titles deposited with it were safe and secure which duty of care the Defendant breached through gross negligence and recklessness, leading to loss of the title documents while in the custody of the Defendant. The Plaintiff reiterated that they had secured a buyer for the property but could not proceed with the sale and lost an opportunity to sell the property at the price of 65,000,000. The Plaintiff seeks compensation for this lost opportunity which would allowed it to redeem all the outstanding loans first.



6. PW2, Wilfred Abincha Onono, is an Accountant and a Managing Consultant of IRAC. He testified on behalf of the Plaintiff and confirmed that he was engaged by the Plaintiff as an independent financial consultant known as working for an outfit known as Interest Rates Advisory Centre Limited (IRAC) and its work was to identify if the Plaintiff had suffered loss through the Defendant's actions and omissions were deliberate and imbued with malice or extreme recklessness. It was the testimony of the PW2 that the actions of the Plaintiff in levying profit at 21% instead of the 18% negotiated the Plaintiff had incurred *inter alia* a loss of Ksh 3,513,407.09/- as at 31/05/2016. He testified that based on the recalculation by IRAC, the 1st Defendant overcharged the Plaintiffs' accounts by Ksh 1,507,086.33/. Further that the total amount claimable as a result of the aborted sale is Ksh 45,090,175.49/-.
7. Further, PW2 contended that as a result of the loss of title for L.R No.209/3687, the inability by the Plaintiff to access a cheaper loan from National Bank, the Plaintiff incurred a further loss of Ksh 1,296,667/-. This, according to the evidence availed by the Plaintiff was as a result of its inability to finalise the loan with the National Bank of Kenya which had better terms. It was the evidence by the Defendant that interceding period from when the title was lost up to the time it was replaced, the Plaintiff was forced to pay to the Defendants the sum of Ksh 7,780,002.00/-. The Plaintiff has since moved his loan to National Bank Limited and the same cost him the sum of Ksh 1,871,555.25/- which according to the Plaintiff was unlawfully demanded by the Plaintiff.

The Defendants' Case

8. DW1, Amina Bashir, the Head of Legal and Company Secretary of the 1st Defendant, testified on behalf of the Defendant. She produced in evidence the Defendants' bundle of documents and urged the court to rely on the same to decide the case in favour of the Defendant against the Plaintiff. She testified that the Plaintiffs duly accepted the terms of the various letters of offer and understood that the bank's profit rates were determined by the prevailing rates in the market at the time the facilities were advanced.
9. DW1 confirmed that the 1st Defendant Bank took all reasonable measures to assist the 1st Plaintiff following the discovery of the loss of title documentation but there was no promise that the bank would not levy profit and penalty charges on the remaining facility pending the resolution of the issue of the lost title documents. Instead, there was an agreement that the rate would be varied from 21% to 18% which culminated in the issuance of a letter of offer dated 17/6/2013 by the Bank varying the same rate; that however the 1st Plaintiff did not return a duly executed copy of the same to the Bank to indicate acceptance of the offer therefore the facility continued to operate at the original rate of 21%. It was her testimony that the computation of profit by IRAC Managing Director, who testified as PW2 on behalf of the Plaintiff was premised on a speculative letter of offer and its computation of interest has also failed to take into account the contractual terms of parties that were prevailing at the time. She urged the court not to place any reliance on the same.
10. In her testimony before the court, DW1 confirmed that indeed the Plaintiffs' title was lost in transit and in custody of the 2nd Defendant while being transmitted to the Defendants advocates through a letter dated 23/9/2013 to represent the Defendant in the takeover process by National Bank of Kenya. She testified to having enclosed the original title documents and handed over to the 2nd Defendant, Data Rush Courier Services Limited. She confirmed that it was unfortunate that the said letter and the enclosures were lost by the 2nd Defendant in the course of delivery.
11. On the purported loss of opportunity to sale the property whose title had been lost in transit by the 2nd Defendant, DW1 testified that the 1st Plaintiff did not introduce a purchaser of his property L.R No. 209/3687 to the Bank with a view of obtaining a discharge of the property to facilitate any agreement for sale and that the 1st Plaintiff did not provide a sale agreement contrary to Section 3 of the [Law](#)



of Contract Act. She urged the court to find there was no sale and disallow the prayer for damages as sought by the Plaintiffs. She confirmed that with the cooperation and collaboration of the Plaintiffs, the lost title was eventually replaced and handed over to the Plaintiffs' albeit with some delay.

