



Oriental Commercial Bank Limited (Formerly Commercial Bank Limited) v Pharmaceutical Products Limited & 5 others (Civil Appeal 20 of 2008) [2023] KEHC 21051 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 20 OF 2008
DKN MAGARE, J
JULY 6, 2023**

BETWEEN

ORIENTAL COMMERCIAL BANK LIMITED (FORMERLY COMMERCIAL BANK LIMITED) PLAINTIFF

AND

**PHARMACEUTICAL PRODUCTS LIMITED 1ST DEFENDANT
FERRO METAL FORWARDERS LIMITED 2ND DEFENDANT
ARCO INVESTMENT LIMITED 3RD DEFENDANT
EAST AFRICA NAIL WORKS LIMITED 4TH DEFENDANT
SHAILESH JAYANTILAL RAJANI 5TH DEFENDANT
ADMINISTRATORS OF THE ESTATE OF JAYANTILAL G.
RAJANI 6TH DEFENDANT**

JUDGMENT

1. The Plaintiff filed suit on 6/6/2008. The plaintiff was amended. On 15/2/2023 to include the second change of name from Oriental Commercial Bank Ltd to M' Oriental Bank Ltd.
2. The main claim is that the 2nd Defendant's indebted to the Plaintiff's at 31/8/2003 to the time of Ksh 4,029,838.98. This related to guaranteed which were given to various clients.
3. The debts for Ferro Metal Forwarders Ltd were pursuant to 4 guarantees dated 22/3/2001 (Arco Investment for 20 Million 22/3/2001 for East African Nail Works Ltd, for 20,000,000/= 26/3/2001 for 20,0000/= and 25/3/2001 to later Jayantilal Gokaldas Rajain.



4. Secondly, regarding Pharmaceutical Produced Ltd, on 30/4/1999 of Arco Investments Ksh. 5,000,000/=, East African Nail Works Ltd for 5,000,000/= Guarantee dated 24/5/1999 of Jayantilal Rajani for Ksh. 5,000,000/=, Guarantee dated 24/5/1999 of the late Jayantil Gokaldas Rajani.
5. The debt is said to have been due as at 19/8/2003 for the 2nd Defendant and Kshs. 1,370,069.05 for 1st defendant. The claim was thus for Kshs. 5,424,634.98 with interest of Kshs. 21.25 %.
6. Only the 5th Defendant filed appearance through the firm of J.M. Njenga & Companies Advocates. The 5th defendant denies the debt of the 1st Defendant and 2nd Defendant.

Evidence

7. The Plaintiff testified through Wilfred Kennedy Machini. He adopted the statement dated 10/12/2018. He produced exhibit 1-31 as per the schedule. The facilities were enjoined by the 1st and 2nd Defendant in the year 2000. By the year 2003 they reportedly had a debt of 3,983,643 and 1,370,069.
8. The 1st and second Defendants promised to pay in vain. This was secured by guarantee by the 3- 6 Defendants for Ksh. 5,424,634.98.
9. He stated that the 5th Defendant was a director of the 1st defendant. He is the only one defending the suit. It was his evidence that the bank changed its name in 2010.

Analysis

10. The debtor was informed at as can be seen from page 111 on 3/07/2002. In impugned letter amount claimed from the 2nd defendant was Ksh 3,535,738/=. Therefore, default occurred on 3/7/2002. The borrowing was done on 10/4/9999 and guarantees were given equally in April, 1999. Personal guarantors were given in May 1999. The letter over was in 1999 and the and the purpose was for 90 days.
11. The exhibit number 10 has a letter for banking facilities for 1st defendant. As at 24/7/2002, the Ferro Metal Forwarders Ltd (2nd defendant) acknowledged debt.
12. By a letter dated 19/8/2003 a dispute was declared. From pages 122 to 124 bills that were noted for various amounts were indicated. By a letter dated 26/9/2003, acknowledging the debt on behalf of Pharmaceutical Product. Therefore, the claim though time barred was revived by that acknowledgment.
13. I therefore find that the plaintiff Case against the 1st and 2nd defendants is not time barred by dint of the acknowledgement.
14. There has been no acknowledgment of Analysis indebtedness as against the 3rd, 4th, 5th and 6th Respondents. Consequently, the claims against them are time barred.
15. Accordingly, I dismiss the suit against the 3rd, 4th, 5th, and 6th defendant as with costs of 200,000 of the 5th defendant payable by the Plaintiff within 30 days in default execution to issue.
16. The 3rd, 4th and 6th defendants did not participate and therefore will bear their own costs.
17. I note that the 1st and 2nd respondents are jointly and severally sued and no basis was laid for the same. I note in paragraph 4 of the plaint the 1st defendant's indebtedness was 4,029,83898 while the 1st defendants indebtedness of Ksh 1,394,796. The nature of the claim are various matters where from the witness statement there are certain bills.