12. On being replaced, DW1 testified that she duly notified the 1st Plaintiff. She averred that the 1st Defendant had on numerous occasions unsuccessfully attempted to avail the title documents to the 1st Plaintiff during the period between 2015 and 2017 but the Plaintiffs failed, ignored and/or refused to pick the said documents. She urged the court to find that there was no loss suffered by the Plaintiffs since their title deed was replaced. On the other hand, DW1 urged the court that, In the event that it did find that the Plaintiff had a claim as a result of this loss and that in the 1st Defendant was found liable, any damages or consequential loss should be born wholly by the 2nd Defendant.
13. The 2nd Defendant called one witness to the stand. DW2, Eva Njuria, was the Managing Director of the 2nd Defendant. She testified that indeed there was an indemnity clause in its contract between the 1st and 2nd in the contract dated 1/10/2012 between itself and the 1st Defendant only and its coverage extended to the physical documents and the cost of replacing the same. It was her testimony that this was done and hence its role in the matter was therefore extinguished. The 2nd Defendant urged the court to find that there was no cause of action between itself and the 1st Defendant or the Plaintiffs in the matter before court and dismiss the claim against the 2nd Defendant.

Analysis and Determination.

14. I have analysed all of the pleadings filed in this matter and the parties' respective submissions and the testimony by the witnesses including the bundles and list of documents and note that despite the numerous prayers sought by the Plaintiff, three issues merge for determination; to wit,
 - i. whether the 1st Plaintiff entered into a valid sale agreement for the sale of L.R No.209/3687 to warrant damages for loss of bargain of Ksh 45,090,175/-.
 - ii. whether the 1st Defendant charged profit and penalties at the prevailing contractual and commercial rates.
 - iii. whether the 2nd Defendant is entitled to indemnify the 1st Defendant for all losses occasioned by the loss of the Plaintiff's original security documents.
15. On the first issue for determination; whether the 1st Plaintiff entered into a valid sale agreement for the sale of L.R No.209/3687 to warrant damages for loss of bargain of Ksh 45,090,175.49/-. The Plaintiffs argue that they had received an offer to sell their property L.R No.209/3687, and to substantiate the same the Plaintiff tendered in evidence a letter of offer dated 13/8/2013 from Welldan Contractors Ltd. The Plaintiffs further argue, that due to failure of the 1st Defendant to avail the Plaintiffs with the title deed for L.R No.209/3687, they were unable to sell the said property.
16. The position taken by the Plaintiff is they lost an opportunity to make a profit of Ksh 45,090,175.49/- upon redemption of the loan secured by the other properties with the 1st Defendant. On its part, the 1st Defendant argued that there was no valid offer as the said letter dated 13/8/2013 from Welldan Contractors was unsigned and that the 1st Plaintiff failed to produce evidence of his written acceptance of the offer within 90 days and that a sale agreement had not been executed. Upon perusal of the bundle and list of documents I note that the Plaintiff attached a letter of offer dated 13/8/2013 from Welldan Contractors Ltd which is on page 107 in the said bundle. According to the said letter, Welldan Contractors offered to pay Ksh 65,000,000/- for the property and invited the 1st Plaintiff to confirm acceptance and to provide photocopies of the title documents so that they may carry out searches. The



offer was valid for 90 days from 13/8/2013. Section 38 of the Land Act and Section 3 (3) of the Law of Contract Act, is to the effect that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing and signed by all parties.

17. I note that the offer letter is not signed by the director of Welldan Contractors. I note further that the Plaintiff did not produce a sale agreement nor a valuation report to substantiate that indeed the property could be sold at Ksh 65,000,000/-. In my view, I find that the Plaintiff has not provided sufficient evidence to support this claim and hold that they are not entitled to the purported loss of Ksh 45,090,175.49/- as pleaded in the plaint. Thus the claim for damages on account of the aborted sale holds no water.
18. The second issue for determination is “whether the 1st Defendant charged profit and penalties at the prevailing contractual and commercial rates”. The Plaintiff submitted that the 1st Defendant, through a letter of offer dated 17/6/2013, reduced the rate of profit and penalty rates from 21% to 18%. It was the testimony of the PW2 that the actions of the Plaintiff in levying profit at 21% instead of the 18% negotiated the Plaintiff had incurred *inter alia* a loss of Ksh 3,513,407.09/- as at 31/05/2016. The Plaintiff has urged the court to find that they are entitled to the refund of the said funds by the 1st Defendant. On the other hand, the 1st Defendant that although there was intention by the parties to lower the rate applied to the profit, the same was solely based on the Plaintiffs acceptance of the new terms as per their letter of offer of 17/6/2013 which the Plaintiffs never returned to the Bank. Failure to do so made that the bank continued to levy the old rate. This evidence was not rebutted or controverted by the Plaintiffs.
19. Courts have time and again held the stated that parties are bound by the terms the put in their contracts. The terms of a contract cannot be rewritten. In my view, IRAC’s report purports to introduce new terms to the contract between the Plaintiffs and the 1st Defendant and the court is being invited to interfere with the terms of the contract. In the case of Kebirigo General Stores Limited v Barclays Bank of Kenya Limited [2009] eKLR Justice Koome (as she then was) dismissed the IRAC report as it was in contravention of the parties’ agreed contractual terms, she stated:

“Under those charge documents the Defendants have a right to vary the interest rates and to consolidate the Plaintiff’s other accounts. Am afraid the court cannot rewrite those contracts to factor in the interest rates proposed by IRAC.

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I have also considered a report by IRAC showing the recalculation of interests which is also denied by the Defendant because it is contended that IRAC did not base their recalculations on the amount of interest agreed, but relied on what they believed was the applicable interest rates based on the prevailing Central Bank Act, regulations and the prevailing value of the treasury bill.”

This position is the one taken by this court. The court herein finds that the report by IRAC is of no evidential value and will disregard it. The finding on this ground is that the same has not been proved on a balance of probabilities.

20. The third issue for determination is whether the 2nd Defendant is entitled to indemnify the 1st Defendant for all losses occasioned by the loss of the Plaintiff’s original security documents. The 1st and



2nd Defendant entered into the Agreement for Provision of Courier Services on 1/10/2012 provided at clause 4.3:

“ to indemnify and keep indemnified the Bank and any other third party from and against any and all loss, damage, or liability whether criminal or civil, including all consequential losses or any other loss suffered by the Bank, costs, legal fees, and interests incurred by the Bank or claimed by any third party resulting from a breach of the Agreement.”

21. The 1st Defendant's sent a letter dated 23/9/2013 to its advocates in order to facilitate the loan takeover process to National Bank of Kenya. The letter had three of the Plaintiffs' titles enclosed which all got lost on the way. The 2nd Defendant, who was the courier service accepted liability on loss of the titles and paid funds toward replacing the said titles. Under clause 4.3 of the agreement between the 1st and 2nd Defendant, the latter was to indemnify the latter from all loss, damage, or liability whether criminal or civil, including all consequential losses or any other loss suffered by the Bank or claimed by any third party resulting from a breach of the Agreement. In my view this indemnity covered all liability incurred by the 1st Defendant due to the loss of the said titles.
22. However, as analysed above, the Plaintiff has failed to prove the losses incurred as a result of the loss of the titles or that they were a direct consequences of the actions of the 1st Defendant. There is therefore no need to invoke the indemnity clause as against the 2nd Defendant and the counterclaim by the 1st Defendant against the 2nd Defendant is unsustainable in the circumstances.
23. The upshot of the above deliberations is that the Plaintiffs case as contained in the re-amended plaint should be dismissed with costs as the Plaintiffs have not proved their claims. Since there is no decretal sum awarded in favour of the Plaintiffs resulting from the loss of the letter dated 23/9/2013 which had the titles, the counter claim is also set aside.
24. The Plaintiff has a right of appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2023

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J. W. W. MONG'ARE

JUDGE

In the Presence of:-

1. Mr. Danstan Omari for the Plaintiff.
2. Mr. Otieno for the 1st Defendant.
3. Mr. Musili for the 2nd Defendant.
4. Sylvia- Court Assistant