18. These bills are bare. They have not been specifically pleaded, how they arose, which ones were paid and which ones were not paid. Other than the demand letter which relates to personal guarantees there's no evidence of indebtedness as pleaded. There is no bank statement showing how these debts were incurred, which were paid and which ones weren't.
19. In the case of *David Bagine v Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -
- “It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabbani v. City Council of Nairobi* [1982-88] IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:
- “Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”
20. Simply listing bills in a witness statement and showing them to the court is not useful. A claim of this nature must be particularized before proceeding to prove its not enough tell the court that this is what I was owed as at this period. The court must be satisfied that way of pleading that that debt arose. By seeking Kshs. 5,424,634.38 jointly and severally, against the defendants they leave it to the court to discern what possibly each defendant could be owing.
21. We don't simply believe a bank when it says its owed. It must show that its owed whether it's a claim over letters of credit, it's an overdraft or even a loan. In the case of *Mithika M'inoti v Eusabia Nkuene Julius* [2013] eKLR, the court stated as doth: -
- “10) The 4 days off duty lacked particularized amount in the pleading. It was in the nature of special or liquidated damages. The same will therefore fail for want of proper pleadings and further for submissions that were inconsistent with the material on record as to the claimant's monthly pay and daily rate thereof.”
22. Each of the directors or companies named are said to have issued guarantees of 5,000,000 but there no pleading relating to the guarantees that became due and owing. The reason why pleadings of this nature must be specifically made is not just for the purpose of limitation of actions but also for purpose of a party being able to defend its claim.
23. In *Gandy v Caspair Air Charters Ltd.* [1956] 23 EACA 139 Justice Sir Sinclair, V-P, as he was then, said:
- “The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them, so that each may have full information on the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given.”
24. I adopt this mantra. Parties must be bound by their pleadings, it is not enough to throw evidence to the court during the hearing that has no basis in pleadings.
25. This is so in particular for this matter that started with documentation in 1999 and debts being incurred in 2001 while the suit is being filed in 2008 a period of 9 and 7 years respectively.



26. In the case of *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR, Justice T. W. Cherere held as doth; -

“ 18. The next issue for determination is whether respondent can enforce the contract between appellant and Andmore Timber Yard. Halsbury’s Laws of England, 3rd Edition, Volume 8 at paragraph 110 which was quoted extensively in *Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi* [1985] eKLR states as follows:

“As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

27. The 1st and 2nd Defendants are not said to have joint liability. No claim is particularized as against each. Yes, they may be a debt between them. However, given that no one can be held liable for a contract he is not party to, there needed to be specific evidence and pleadings on how each indebtedness arose.

28. The documentation product show that the credit period was 90 days and if payment was not made it means default occurred between 1999 and 2001. Only proper pleadings could have shown whether the claim fell outside the exceptions under the Limitation Act Cap 22.

29. Section 4(1) of the *Limitation of Actions Act*, cam 22, laws of Kenya provides as doth: -

“ 4. Actions of contract and tort and certain other actions

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

- (a) actions founded on contract;
- (b) actions to enforce a recognizance;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

30. The Court is bound to first ensure that before delivering judgment that it has jurisdiction to do so. This is important in that without jurisdiction this Court has to down its tools. In Lilian S, Justice Nyarangi JA stated as doth: -

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it



holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

31. We cannot twist facts and confer jurisdiction over the Court S.K. Macharia the Supreme Court stated: -

“(24) In response, Mr. Oraro asserts that the jurisdiction of any Court is derived from the law. He relies on the Supreme Court’s decision in, In the Matter of Advisory Opinions of the Court under Article 163 of the Constitution (Constitutional Application No. 2 of 2011 at para. 30), where the Court stated:

“...a court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament, where the legislation is clear and there is no ambiguity.”

32. In the circumstances, the plaintiff has not proved its case of the required standard against the 1st and 2nd Defendant.

33. I therefore dismiss the entire case against the 1st and 2nd defendants. Each party to bear its costs given that the 1st and 2nd defendants did not defend the case.

Determination

34. In the upshot of the foregoing is that: -

i. The plaintiff’s case lacks costs and is dismissed *in limine* with costs of the 200,000 to the 5th defendant payable within 30 days, in default execution to issue against the plaintiff.

ii. All the other parties to bear their own costs.

iii. The case is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF JULY,2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -



Wachanga for Njenga for 5th Defendant

No appearance for the Plaintiff

No Appearance for 1st, 2nd, 3rd, 4th and 6th Defendants.

Court Assistant - Brian

